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CASES

DECIDED IN

THE COURT OF SESSION,

COURT OF JUSTICIARY,

AND

HOUSE OF LORDS,

FROM JULY 20, 1874, TO AUGUST 13, 1875.

REPORTED BY

MIDDLETON RETTIE, DONALD CRAWFORD, G. F. MELVILLE,
A. E. HENDERSON, D. GILLESPIE, AND H. JOHNSTON,
ESQUIRES, ADVOCATES.

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YMANLI UNIVERSITY

JUDGES

OF THE

COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

FIRST DIVISION.

Lord President, The Right Hon. JOHN INGLIS.

Lord DEAS.

Lord ARDMILLAN.

Lord MURE.

SECOND DIVISION.

Lord Justice-Clerk, The Right Hon. Lord MONCREIFF.

Lord NEAVES.

Lord ORMIDALE.

Lord GIFFORD.

PERMANENT LORDS ORDINARY.

Lord MACKENZIE.*
Lord SHAND.
Lord YOUNG.
Lord CRAIGHILL.
Lord CURRIEHILL.

---

* Lord Mackenzie died on 19th May 1875. His successor, Lord Rutherfurd Clark, was appointed in November 1875.

HIGH COURT OF JUSTICIARY.

Lord Justice-General, Right Hon. JOHN INGLIS.
Lord Justice-Clerk, Right Hon. Lord MONCREIFF.

LORDS COMMISSIONERS OF JUSTICIARY.

Lord DEAS. Lord ARDMILLAN. Lord NEAVES.
Lord YOUNG. Lord MURE.

Lord-Advocate, EDWARD S. GORDON, Esquire.

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HOUSE OF LORDS.

PEERS

WHO DELIVERED JUDGMENTS IN SCOTCH APPEALS DURING THE PERIOD OF THESE REPORTS.

Lord Chancellor, Lord CAIRNS,

Lords CHELMSFORD, HATHERLEY, O'HAGAN, and SELBORNE.

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ERRATA.

P. 117, (H. of L.) line 7 of rubric, *for* and parish, *read* the parish.

P. 103, line 10 of note, *for* 265, *read* 465.

P. 206, line 11 from bottom, for *delictu*, read *delicto.*

P. 258, line 9 from foot, for *Sol.-Gen. Watson—Mackintosh*, read *D.-F. Clark —Readman.*

line 7 from foot, for *D.-F. Clark—Readman*, read *Sol.-Gen. Watson—Mackintosh.*

P. 333, last line of page, *for* Nov. 26, Poor-Law Mag. 348, *read* Nov. 26, 1863, 9 Poor-Law Mag. 348.

P. 369, line 13, delete *were.*

P. 378, line 12, *for* disposition to Grant by Morison, *read* disposition by Grant to Morison.

P. 896, line 3 of note, *for* 1838, *read* 1638.

P. 898, line 6, *for* In this, *read* This.

P. 901, line 11 from foot, *for* in not, *read* is not.

CASES

DECIDED IN

THE HOUSE OF LORDS.

1875.

LLOYD AND COMPANY, Defenders and Appellants.—*Joseph Brown, Q.C.*—*Joseph Dixon.*
JOHN LAURIE, Pursuer and Respondent.—*Cotton, Q.C.*—*Shiress Will.*

No. 1.

Feb. 16, 1875.
Lloyd and Co. v. Laurie.

Contract—Construction—Agent and Principal.—A commercial traveller agreed to act for a firm of wholesale tea merchants for a commission of one-third of the difference between the price quoted by his employers as the value of the tea, adding the charge for brokerage and other expenses, and the money obtained by the sale of the tea, his employers retaining the right of accepting or rejecting orders, and collecting all accounts themselves. *Held*, upon the terms of the agreement (*aff.* judgment of the Second Division), that this entitled him to one-third of the profits, if any, on each sale effected through him, without deduction in respect of loss upon other sales.

(IN the Court of Session, February 20, 1873, 11 Macph. 413, 45 Scot. Jur. 286.)

This was an appeal from a judgment of the Second Division.

The House, after hearing counsel for the appellant, affirmed the judgment, the Lord Chancellor observing that no legal principle was involved in the case.

Ld. Chancellor (Cairns).
Ld. Chelmsford.
Ld. Hatherley.
Ld. Selborne.

INTERLOCUTOR appealed from affirmed, and appeal dismissed, with costs.

SYMES, SANDILANDS, & HUMPHRY—WILLIAM B. HAY, S.S.C.—R. M. GLOAG—JAMES BUCHANAN, S.S.C.—Agents.

JOHN MILLER (Finlay's Trustee), Appellant.—*John Pearson, Q.C.*—*J. T. Anderson.*
MRS MARY ANNE ALEXANDER OR FINLAY AND OTHERS (Mr and Mrs Finlay's Marriage-Contract Trustees), Respondents.—*William Pearson, Q.C.*—*Nevay.*

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Feb. 25, 1875.
Miller v. Finlay's Trustees.

Succession—Vesting—Trust.—A took the title to heritable subjects which he had purchased in the names of certain persons, who, by deed of declaration of trust, declared that they held the subjects in trust, *inter alia*, for the payment of the free yearly proceeds to A during his life, and after his death to his wife, if she survived him, for their liferent uses allenarly, the wife's liferent to be restrictable to such extent and in such manner as might be fixed by A; and after the

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determination of the foresaid liferents, in trust for A's children, in such shares and proportions as might be fixed by A, and failing such apportionment, share and share alike; declaring that the fee of the shares should be payable after the determination of the said liferents, and after the whole children who should have survived A and his wife, and who should be alive, had attained majority, or at such other times after the determination of the said liferents as should be fixed by A. A died, survived by his wife, and without fixing the shares of the children. *Held* (*rev.* judgment of the Second Division) that the children's shares of the estate vested at the execution and registration of the deed of declaration of trust in the children then born, and in the others as they came into existence.

Ld. Chancellor (Cairns). Ld. Chelmsford. Ld. Hatherley. Ld. Selborne.

(IN the Court of Session, July 17, 1873, reported under date July 16, 1873, 45 Scot. Jur. 564.)

In 1829 the late Mr J. H. Alexander purchased the Theatre Royal, Glasgow, and took the disposition in favour of certain persons as trustees, for the ends, uses, and purposes to be declared in a deed of declaration of trust to be executed by the trustees. The trustees were duly infeft in the subjects.

By deed of declaration of trust, dated 21st December 1830 and 14th January 1831, and recorded in the Register of Sasines for the burgh of Glasgow 29th January 1831, executed under the powers conferred by the disposition, Mr Alexander was himself assumed as a trustee, and the trustees declared that they held and were infeft in the subjects in trust for the following purposes, viz., payment of certain debts due by Mr Alexander, therein enumerated; "in the fifth place, but only after we are freed and relieved from all reasonable obligations come under by us, in trust for the payment of the free yearly proceeds or rents thereof to the said John Henry Alexander during his life, for his liferent use allenarly, and after his death, in the event of being survived by Mrs Elizabeth Riddell or Alexander, his spouse, in trust for the payment to the said Mrs Elizabeth Riddell or Alexander, in like manner, of the free yearly proceeds or rents thereof during her life, for her liferent use allenarly, it being declared that in the event of the said Mrs Elizabeth Riddell or Alexander surviving the said John Henry Alexander, and marrying again, or of her doing anything inconsistent with a good and respectable moral character, the said liferent shall, upon such marriage or immoral conduct, *eo ipso* cease and determine, and restrictable, the said liferent, to such extent and in such manner as may be fixed by any probative writing to be subscribed by the said John Henry Alexander, even on deathbed; declaring that the foresaid provisions in favour of the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander, and his or her interest in the present trust, shall be in nowise attachable for debt, but that the same shall be considered alimentary, and after the determination of the foresaid liferents, in trust for the whole lawful children of the present marriage between the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander, in such shares and proportions as shall be fixed and determined by any probative writing subscribed by the said John Henry Alexander, as before mentioned, and failing such writing, then share and share alike, declaring that the fee or principal of the shares or interest of the said children shall be payable after the determination of the said liferents, and after the whole children who shall have survived the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander, and who shall be alive, shall have attained majority, or at such other terms after the determination of the said liferents, and under such conditions or provisions as shall be fixed by the said John Henry Alexander in any writing to be left by him as before mentioned, it being hereby provided that after the determina-

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tion of the said liferents it shall be in the power of the trustees, or a majority of them, to make payment to the said children yearly of such part of the free proceeds or rents of the trust-subjects as shall in their discretion be necessary for their maintenance and support in a respectable manner, the remainder of the said rents being accumulated and massed with the trust-funds, and payable at the dates and under the conditions foresaid."

The deed further declared that "this trust shall subsist and continue aye and until the same be wound up, on the shares of the parties interested therein as fiars becoming payable as before mentioned."

Mr Alexander died in December 1851, without leaving any writing fixing the shares of his children in the trust-estate. He was survived by his wife, Mrs Elizabeth Riddell or Alexander, and four children, one of whom, Mary Anne, was married in 1845 to John Finlay, carver and gilder in Glasgow. Three of these children, including Mrs Finlay, were born before the execution of the deed of declaration of trust.

On 28th February 1852 Mr and Mrs Finlay, who had married without an antenuptial contract, executed a postnuptial contract of marriage, whereby, *inter alia*, they conveyed to themselves and others, as trustees, all right, title, or interest which Mrs Finlay or her husband had or might thereafter have in the succession and estates of her deceased father.

Mr Finlay's estates were sequestrated in 1860, and he died an undischarged bankrupt on 19th March 1872.

Mrs Alexander, who enjoyed the liferent of her husband's trust-estate, died on 8th April 1872, all the four children of the marriage being then alive, and having reached majority.

In 1863 the Theatre Royal was burned down. Mr Alexander's trustees sold the site and ruins, and recovered the sums for which the theatre was insured.

The proceeds formed the fund *in medio* in the present action of multiplepoinding, which was raised on 16th September 1872 by Mr Galt, who had been appointed judicial factor on the trust-estate in 1865, the acting trustees having resigned without having assumed new trustees.

The one-fourth share of Mr Alexander's trust-estate effeiring to Mrs Finlay was claimed by (1) John Miller, accountant, Glasgow, as trustee on her husband's sequestrated estates; and (2) by the trustees acting under the postnuptial contract between her and her husband.*

Mr and Mrs Finlay's marriage-contract trustees averred:—(Cond. 5.) "The said postnuptial contract was registered in the books of Council and Session on 7th December 1857, and it and the assignation therein contained were duly intimated to the pursuer, as judicial factor foresaid, on 29th November 1865. It was intimated to the trustees of Mr Alexander shortly after the date of the postnuptial marriage-contract, and before the date of Mr Finlay's sequestration; and the claimants concurred with the trustees in various acts connected with the administration and management of Mr Alexander's trust-estate. They also concurred in a lease of the subjects in favour of Mr Edmund Glover, dated 28th July 1852. This lease, as well as the marriage-contract itself, were well known to the trustees of Mr Alexander, and were acted upon and recognised by them in their transactions in regard to the trust-estate."

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* *A litigation* took place between the trustee on Mr Finlay's sequestrated *estate and* the trustees under Mr and Mrs Finlay's postnuptial contract, *first, in regard to the fee* of a sum due to Mrs Finlay as *legitim* out of her father's *moveable estate*—Miller v. Learmonth, H. of L., May 17, 1870, 42 Scot. Jur. 418, L. R. 2 Sc. App. 109; and *secondly*, with regard to the interest of the said *legitim fund during* Mr Finlay's life—Learmonth v. Miller, H. of L., May 3, 1875, *infra*.

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Mr Miller denied that the assignation contained in the marriage-contract was intimated to Mr Alexander's trustees, or to the judicial factor, until long after Mr Finlay's sequestration.

Mr Miller pleaded;—(1) Upon a sound construction of the conveyance and relative deed of declaration of trust the interest of the children of Mr and Mrs Alexander under the same vested in them at the date of the said deed, or, at all events, prior to the sequestration of Mr Finlay, and the said interest was and is in law, as it is in fact, moveable. (2) The rights or claims of Mr Finlay, as husband of Mrs Mary Anne Alexander or Finlay, not having been renounced or excluded at the date of their marriage, Mrs Finlay's interest under the said deed of declaration of trust fell absolutely under Mr Finlay's *jus mariti*, and was carried to the pursuer as trustee on his sequestrated estate, by virtue of his act and warrant. (3) The assignation contained in the postnuptial contract of Mrs Finlay's share or interest under the declaration of trust never having been intimated to the trustees under the declaration of trust, and not having been intimated to the pursuer as judicial factor on the said estate till long after the sequestration of the said John Finlay, no right to Mrs Finlay's said share or interest in competition with the present claimant was conferred on the trustees or beneficiaries under the postnuptial contract.

Mr and Mrs Finlay's marriage-contract trustees maintained that Mrs Finlay's share of the fund *in medio* had been duly transferred to them by assignation, and also that, being a *surrogatum* for heritable property, it did not fall under the *jus mariti*. The only plea, however, dealt with in the present appeal was—(7) The fund *in medio* not having vested in the children of Mr Alexander until the termination of the liferents, Mrs Finlay's share thereof could not in any view fall under the *jus mariti*, or be affected by the sequestration of her husband, who predeceased that period.

The Lord Ordinary (Ormidale), on 11th March 1873, pronounced the following interlocutor:—"Sustains the claim of Mr and Mrs Finlay's marriage-contract trustees; and repels the competing claim for Mr Miller, the trustee on Mr Finlay's sequestrated estate: Therefore ranks and prefers on the fund *in medio* the claimants Mr and Mrs Finlay's marriage-contract trustees in terms of their claim, and decerns against the pursuer, the holder of the fund *in medio*, for payment accordingly: Finds the claimants, Mr and Mrs Finlay's marriage-contract trustees, entitled to the expenses incurred by them in the competition as against said other claimant." *

* "NOTE.— . . . The present dispute relates to the fourth share of the trust-estate falling to Mr Alexander's daughter, Mrs Finlay, who is still alive. Her husband, Mr Finlay, died on 19th March 1872. It is claimed by their marriage-contract trustees in virtue of a postnuptial contract executed by them on 28th February 1852, whereby they conveyed to the claimants all the rights and interests which they then had or might thereafter have in the succession or estates, heritable or moveable, of her (Mrs Finlay's) father, Mr Alexander.

"On the other hand, Mr Finlay having been sequestrated as a bankrupt in 1858, the fund now in question is claimed by Mr Miller, the trustee in the sequestration, for his creditors.

"Which is the preferable claim depends on when it is to be held that Mrs Finlay's share of the trust-property in question vested, and whether it is to be held as moveable or real estate. If it is to be held as of the nature of moveable estate, and as having vested in Mrs Finlay at the date of the declaratory trust-deed in 1830, as was contended for by Mr Miller, or even on the death of Mr Alexander in 1851, as was alternatively contended for by him, it fell to her husband *jure mariti*, and was carried to the trustee on his sequestrated estate in 1858. If, however, the fund did not vest in Mrs Finlay till the death of her

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Mr Miller reclaimed. On 17th July 1873 the Second Division adhered to the Lord Ordinary's interlocutor. *

mother, Mrs Alexander, in 1872, as was contended for by the marriage-contract trustees, or if it is to be held as of the nature of real or heritable estate, as was also contended for by them, it could not fall under the sequestration of Mr Finlay, and could not be carried to Mr Miller as trustee in his sequestration, but, on the contrary, must now belong to the claimants, Mr and Mrs Finlay's marriage-contract trustees.

"The Lord Ordinary, holding the funds or estate in question not to have vested in Mrs Finlay till the death of her mother, Mrs Alexander, in 1872, has preferred the claim of her and her husband's marriage-contract trustees. There are various considerations arising from the terms of the declaratory trust-deed which have led the Lord Ordinary to this conclusion. That deed expressly bears that it was only after the termination of the liferent of Mr and Mrs Alexander that the trustees were to hold the trust-estate for their children; and not only was no beneficial interest in it to be enjoyed by the children or any of them till after the termination of the liferents, but there is a declaration in the deed of great importance, as it appears to the Lord Ordinary, in reference to the question of vesting, not only to the effect that the fee or principal 'of the shares or interest of the children should be payable after the determination of the said liferents,' but also to the effect that such payment should not be made till 'after the whole children who should have survived the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander, and who shall be alive, shall have attained majority, or at such other terms after the determination of said liferents' as shall be fixed by Mr Alexander. Now, although this part of the trust-deed is not very clearly or well expressed, the Lord Ordinary cannot doubt that it was intended to mean, and must be held to mean, that the children were not to have any beneficial enjoyment till after the determination of the liferents, and also that the trust-estate was to be divided amongst the children alone who might survive the liferenters and might be then alive. In short, there is here, the Lord Ordinary thinks, if not a clear and distinctly expressed, a plain and unmistakeable survivorship implied, having reference to the termination of the liferents. And if the Lord Ordinary be right in this view, it must, he thinks, be held to follow, on the principle of the judgment of the House of Lords in Young v. Robertson (February 1862, 4 M'Q., p. 314), that the children's share of the estate in question did not vest till after the determination of the liferents, or, in other words, till the period of distribution. On any other footing it is difficult, or rather impossible, in the opinion of the Lord Ordinary, to understand that portion of the declaratory deed of trust above referred to and partly quoted, and if so, the reasoning of the noble and learned Lords who took part in the judgment in the case of Young v. Robertson appears to the Lord Ordinary to be as applicable to the present as to that case. And the same principle had been previously given effect to by this Court in Newton v. Thomson and others (27th January 1849), 11 D. 452, where Lord Fullerton expressed an opinion which appears to the Lord Ordinary to have a material bearing on the present case.

"If the Lord Ordinary is right in his view of the question of vesting as now explained, it follows that the fund now *in medio* could not have fallen to Mrs Finlay's husband *jure mariti*, or been carried to the trustee in his sequestration, and consequently that it is unnecessary to consider whether it is of the nature of heritable or moveable estate; for whether it is to be held to be the one or the other, if it did not vest till after the determination of the liferents, which occurred at the death of Mrs Alexander on 8th April 1872, it could not have fallen under the *jus mariti* of Mr Finlay, who had previously died on the 19th of March 1872. And neither, for the same reason, is it necessary to inquire whether Mr and Mrs Finlay's marriage-contract was, or was not, intimated as averred in article V. of the condescendence for the trustees acting under that deed."

* The following opinions were delivered at advising:—

LORD JUSTICE-CLERK.—The deed in reference to which the questions before

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LORD CHANCELLOR.—My Lords, the circumstances are somewhat peculiar

us arise relates to the purchase of a theatre by the late Mr John Alexander with his own funds, and the titles were taken in the name of certain parties as trustees. The deed is not a trust conveyance, but a declaration of trust, and its provisions are of two kinds, which are separate and distinct. In the first place, there is the creation of a real security, for the payment of certain obligations of Mr Alexander, and the estate is to be held by the trustees for that purpose. In this respect the conveyance is only in security, and Alexander is not divested of the radical right. Then, in the second place, there are the provisions contained in the fifth purpose of the deed, in which the trustees declare that they hold the subjects in trust for payment of the free yearly proceeds or rents to Mr Alexander, "during his life for his liferent use allenarly," and after his death, in event of his being survived by Mrs Elizabeth Riddell or Alexander, his spouse, in payment to her "of the free yearly proceeds thereof during her life, for her liferent use allenarly," "and after the determination of the foresaid liferents, in trust for the whole lawful children of the present marriage, ... declaring that the fee or principal of the shares or interest of the said children shall be payable after the determination of the said liferents, and after the whole children who shall have survived the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander, and who shall be alive, shall have attained majority.

Now, under this part of the deed, there are three questions presented to us—(1) Did the declaration of trust divest Alexander of the fee of the estate at all? (2) If he was to any extent divested of the fee, did the shares of any of the children vest from the time of the trustees' infeftment? and (3) Was such share moveable or heritable? This latter question, however, is not now before us.

On the first question I have great doubt whether this deed divests Alexander at all, not because it is not perfectly possible for a parent to divest himself of the fee of his estate during his life, or that in such a case the fee might not vest in the children at once, but because the whole conception of this deed is to retain to Alexander his control over the property. In the first place, there is a joint liferent to himself and his wife, but in reference to the wife's liferent there is the provision that it shall be "restrictable to such extent and in such manner as may be fixed by any probative writing to be subscribed by the said John Henry Alexander, even on death-bed." So it is clear that the wife had no vested interest in the estate, or, at all events, that her interest was subservient to the control of the husband. And in regard to the children's provisions, it is provided that they shall be paid at such time and in such shares and proportions, and under such conditions and provisions, "as shall be fixed and determined by any probative writing subscribed by the said John Henry Alexander." Now, I cannot read these provisions without coming to the conclusion that Alexander intended to keep in his own hand as much power as was compatible with the form of the deed, and I think it very material to observe that the trustees declare that the trust is not for the children until the determination of the liferent, and that until that event they are not in a position to hold the estate for the children. So, is a deed of this kind a deed of divestiture at all? Now, I do not think it necessary to give an absolute opinion on that point, but I think it would be extremely difficult for the children to maintain, in a question with creditors of their father, that he had divested himself of the estate. I think that Alexander retained the radical right.

Then, in regard to the second question, I think that the Lord Ordinary has taken a sound view, and that there was no vesting of the children's shares of the estate until the determination of the liferents,—that is, at the death of Mrs Alexander. Mr Lorimer argued perfectly soundly when he said that a mere power of distribution, or the postponement of the term of payment, will not prevent the fund vesting *a morte testatoris*. But Mr Lorimer has to shew that this is a case in which the vesting takes place at once. I do not think that it

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under which this case now comes before you. There is a fund *in medio* in the Court of Session in an action of multiplepoinding, and that fund is claimed by the present appellant, who is the assignee under a sequestration. The bankrupt, whose assignee he is, and in whose right he claims the fund, is a person of the name of John Finlay, who is now dead. The fund is said to have belonged to John Finlay in right of his wife, who before her marriage with him was Mary Anne Alexander. The right of Mary Anne Alexander arose under a voluntary settlement executed in January 1831 by her father. The property which was the subject of that settlement was a theatre in Glasgow, and, undoubtedly, at the time of the settlement the theatre was heritable property. Now, it is said that by virtue of that settlement and the acts done under it the share which was allotted under the settlement to Mary Anne Alexander became moveable property, and passed to her husband *jure mariti*, and that the assignee of the husband is now entitled to claim so much of the fund *in medio* as represents that share. To that statement I must add this, that Mary Anne Alexander having been married to John Finlay in the year 1845, no settlement was executed on the occasion of that marriage, but in the year 1852, on the 28th

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is so, for payment is directed to be made "after the determination of the liferents, and after the whole children who shall have survived the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander, and who shall be alive, shall have attained majority." That shews that there is no vesting until the termination of the liferents. And what makes this more clear is the fact that there is no certain term of payment fixed, for immediately after the clause which I have just read it is provided alternatively that payment shall be "at such other times after the determination of the said liferents as shall be fixed by the said John Henry Alexander in any writing to be left by him." I do not think there has ever been a case in which vesting has been held to take place under conditions like these.

As to the question of survivorship, I agree with the Lord Ordinary that there is clearly a survivorship implied, but it is not necessary to go into details.

I am of opinion that we should adhere to the interlocutor of the Lord Ordinary.

LORD COWAN concurred.

LORD BENHOLME.—I concur with the opinions that have been delivered. My judgment is mainly founded on the clause in the trust-deed (which I think is in itself decisive) that the trust in favour of the children is not to commence until the termination of the liferents. The trustees had a power of sale in conjunction with the father, or in conjunction with any persons that he might appoint to concur with him in a sale; but until the sale has been completed in either way it does not appear to me that the nature of the heritable property is affected. It is burdened with two liferents, but it remains heritable until it is sold. No doubt the interest of the children may be vested, and it probably is vested, when the trust in their favour commences, viz., at the termination of the liferents; and it may then be regarded as an interest of a moveable kind. But I am at a loss to see any reason for vesting the interest of the children before the commencement of the trust in their favour. On that view, a share of the fee would vest in each child as soon as it was born, even though it should die before attaining the years of discretion. It is very difficult to hold this view to be correct, for it is not generally regarded as at all desirable in settlements of this kind that the children should be able during their parents' lives to raise money on their future interests. I can see nothing in the deed now before us indicating any intention that the children should be entitled to draw upon their shares of the fee until the termination of the liferent interests of their parents. I therefore cannot but concur in the opinions which have been delivered.

LORD NEAVES concurred.

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of February, a postnuptial settlement was executed between them, which clearly, by the admission of both sides, included the share of Mrs Finlay in the property in question.

Under those circumstances, the questions which naturally would fall to be considered by the Court would be three in point of number, and I think your Lordships will agree with me that the order in which, logically, they ought to be considered would be the order in which I am now about to state them. First, it would require to be ascertained whether the postnuptial settlement which I have mentioned, of the 28th of February 1852, was properly intimated to the trustees who held this property, so as to make it a complete and binding disposition, because, if, by reason of the circumstances under which it was executed, and by reason of proper intimation having followed, it was a complete and binding disposition, it would clearly include the interest of Mrs Finlay whether the property be looked at as heritable or as moveable property. The second question would be, whether the property continued to be, as it was at the time of the original settlement of 1831, heritable, or whether it had been converted into moveable property, because, if it continued heritable, the *jus mariti* would, as I have said, be excluded. And the third question would be, whether upon the construction of the settlement of 1831 the share in the property settled and provided for Mrs Finlay was vested in her anterior to the time when the persons who were liferenters under that settlement died, or whether the vesting did not take place until the death of the liferenters, because the liferenters being her father and her mother, the survivor of them did not die until the 8th of April 1872, a period subsequent to the death of John Finlay, the bankrupt, and consequently, if the vesting of the share of Mrs Finlay did not take place before the death of the liferenters, there would be nothing to go to her husband *jure mariti*, and nothing to come to the present appellant as his assignee in bankruptcy.

Out of these three questions only one, and that the third, has been considered or dealt with either by the Lord Ordinary or by the Court of Session. The Lord Ordinary and the Court of Session have considered and determined the question with regard to the vesting; they have determined nothing with regard to the question whether the property was heritable or moveable, or as to whether the postnuptial settlement was binding or not binding; and the interlocutors pronounced, and which are under appeal, merely assert the right to the fund *in medio*, and repel the claim of the appellant, the assignee in bankruptcy, but do not state the ground upon which the fund *in medio* is awarded to the respondents and refused to the appellant.

On the question whether the share of Mrs Finlay vested before the death of her parents, I should have thought, but for the respect which I entertain for the opinion of the learned Judges who have taken a different view in the Court below, that the question hardly admitted of doubt or of argument. Certainly, according to our ideas in this country of the construction of instruments of this kind, ideas which have been formed upon a long series of decided cases, the question would hardly appear to be an arguable question, because the settlement, after providing for the interest given by way of liferent to the parents, continues,—"After the determination of the foresaid liferents in trust for the whole lawful children of the present marriage between the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander, in such shares and proportions as shall be fixed and determined by any probative writing subscribed

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by the said John Henry Alexander as before-mentioned, and failing such writing, then share and share alike"—(I will omit the parenthetical words with regard to the writing to be subscribed by John Henry Alexander, for none such was made, and I will read the sentence without those parenthetical words)—"After the determination of the foresaid liferents in trust for the whole lawful children of the present marriage between the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander," "share and share alike."

I pause there for the purpose of saying that there is no conveyancer in England, who, if he wished to express a trust which would give to a father and mother life interests with immediate vested remainder to all the children of the marriage alike, could have found words more clear and apposite to express an intention of that kind. They are the apt and appropriate words, according to our ideas, for describing liferent interests, with vested interests in remainder, and under them interests of that kind would vest in the children from time to time as they were born, the first child born taking the whole in remainder, with the interest opening to admit others subsequently born. If nothing more was found, and if a child died under twenty-one in the lifetime of his parents, he or she would have a vested interest which, if not given over to any person else, would go to his representatives. On the other hand, if in the lifetime of his parents the child attained the age of twenty-one, he or she would be able to make arrangements with regard to that portion of the property on marriage or otherwise, as property in which the interest of the child was absolutely vested.

Now, that being so, is there anything in the words which follow which in any way qualifies or puts a different construction upon the words which I have read? It appears to me that the words which follow are words which merely point to the manner of payment and the division of the fund or property in question,—"Declaring that the fee or principal of the shares or interest of the said children shall be payable after the determination of the said liferents." Who are "the said children" mentioned there? "The whole lawful children of the marriage" between the father and the mother. Therefore the sentence reads thus,—"The fee or principal of the shares, or interest of the whole lawful children of the marriage, shall be payable after the determination of the liferents." If any of them had died before, it would be payable of course to their representatives. But what of those who survived? The sentence continues,—"And after the whole children who shall have survived the said John Henry Alexander and Mrs Elizabeth Riddell or Alexander, and who shall be alive, shall have attained majority"—(I pass over again parenthetical words relating to an appointment, none having been made)—"it being hereby provided that after the determination of the said liferents it shall be in the power of the trustees, or a majority of them, to make payment to the said children, yearly, of such part of the free proceeds or rents of the trust-subjects as shall, in their discretion, be necessary for their maintenance and support in a respectable manner, the remainder of the said rents being accumulated and massed with the trust-funds, and payable at the dates and under the conditions foresaid."

I read this as a direction, the consequence of which would be, that if there were children alive after the death of the parents, some of whom or all of whom might be under age, there was to be no absolute division until the youngest had attained the age of twenty-one, but there was to be a power on the part of the trustees to use the income of the various shares, so far as in their

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discretion it appeared to be necessary, for the maintenance of those who could not, during that interval, receive the principal. That is perfectly consistent with the possibility of there having been children who might have predeceased their parents, and who, in that case, would not be there to be maintained, but whose representatives would be entitled at the period of the division to the absolute payment of their shares.

My Lords, I have said that, in this country, that would, in my opinion, have been the interpretation of the words, and I may point out to your Lordships that that interpretation, as it appears to me, satisfies the meaning of every single word in the whole of these sentences. It also accords with that which now has been in this country a cardinal rule of construction, namely, that where you find interests given to a class, but the payment postponed for the purpose of letting in preceding life interests, the interests so given in remainder are vested immediately, and are not postponed until the time of the payment. Is there any difference between the law of Scotland and the law of England upon that point? The construction which I have submitted to your Lordships does not depend upon any technical rules either of feudal law or of English conveyancing. It depends upon the ordinary construction of ordinary words, and upon the plain consideration of the exigencies which, upon a settlement of this kind, are naturally supposed to lead to the form in which the provision for a family is made. In the case of Young v. Robertson[1] it was held by your Lordships, that there was no technical difference between the law of England and the law of Scotland upon the construction of clauses of this kind, but that the clauses were to receive their natural meaning according to the plain principles of interpretation, whether the settlement was an English settlement or a Scotch settlement.

Upon what ground in this case has it been held that this should not be the construction placed upon the settlement? Not upon the ground of authority, for the only authority cited was the case to which I have referred, namely, Young v. Robertson. That is no authority at all for the decision arrived at by the Court of Session, for in the case of Young v. Robertson there was that which there is not here, namely, a provision in favour of survivors, which required you at once to determine the period at which the survivorship was to take place, and to hold that those only who were alive at that period could take. And your Lordships will observe that which, as it appears to me, accounts in some degree for the decision arrived at by the learned Judges in the Court below, namely, that the Lord Justice-Clerk, and, I think, Lord Benholme also, and the Lord Ordinary, appear to be of opinion that there is something in the form of this settlement which operates as a gift to the children by way of survivorship at the death of the liferenters. My Lords, I can find no such words. The words of the trust and the gift are, as I have already said, to "the whole lawful children." The introduction of the term "survivor" is in a different clause and for a different purpose, namely, to provide with regard to those children surviving who might be under the age of twenty-one, that they should not receive payment until they attained their full age.

I am, therefore, notwithstanding the great respect which I feel for the united authority of the learned Judges in the Court below, compelled to advise your

[1] Young v. Robertson, Feb. 14, 1862, 4 Macq. 314, 34 Scot. Jur.

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Lordships to hold that there is in this case a vested interest in all the children of the settlors, including the wife of the bankrupt, Mrs Finlay.

That being so, the third of the three questions which I pointed out to your Lordships as being the questions in the case, ought, in my opinion, to have been determined in favour of the appellant, and adversely to the respondents.

But will that dispose of the whole case? Certainly not. There remain the first and the second questions which I have mentioned, and upon which we have no decision and no opinion of the Court below. It would be extremely inconvenient, and I think it would be contrary to your Lordships' general practice, if you were now to have those questions fully argued before you, and to arrive at an opinion upon them as a Court of first instance without having the benefit of the opinion of the learned Judges upon these questions, one or both of which may, to a considerable extent, depend upon considerations of Scotch law. I should, therefore, humbly recommend your Lordships not to determine either of those other questions, but, finding that so far as the Court below has gone, and upon the question which alone they have entertained, your Lordships are unable to agree with them, I should submit to your Lordships that the case should go back to the Court of Session in order that upon the two other questions I have mentioned we may have the benefit of the opinion of the learned Judges of that Court. Those two questions are, whether the property continued to be heritable, or had become by conversion (to use an English term) moveable property; and whether the postnuptial settlement had been intimated to the trustees of the original settlement so as to make that postnuptial settlement a binding instrument as against the property, whatever might be its character.

I should therefore recommend your Lordships that the course should be taken in this case which was taken in the case of Lord Fife v. Duff,[1] in the year 1861, where a similar remit was made, namely, that an order should be made in this form:—[His Lordship here suggested the order given *infra*, p. 13.]

Lord Chelmsford concurred.

Lord Hatherley.—My Lords, I concur entirely in the proposal which has been made by the Lord Chancellor as to the manner in which this case should now be dealt with.

The only point which we have had before us for our consideration, and the only point which has been decided in the Court below, has been the point with reference to the period at which the interest of the children was to be treated as a vested interest. Upon that point I have been compelled, like my noble and learned friends who have preceded me, to come to a conclusion contrary to that which was come to by the Court below. It appears to me that the very plain and distinct declaration of trust as to the persons in whom the property shall vest cannot be over-ridden by a direction given in a subsequent part of the settlement after the gift has been made to the children as to what is to be done in the event of any of those objects of the settlement being minors at the time of the death of the survivor of Mr and Mrs Alexander. The limitation to the children is absolute after the determination of the liferents, one of which liferents might be determined by the second marriage of Mrs Alexander. At that time, whenever the liferents determined, there is a strict declaration of trust for

[1] Earl of Fife v. Duff, July 19, 1861, 33 Scot. Jur. 715 (see p. 718).

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the "whole lawful children" of the marriage between Mr and Mrs Alexander. And although that expression might in itself have been supposed, but for a long current of authorities, to have created some doubt as to the exact period of the vesting, it has been distinctly settled long ago that where a limitation which might seem to point to a different period of vesting than the immediate operation of the instrument is in effect only a postponing of the interest in possession of the persons in whose favour the settlement is made until after the determination of a previous life estate, in that case the interest in remainder is held to be vested at once from the execution of the instrument.

Here, therefore, there is a perfectly plain and clear trust in the first part of the instrument for all the children at the determination of the liferents, which would determine either by the death of Mr Alexander and the death of Mrs Alexander, or by the death of Mr Alexander and the second marriage of Mrs Alexander. The words which we find afterwards are simply owing to the view which had occurred to the testator that some of the objects of his bounty might be infants at the period of the decease of himself and his wife. Therefore he says that the property, the fee or principal of the shares, shall be payable after the determination of the liferents, and after the whole of the children who shall have survived Mr and Mrs Alexander, and who shall be alive, shall have attained majority. He contemplates that some may possibly die under age in the lifetime of himself and his wife, and that some may be alive after the death of the survivor of the two, and still be under age. If they die before their parents, then this declaration will not take effect, because it says, "who shall be alive" at the time the distribution is to be made. As soon as all are cleared away (and with regard to this particular direction the period of payment is distinguished from the period of vesting), either by predeceasing their parents or by attaining the age of twenty-one, then there shall be, not a gift of the principal, but a division of the principal. The period for the division of the principal is pointed out solely with regard to the particular circumstance of some of the children being under twenty-one, and therefore not in a condition to receive or give discharges for the share of the principal to which, together with their brothers and sister, they would become entitled, namely, the first gift at the time of the determination of the previous life interests.

Lord Selborne.—I agree in what has been proposed to your Lordships.

It was argued by the respondents' counsel that the conditions of survivorship and attainment of majority were here of the substance of the gift. But the sole foundation for that argument was the occurrence of the mention of the survivorship of certain children, and the attainment of their majority, not in any clause either giving interests or defining the conditions upon which interests were given, but in a clause defining the period of time at which interests already given, and given in clear terms to all the children, should be payable or transferable. With regard to the clause which follows, as to the application of income during the interval between the termination of the liferents and the attainment of majority by the children supposed to be then under age, I see no reason at all to differ from the view which, as I understood my noble and learned friend upon the woolsack, is taken by him, that that is a clause to be applied according to the shares of the children, and not so as to make the income of one share applicable to the maintenance of children not entitled to the capital. But I have no hesitation in saying (that being a question which your Lordships are not called

upon to decide), that if it were clearly the other way, and if this trust had been to apply the whole of the income of the entire trust-estate to the maintenance and education of those children only who were minors at the death of the last liferenter, to the exclusion of all children then adult from all benefit of the income until the attainment of majority by the youngest living child, I should still think that such a trust of intermediate income would neither suspend the vesting of the shares of the children who were entitled, subject thereto, to the capital of the trust-estate, nor be of itself evidence, apart from the other clauses in the deed, that those children only who survived the last liferenter, and were at that time under age, were entitled to participate in the capital.

The only other point upon which I think it necessary to make a single observation is the question with reference to the effect of the marriage-settlement. I entirely concur with the terms of the proposed remit which has been mentioned by my noble and learned friend upon the woolsack, but I do not understand your Lordships to mean to express any opinion at all upon the question whether intimation was or was not necessary. That, as well as all other questions connected with the effect of the deed, I apprehend your Lordships desire to have considered and determined by the Court of Session.

LORD CHANCELLOR.—My Lords, perhaps it may be as well that I should say that I quite agree with my noble and learned friend, and that in anything that fell from me I did not for a moment desire to assume that intimation would be found to be necessary. My only desire was that the whole of that question should be considered by the Court of Session.

THE order pronounced by the House was as follows:—"Ordered, by the Lords Spiritual and Temporal in Parliament assembled, that the cause be, and the same is hereby remitted back to the said Second Division of the Court of Session in Scotland to review generally the interlocutors complained of, and if, in their opinion, a proof shall appear to be necessary in reference to the allegation of intimation of the postnuptial settlement of the 28th of February 1852, and to the other alleged facts and circumstances following said allegation, all contained in article 5 of the condescendence of the respondents, the marriage-contract trustees, then to allow such proof, and to report their opinions on the whole case to this House: And this House does not think fit to pronounce any judgment upon the said appeal until after the said interlocutors shall have been so reviewed, and the opinions thereupon shall have been reported according to the direction of this order."

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LORD SELBORNE.—I agree in what has been proposed to your Lordships.

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Barr & Shearer v. Cooper.

BARR AND SHEARER (Defenders), Appellants.—*Cotton, Q.C.—Watkins Williams, Q.C.*

WILLIAM EDWARD COOPER AND MANDATARIES (Pursuers), Respondents.—*John Pearson, Q.C.—Mackintosh.*

Ship—Lien for Repairs—Possession.—A vessel was placed in a patent slip belonging to a firm of shipbuilders for repair. When certain outside repairs were completed she was removed by the shipbuilders, for their own convenience, into a public wet dock, into which the patent slip opened, and the repairs were there completed, the vessel being attached to pawls situated within the premises of the shipbuilders, and lying close to their slip. From time to time the vessel was moved for the convenience of those using the slip at the order of the harbour-master, but chiefly by the shipbuilders' men. During the whole time the master was present in the ship during the day, and at night a ship-keeper. *Held (rev.* judgment of the First Division), that the possession of the ship, and the resulting lien for the cost of repairs, which the shipbuilders had while it remained in their slip, did not cease when the vessel was removed by them to the public dock.

Ld. Chancellor (Cairns).
Ld. Chelmsford.
Ld. Hatherley.
Ld. Selborne.

(IN the Court of Session, June 6, 1873, 11 Macph. 651, 45 Scot. Jur. 408).

This action was brought in the Court of Session by W. E. Cooper, as mortgagee of the barque "Joan Cunllo" of Aberystwith, against Barr and Shearer, shipbuilders at Ardrossan, concluding for delivery to the pursuer in virtue of his mortgage of the said ship, described as "at present lying in the defenders' patent slip at Ardrossan," and in the event of their failure to do so for payment of £3000.

The owner of the ship, Mr Lewis, in September 1872, had put her into the hands of the defenders to have certain repairs done, and by them she was put on their patent slip in their shipbuilding yard, which opens into the public wet dock in the harbour of Ardrossan. After a portion of the repairs had been executed she was removed from the slip to the wet dock by the defenders to make room for another vessel. When launched into it she was, by the orders of the deputy harbour-master, removed to a berth at the north side of the dock opposite the patent slip. She lay there for a few hours, and then, because the master persuaded the harbour-master, for the convenience of the carpenters, to have her shifted, she was removed, chiefly by the shipbuilders' men, to a berth at the foot of the slip, where she lay moored by her own ropes to pawls within the premises of the defenders. From time to time the vessel was moored for the convenience of those using the slip at the order of the harbour-master, but chiefly by the shipbuilders' men. The repairs were completed while the vessel lay in the dock. While the repairs were proceeding, the master was in the ship during the day, and a ship-keeper at night. After the repairs were completed, the shipbuilders replaced the vessel on the slip and detained her.

The pursuer pleaded;—(1) The pursuer, in virtue of the mortgage libelled, is entitled to possession of the ship or barque thereby mortgaged, and to sell the same in payment of his debt preferably to all other creditors. (2) The defenders, having lost their lien or retention over said vessel, are not entitled to withhold delivery thereof from the pursuer.

The defenders pleaded;—(1) In respect of the defenders having executed the said alterations and repairs upon the said "Joan Cunllo" they have a lien or right of retention over her, preferable to any right which the pursuer has as mortgagee, and, in virtue of their said lien or right of retention the defenders are entitled to retain possession of her until their said account is paid.

A proof was led before the Lord Ordinary, in which the facts above narrated were proved.

The Lord Ordinary (Gifford), on 11th March 1873, pronounced the fol-

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lowing interlocutor:—"Finds it sufficiently instructed in point of fact,—First, That the defenders, Messrs Barr and Shearer, were employed by Thomas Lewis of Walcott, Bath, the owner of the ship or barque 'Joan Cunllo' of Aberystwith, and who was in possession and management of the said ship, to execute certain repairs upon the said ship; Second, That under and in virtue of this employment the defenders, Messrs Barr and Shearer, obtained possession of the said ship or barque, and placed her upon their slip at Ardrossan for the purpose of executing the said repairs, or part thereof; Third, That under the said employment the defenders, Messrs Barr and Shearer, executed extensive repairs upon the said ship, in respect of which a large account is now due to them; Fourth, That the defenders, Messrs Barr and Shearer, never gave up, surrendered, or lost possession of the said ship or barque, but that they still retain possession thereof in security of the payment of their said account for repairs and work executed thereon: Finds in point of law that the defenders, Messrs Barr and Shearer, have a valid and effectual lien over the said ship or barque, or a right to retain the same in security of their said account, and finds that the pursuer is not entitled to demand or enforce possession of the said ship or barque without paying or securing the said debt due to the defenders; and to the above effect sustains the defenders' pleas, and assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses," &c.

The pursuer reclaimed.

This interlocutor was pronounced by the First Division on 6th June 1873:—"Recall the interlocutor: Repel the defences, and decern and ordain the defenders forthwith to deliver to the pursuer the barque 'Joan Cunllo,' at present lying on the defenders' patent slip at Ardrossan, and that at the sight of Archibald Steele, harbour-master of Ardrossan: Authorise interim extract of the decree, and dispense with the minute-book: Find the defenders liable in expenses; allow an account," &c.

The defenders appealed.

LORD CHANCELLOR.—The question which your Lordships have to deal with in this case is in reality a question of fact, but it is a question involving considerations interesting not only to the litigants in the present appeal, but generally to those who are concerned in the management of property such as that which forms the conspicuous feature in this case. The question which is raised is not whether the shipbuilders in this case had at one time a lien for the repairs of the ship which was in their hands, but whether, by the circumstances which at a later period occurred, they lost or abandoned that lien which they once possessed.

The narrative of the facts which require to be looked at may be compressed into a very moderate compass. The owner of the ship tells us that the circumstances under which the ship originally came to Ardrossan for repairs were these. He says,—"She had been on a voyage to the West Indies, and on her return I made arrangements for having her repaired by Barr and Shearer of Ardrossan. I accompanied the vessel to Ardrossan, along with the captain who had taken her to the West Indies, on the 17th of September 1872. Before taking her to Ardrossan I had some conversation with Mr Cooper in London with reference to the repairs. I stated to him that the ship had come off her class, and that I wanted her to be re-classed. He was against it, but I could do nothing with the ship unless she had a class, and therefore I made up my mind that I would have her repaired myself." The repairs would therefore be not inconsiderable, but they would be repairs that would enable the ship to be

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re-classed, as she had been classed before, A1 at Lloyd's. "The vessel," he continues, "was not put upon Barr and Shearer's patent slip immediately on her arrival at Ardrossan. She lay in the public wet dock waiting her turn, and was put upon the slip on the 3d October."

I should be unwilling to rest any important argument upon a critical consideration of the words in the condescendence, but I own that it appears to me that the condescendence properly describes the conclusion which is to be drawn from the statement of the owner that I have read, for the condescendence says,—"In the course of the month of September last the ship or barque was, by the orders and instructions of Thomas Lewis, and without the knowledge and consent of the pursuer, put into the hands of the defenders, Messrs Barr and Shearer, who are shipbuilders and ship smiths at Ardrossan, to have certain repairs done; and in order that she might be duly overhauled and repaired the defenders placed her on their patent slip in their shipbuilding yard, which opens into the public wet dock at the harbour of Ardrossan."

It is admitted upon all sides that, the repairs having been done, there was a lien as long as the ship was upon the slip for those repairs. Bur I refer to this evidence and this averment in the condescendence for the purpose of submitting to your Lordships that the natural and proper conclusion from those statements is, not that the lien arose in consequence merely of the ship being placed upon the slip, but that she was placed before that in the hands of Barr and Shearer for repairs, that she was handed over to them for that purpose, and that it was by reason of their having thus received the possession and the control of the ship that they were able to place, and that they did place, the ship upon their slip for the purpose of repair.

I may remind your Lordships of one very important fact with regard to the possession of this ship when she was upon the slip. During the whole of that time we are informed that the captain or master of the ship was residing at Ardrossan, and was in the habit of going to the ship and superintending the repairs that were going on, spending the whole or the greater part of each day upon the ship. Your Lordships also find that during the whole or a part of that time there was a mate who seems to have been occupied in much the same way. But in addition to the captain and the mate there was a care-taker sleeping on board the ship, and the purpose for which he was doing so is thus described in the evidence. Thomas Lewis says,—"I know for certain there was a ship-keeper constantly on the ship to watch against damage." I think your Lordships will consider it important to bear in mind these circumstances in the further history of the case. At the time when undoubtedly the ship was in the possession of Messrs Barr and Shearer, the shipbuilders, when it was in their hands and when a lien subsisted for the repairs, you have the master and the mate frequenting the ship and superintending the repairs, and a ship-keeper sleeping on board the ship to watch against damage. Those persons, the captain, the mate, and the keeper, were not there for the purpose of keeping possession of the ship; the possession was the possession of Barr and Shearer. But that possession was consistent with the presence of those three servants of the owner, who were there for the double purpose of superintending the repairs and watching against damage.

Well, my Lords, the ship left the slip on the 15th of November. Why did she leave the slip at that time? Was it because the owner asked for her? because the owner required possession of her? because the builders informed

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the owner that the time had arrived when they had completed the repairs and that they wanted to give up possession of the ship? My Lords, it was for no reason of that kind. We are informed by the owner that he was anxious that she should have remained on the slip, and that he asked the builders to keep her there for some days longer, but that they informed him that they required the slip for the purpose of placing another ship upon it, and that the remaining repairs could be done as they were in the habit of doing them, as the harbour-master says, in the wet dock. Therefore it was not for the purpose of giving up possession to the owner that the ship was removed from the slip. Then, when she was removed from the slip, was anything said to the owner or to the servants of the owner, indicating the intention of Barr and Shearer to alter the possession of the ship? Nothing was said; not a word is reported to have passed between Barr and Shearer and either the owner or any of the servants of the owner upon the subject. Then into whose hands was the ship given when she left the slip? There, again, your Lordships have evidence which is uncontroverted. In the first place, the owner himself tells us,—"When she was put off the slip Barr and Shearer's men were finishing the small jobs on board of her. They continued to work on board after she was put off just as they had done before. I believe there were three or four of them, and then they were reduced to two, and at last to one. (Q.) From the time she was off the slip till you went to London who directed where she should be moored? (A.) The deputy harbour-master has the control, and can compel the captain of any ship to move about as he thinks proper. I gave no directions as to where the ship was to be moved to. I do not know what the captain did. The mate did not, so far as I know. The ship-keeper was obliged to act according to the deputy harbour-master's instructions."

What does the deputy harbour-master say? And he, my Lords, is a witness for the respondents in the case. The deputy harbour-master says,—"I saw her launched" (that is from the slip) "and took her under my orders as soon as she was afloat. When she came off, the master asked me where he would take her, and I told him to take her to the north side, right opposite the slip. He took her over, but asked me to give her a more convenient berth, and I told him that as soon as I could get another schooner upon the patent slip I would lay her across there again. By and by I let her across, about four o'clock in the afternoon. The vessel had come off about ten o'clock. At four o'clock she was moored off the patent slip. She lay there about a week, and then I ordered her to be removed to the south-west corner of the dock. Her stern ropes were moored to the pawls between the graving dock and the patent slip. I am in the way of mooring vessels, loaded and unloaded, to the pawls. All the vessels which lie in the same berth are moored to those pawls. When we cannot get over the gate we have access to the pawls by steps from the dock just at the corner of the patent slip. The vessel remained a considerable time at the south-west corner. I cannot say how long. She remained till she was on the slip again."

Therefore, from the time she left the slip till the time she came back to the slip she was not under the orders of the master or of any servant of the owner. Where she was moored to depended on the orders of the deputy harbour-master, and the owner of the ship does not profess to say that any servant of his, either by his orders or without his orders, took any control whatever over the ship. Now, my Lords, during that time, when she was thus not handed

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over to the owner, or to any servant of the owner, for the purpose of control or direction, what was being done to the ship? The workmen of Barr and Shearer were on board of her, concluding the repairs that were to be done as a whole, and not as individual items, just as they had been before. And your Lordships are told by the harbour-master, Archibald Steele, that "Barr and Shearer sometimes complete the repairs on vessels in the wet dock—in that case, the vessels are sometimes moored in one place and sometimes in another. The usual place is across the mouth of the slip, which is the most convenient place for them." Further than that, during the whole of this time the vessel occupied two positions only, one across the mouth of the slip, and the other on the south side of the graving dock. On both of those occasions, in both of those berths, she was moored by hawsers to pawls which were inside the premises of Barr and Shearer. And your Lordships have the uncontradicted evidence of two of the servants of Barr and Shearer, that it was their duty, and their orders were to attend to the moorings of the ship and see that no persons disturbed those moorings and fastenings by which she was attached to the premises of Barr and Shearer.

I suppose it will not be disputed that, if at the time this ship came off the slip of Barr and Shearer she had been slid down, not into a public wet dock, but into a private wet dock of Barr and Shearer, no question could have arisen as to any alteration in the possession or the lien. But, my Lords, is there any authority to say, if a tradesman has delivered to him a chattel for the purpose of repairs, and he executes a portion of those repairs upon his own premises, and then passes the chattel, for a temporary purpose, and for the continuance of those repairs, on to some public thoroughfare or highway abutting upon and adjacent to his premises, and continues to execute the repairs upon the chattel then and there, that, because he has passed it for this purpose out of his own private premises on to this public piece of ground, he therefore has lost the lien which up to that time he had? because that must be the proposition upon which alone the decision of the Court of Session can be maintained.

Now, when I look at the opinion of the learned Judges of the Court of Session what I find is this. If I do not mistake, the learned Judges lay down these three propositions. They say, with regard to a ship in a public harbour or a maritime highway, repairs executed upon a ship under such circumstances confer no lien. Very probably they do not. I should be disposed to say *prima facie*, in the absence of some countervailing circumstances, that they do not. But I am not prepared to say that, even there, there may not be circumstances indicating such a transmission of the ship, such a handing over of the ship to the workmen, that there may arise a lien for repairs. That is not a question to be decided now, and I only guard against being supposed to have expressed an opinion upon it, but I accept the opinion of the Court that *prima facie*, in that condition of things, there is not a lien for repairs.

Then say the learned Judges, secondly, there was a lien for repairs by virtue of the presence of the ship upon the private slip of Messrs Barr and Shearer; but they say, thirdly, seeing that at a later period the ship was moved into a public dock—a public highway—inasmuch as originally there could not have been a lien on the ship for repairs effected on the ship while in that public dock, the moment she gets into the public dock from the slip, the lien which existed while she was upon the slip ceases, and no lien whatever continues to attach. My Lords, it is to that conclusion in that third proposition that I must venture

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most respectfully to object. I cannot follow the conclusion of the learned Judges. I think it is a question of fact and of the circumstances of the case, and it appears to me that the circumstances of the present case clearly shew that this ship was originally handed over, in the literal sense of that expression, to the builders for repair. She was taken possession of by them as was intended, and she was placed upon their slip. In that state of things a lien attached and was maturing, and that lien did not cease when, for the limited purpose which I have described and under the circumstances which I have mentioned, she was moved off the slip for the completion of the repairs in a part of the public harbour adjacent to the premises of the builders.

My Lords, I humbly submit to your Lordships that the interlocutor of the Lord Ordinary is a satisfactory and correct expression of the facts and the law of this case; that that interlocutor ought to be restored, and that the interlocutor of the Court of Session ought to be reversed.

LORD CHELMSFORD.—My Lords, it is agreed that the question before us is one entirely of fact. If the learned Judges of the Court of Session had dealt with the case entirely on that footing I cannot help thinking that their determination would have been different. But they thought that there was some rule of law which compelled them, with expressed reluctance, to decide against the appellants.

The question is whether, the appellants having originally a lien on the ship for their repairs, they relinquished their possession and so lost their lien.

The ship, as stated by the pursuer in his condescendence, was put into the hands of the appellants for the purpose of repairs. Now, the owner must have intended to give the appellants such possession of the ship as was necessary for the purpose of repairs, and he must have known that part of the repairs could only be properly effected upon their slip. It is admitted that while the ship was upon the slip the appellants had a possession upon which the lien attached. Now, was this possession ever abandoned? It is contended by the respondents that the moment the ship left the slip and touched the water of the wet dock the appellants' possession was gone. But it certainly was not the intention of the appellants to give up the possession of the ship to the owner, because when it was put into their hands it was handed over to them in order that they might complete the repairs which were then unfinished. Why was it that the ship was removed from the slip? Not for the purpose of parting with the possession, but in order to make room for another vessel on the slip. So far from parting with the possession, all things continued as before with respect to the repairs for which the possession was originally given. The ship, after leaving the slip, was removed from opposite the appellants' shipyard to another part of the wet dock by the orders of the harbour-master, and was afterwards removed back and attached to pawls on the appellants' premises. The removal by order of the harbour-master cannot be considered as a relinquishment of the possession, as it was not the voluntary act of the appellants. And as to the captain of the vessel being on board, it was a necessary precaution to have present a person skilled to direct any movement of the ship ordered by the harbour-master. All things continued in the same state from the beginning to the end, and, with the exception of five or six hours after the ship left the slip, the appellants literally kept hold of the ship.

Treating the question as one of fact, I can come to no other conclusion than

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that the removal of the ship from the slip for the purpose of continuing the repairs in the wet dock was no relinquishment by the appellants of their possession, and that their lien was not lost. Therefore I agree with my noble and learned friend that the interlocutor appealed from must be reversed.

LORD HATHERLEY.—I entirely concur in the views which have been already expressed to your Lordships by my noble and learned friends.

It appears to me that the law may be taken to be very well laid down in the passage from Chief-Justice Abbott's Treatise on Shipping, where he says—"A shipwright, indeed, who has taken a ship into his own possession to repair it, may not be bound to part with the possession until he is paid for the repairs, any more than a tailor, smith, or other artificer in regard to the object of his particular trade, unless there be a special agreement to give credit for a certain period, or such a usage in the trade as is equivalent to a special agreement. But a shipwright who has once parted with the possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessaries for a ship, are not by the law of England preferred to other creditors, nor have any particular claim or lien upon the ship."

I apprehend that the case which has been referred to of work done on a ship in a public river or other public water, not conferring a lien, must apply entirely to that class of cases in which the shipowner, or the master in charge of the ship, wishing to have certain repairs done, for the execution of which repairs it is not necessary that the ship should be taken into dock for the purpose of being repaired there by the shipwrights upon their own premises, may send to his shipwrights, and enter into an agreement by contract with them that certain work shall be done upon the ship, and for that purpose may require that they shall come on board the ship, or send the proper number of workmen, qualified to do the work, on board the ship, in order to effect the repairs. If the ship be in that state in an open river, and all that is done by the shipwrights is, at the summons of their employer, to go on board the ship and execute these repairs, there is no taking possession of the ship in any sense—there is no handing over of the ship to them, or placing of it in their hands, for the purpose of repair—and one can easily understand how it may have been said, in such a case as that, that there was no lien.

The whole matter reduces itself to the question, in the first place, whether possession has been taken of the ship. In the consideration of that question we are certainly very much assisted by what is stated in the condescendence, though I agree with my noble and learned friend on the woolsack in saying that I should be sorry if it rested only upon that. However, we are assisted in our inquiry by the view taken by the persons who prepared the condescendence of what had been really done in this case, namely, that the ship had been put into the hands of these shipwrights to repair. But it does not rest upon the condescendence, because the facts, which are scarcely disputed, so bear out that view that it has hardly been thought necessary on the part of the respondents to contest it. It is not disputed—I may say it is admitted—that at all events at the period when the vessel was upon the slip the time had arrived in which possession had been taken. Therefore that which Chief-Justice Abbott in his treatise says the law requires in order to give a lien had been done. The first step had been taken—possession was taken.

The matter, therefore, is now reduced to the simple question whether posses-

sion was ever abandoned. What trace have we, from one end of the case to the other, of possession being abandoned by the shipwrights? It is alleged that possession was abandoned the moment she left the shipwrights' premises (that is the only moment of time that could possibly have been fixed on), the moment she descended from the slip and was launched into the public water. It would be very singular if any such effect were to result from what was done. It is not pretended that at that particular crisis and moment Lewis, the owner, said to the master of the vessel, or the mate of the vessel, or the cook, "Now, the ship is about to leave the slip—she is about to leave the shipwright's yard. You go down and take possession." Nothing of the kind. On the contrary, we find the owner, the master, and everybody who had any interest in the ship, saying that they were anxious that the ship should not leave the slip for at least two days longer. The only conversation the captain seems to have had with the shipwrights or their labourers seems to have been one of a very different description. The master says—"The alteration in her berth was suggested by me, and not in any way by Barr and Shearer, to my knowledge. They had not spoken to me on the subject before I made the suggestion. I had spoken several times to the foreman of the patent slip to see if he would get me laid there till the work was completed"—that is to say, laid in the harbour at the bottom of the slip.

The vessel had to be moved from the slip solely from the accidental circumstance of the ship "James Annan" being required to be placed upon it. We have it in evidence from the harbour-master that Barr and Shearer's people very often completed the repairs of vessels in the wet dock after being taken from the slip, and that the usual place for them to be taken was the bottom of the slip. It so happened that this ship had to be moved to make way for the "James Annan;" but at that moment it was not convenient that she should lie at the bottom of the slip, and consequently she was sent to a distance somewhat further removed from the yard. If that had been done by the captain—if the captain had taken the vessel from this slip—if he had been watching to see when she came down from the slip, and had been there to demand her possession, and, having taken possession, had carried her over to the furthest point he could find from the slip, there might have been some shadow of ground for arguing that possession was intentionally and purposely delivered, and *de facto* handed over to the captain. But, instead of that, we find he is first of all pressing that the vessel may remain two days longer on the slip, and then, when he finds that from the exigencies of the day she is obliged to be moved to an inconvenient position, he interests himself in the matter, and has a conversation with the foreman of the yard, with the view of getting the vessel laid at the bottom of the slip. He does not say what he will do when he has got possession of the ship; but the foreman of the yard cannot obtain from the harbour-master the right of remaining at the bottom of the slip. The ship has to be taken off and carried to this further corner, but is brought back again in a few hours.

And we have it in evidence besides—this is important as counter evidence to all that is said, weak as it is, upon the subject of handing over possession of the ship—we have it in evidence from the appellants' workmen, one of them being Thomson, the manager of their yard, and the other the head carpenter, that they had strict orders to keep the ship attached to the yard of the shipwrights by means of placing hawsers round the pawls which stand confessedly upon the shipwrights' yard. Whether or not those pawls are used by other people by

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courtesy or right appears to be a matter of not the slightest importance. The important point is this, that the shipwrights, in order that there might be no mistake about the matter, took care that all the time the vessel was lying in the harbour she should still continue to be attached by these hawsers to their own premises. The circumstance that these pawls were the means by which other vessels could be attached where requisite does not detract from the force of the observation that *de facto* the ship's hawsers continued to be attached during the whole time to the pawls on the appellants' premises.

It is plain what the captain was there for. The captain was there for two or three purposes. He was there to speed the work—to see that the parties did not loiter about their work, and he was there also to give any suggestion that might be necessary in order to effectuate that which was the object of all the parties, viz., the repairing of the ship, so that she might be again classed as A 1 at Lloyd's—Lloyd's surveyor was constantly viewing the vessel as she was in progress, and giving his directions, and of course the owner of the vessel would desire to see that all was being done as speedily as possible in the first place, and as effectually as possible in the next place. For that purpose there was no more proper person to be on board than the captain. But that the captain had not any ordering of the ship, or anything to do with the ship beyond that, is plain. The harbour-master and his deputy tell us in their evidence that orders were given by them whenever the ship had to be moved, and she was moved only when they gave orders, and whenever she was moved the captain, who naturally was the person to apply to, was applied to, and the persons he employed were the labourers, the foreman, the carpenters, and the rest of the men who were doing the work in the shipwrights' yard. The captain is pressed to state who were the people who actually moved the vessel, and he says,—"The carpenters, with the assistance of my hands," that is to say, the mate and the shipkeeper, who was also left to look after the vessel.

My Lords, I apprehend that there is no trace of any purpose to relinquish the ship—there is no trace of any actual relinquishment in the circumstance of the ship having been sent from the slip into the public water for the reasons assigned, and for the period assigned, and for the particular object in view. In everything that took place, so far as we find any trace of what did occur, there is the simple fact of possession in the shipwrights, the captain filling the position I have described; there is no demand for possession on his part, nor any suggestion that there was any demand on the part of the owner. There was therefore no change of the possession that had been confessedly given and taken in the first stage of the proceedings.

Lord Selborne.—My Lords, the possession before the 15th of November was in the appellants, by contract, and with the consent of the owner, for the purpose of repairs, which were not then completed. The launching of the ship on the 15th of November was an act done by the appellants for the same purpose, with a view to the completion of the same repairs, and only done with the intent to place the ship in a more convenient position for the execution of the rest of the repairs, maintaining as far as was possible, when she was in the water, her attachment locally to the appellants' yard. Not only was there no delivery to the owner, but the appellants' workmen continued all the time of the operation to be on board as before, and the owner was so far from accepting delivery that he rather objected to the whole operation, and was as

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desirous as the shipbuilders that it might interfere with the progress of the works in the yard as little and as shortly as possible. The only control over the whole operation, except that of the appellants, was exercised by the harbour-master. Within a few hours of the ship leaving the slip, and as soon as the operation allowed, the ship was brought back and was attached to the pawls in the appellants' yard, and she so remained till she was put upon the slip again. The harbour-master, his deputy Mr Goodwin, a ship chandler and ship owner, and another ship chandler and ship owner at Ardrossan, all prove that this was the usual way of conducting the appellants' business, and of finishing repairs after they had attained the stage at which they could be more conveniently finished with the ship in the water than with the ship upon the slip. And the evidence as to control is that which has been stated by my noble and learned friends to your Lordships.

My Lords, it seems to me that this case is a very clear case, where a possession legally obtained under contract for a continuing purpose is not to be displaced by inference from equivocal acts; and, further, it appears to me that those acts are really not equivocal, either as to the intentions of the persons doing them, or as to their effect.

I will conclude by putting before your Lordships one illustration. Supposing that a coach-builder in London takes a carriage, which has been put into his hands for repair, through the public streets from one manufactory belonging to him in the Edgeware Road, to another, belonging to him in Long Acre, can it possibly be represented that by that he loses his possession of his lien? And would it make the slightest difference if the coachman of the owner of the carriage, employed by his master from time to time to see how the repairs were going on, helped in that operation by driving through the streets the horses by which the carriage was drawn?

INTERLOCUTOR appealed from reversed: Cause remitted to the Court of Session, with a declaration that the appellants are entitled to their expenses in the Court of Session.

GRAHAMES & WARDLAW—WEBSTER & WILL, S.S.C.—LOCH & MACLAURIN—MORTON, NEILSON, & SMART, W.S.

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Mar. 11, 1875.
Lord Advocate v. Clyde Steam Navigation Co.

THE LORD ADVOCATE, FOR BOARD OF TRADE AND COMMISSIONERS OF CUSTOMS, (Pursuer) Appellant.—*Att.-Gen. Baggallay—Lord-Adv. Gordon—Sol.-Gen. Holker—Beasley.*
THE CLYDE STEAM NAVIGATION COMPANY (Defenders), Respondents.—*Southgate, Q.C.—E. Kay, Q.C.*

Ship-Measurement—Merchant Shipping Act, 1854, *sub-sections* 4 *and* 5 *of section* 21.—A ship was constructed with an "awning" deck above the main deck, extending from forecastle to poop, with the exception of two gaps 13 feet 6 inches and 8 feet 6 inches broad across the vessel. The gaps were provided with doors in the ship's sides, and could be planked over, if required, so as to cover the vessel from stem to stern, but the doors were not capable of resisting the pressure of the sea, and the coverings of the gaps were not made water-tight. *Held* (*aff.* judgment of the Second Division) (1) that the vessel had not "a third deck, commonly called a spar deck," within the meaning of the provisions of sub-section 5 of section 21 of the Merchant Shipping Act, 1854 (17 and 18 Vict., c. 104); and (2) that the space between the awning deck and main deck was not "a permanent closed-in space on the upper deck available for cargo or stores, or for the berthing or accommodation of passengers or crew," in terms of sub-section 4 of section 21 of the said Act.

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Mar. 11, 1875. Lord Advocate v. Clyde Steam Navigation Co.

Ld. Chancellor (Cairns). Ld. Hatherley. Ld. O'Hagan.

(In the Court of Session, February 22, 1873, 11 Macph. 440, 45 Scot. Jur. 301.)

The Clyde Steam Navigation Company had a steamer called the "Bear," which had been officially surveyed in 1870, and registered as of 331·97 tonnage. She was intended for the coasting trade, and was constructed with a covering or deck above the tonnage deck, extending with two breaks from the forecastle to the poop.

Some alterations were made in 1871, and a re-measurement of the ship took place.

The surveying officer, acting on the instructions of the Board of Trade, put a large addition upon her registered tonnage, upon the ground that the vessel was three decked, or had a "permanent covered-in space," and that the space between the upper deck or covering and the tonnage deck, which had not been included in the former survey, should be included in the measurement, under the Merchant Shipping Act, 1854, section 21, sub-sections 4 and 5.*

In order to determine the principle on which the measurement should be made the present action was raised by the Lord Advocate on behalf of the Board of Trade against the Clyde Steam Navigation Company, to have it found that the "Bear" was of a tonnage not less than 585·46 tons.

The defenders averred that the covering in dispute was a hurricane deck covering portions of the ordinary deck, "making the ship more safe, and insuring the greater comfort of the passengers generally, especially of steerage passengers, and also so far protecting cattle and other live stock, but not forming a spar or third deck, and not increasing the carrying capacity of the vessel, and not forming a closed-in space in the sense of the statute."

The Lord Ordinary (Gifford) pronounced an interlocutor, remitting to Mr William Mumford, Lloyd's surveyor, Glasgow, to examine the "Bear," and report "as to the present state and position of the main deck of said vessel, and of the erections, structures, and coverings thereon, so far as the same relate to or bear upon the question as to the measurement for the registered tonnage of the said steam-ship."

Mr Mumford having returned a report (the substance of which is stated in the Lord Chancellor's judgment), the Lord Ordinary (Gifford), on 12th November 1872, pronounced this interlocutor:—"Finds that, according to the sound construction of 'The Merchant Shipping Act, 1854,' and relative regulations, the space above the main or tonnage deck of the steam-ship 'Bear,' intervening between the aft end of the forecastle and the front of the poop, ought not to be measured or included as part of the register tonnage of the said steam-ship, reserving to measure any separate deck-house constructed on the main-deck between said points; and to this extent and effect assoilzies from the declaratory conclusions of the action, and decerns: And, with the above finding, appoints the cause to be enrolled, that parties may agree upon, or that a remit may be made to ascertain, the measurement in conformity with the above find-

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* The 21st section of the Act contains detailed rules for measurement.

Sub-section 4:—"If there be a break, or poop, or any other permanent closed-in space on the upper deck available for cargo or stores, or for the berthing or accommodation of passengers or crew, the tonnage of such space shall be ascertained as follows," &c.

Sub-section 5:—"If the ship has a third deck, commonly called a spar deck, the tonnage of the space between it and the tonnage deck shall be ascertained as follows," &c.

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ing: Finds the defenders entitled to the expenses hitherto incurred by them."

The pursuer reclaimed. The Second Division adhered.

The pursuer appealed.

LORD CHANCELLOR.—My Lords, the ground upon which the rectification of the register is asked for is, that the "Bear" has an upper or spar deck above the tonnage or main deck, and that the space between the tonnage deck and this upper or spar deck ought to be measured in accordance with the rules contained in the Merchant Shipping Act, 1854; and it is not denied that if this space ought to be reckoned in, the register would require to be rectified as desired.

The 5th sub-division of the 21st section of the Merchant Shipping Act, 1854, provides, that "if the ship has a third deck, commonly called a spar deck, the tonnage of the space between it and the tonnage deck should be ascertained as follows,"—then follow certain rules for measurement. The question then is, has the "Bear" a third deck, commonly called a spar deck? The condescendence of the appellant affirms that she has.

No proof was allowed to the respondents, although they desired to have a proof; but the case was, by an interlocutor of the 18th of May 1872, remitted to Mr Mumford, Lloyds' surveyor at Glasgow, to examine the "Bear," and "to report as to the present state and position of the main deck of the said vessel, and of the erections, structures, and coverings thereon, as far as the same relate to or bear upon the question as to the measurement of the registered tonnage of the said steam-ship."

Under this remit Mr Mumford made his report; and the statements in that report, and the model referred to in it, are the only materials before your Lordships as regards the facts of the case. It appears from this report that the deck in question, "being separated by openings completely across the vessel, and those openings being provided with planks and hatches unsuitable to any weather deck, which are not fastened down or rendered water-tight," is not considered by Mr Mumford to be a continuous deck. Further, the report states that "the doors are not fitted so as to be water-tight against any pressure, and that the planks, top-sills of the doors, &c., covering the cuttings in the deck, are not made to fit so as to be efficacious in the sheltering the cargo beneath them. A three-decked ship is usually loaded down, so that her main or middle deck amidships is at or below her water-line, the usual custom being that her submerged side amidships, measured from the top of the upper deck at the side to the water-line, should be three inches to every foot of her depth of hold. This also applies in a measure to the ventilating side ports in the steerage, and their protection in case of accident. The want of strength and efficiency of the gangway doors, and the position of the steerage side scuttles in the 'Bear,' would therefore prevent her from being loaded down as a three-decked ship with well secured ports may with safety be laden and sent to sea. If loaded regardless of these points the vessel would be unseaworthy."

I think it clear that the kind of upper or spar deck mentioned in the Act of Parliament is a continuous deck from stem to stern, fastened down and water-tight, sealing up the cylinder formed between the two decks, and making it a fit place for the stowage of cargo, like a hold.

In the case of the "Bear," judging by the evidence and the model, the upper deck plays rather the part of a covering platform for the main or tonnage deck.

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This covering is fixed for a certain distance. But in this covering there are two gaps made quite across the vessel, one before and one behind the funnel, of the respective width of 13 ft. 6 in. and 8 ft. 6 in., and, as Mr Mumford observes, the deck is not practically a complete deck for all purposes of safety to ship and cargo. The "Bear," being a steamer used for coasting purposes, and chiefly for the conveyance of cattle, this which is called a deck is in reality a covering run along the ship, above and parallel to the main deck, for the purpose of affording shelter against weather, and at the same time affording a platform along which the crew can pass in navigating the ship. The cargo between this covering and the main deck is not cargo stowed and sealed up in a hold, but is deck cargo, protected against the weather.

I am therefore of opinion that the "Bear" has not a third deck, commonly called a spar deck, within the meaning of sub-division 5 of section 21, so that the tonnage of the space between it and the tonnage deck should be ascertained under that sub-division.

It was then contended that the register tonnage should be increased under sub-division 4 of the same section.

It appears to me that the condescendence of the appellant and his pleas in law are confined to the case advanced under the 5th sub-division, to which I have already referred. But, even if this were not so, the argument under the 4th sub-division does not appear to me to be capable of being supported. The part of the deck underneath the moveable covering which I have described cannot in any sense be called a "permanent closed-in space on the upper deck, available for cargo." It is the whole of the deck underneath the covering, and there is no enclosure or separation of one part of the deck cutting it off from the rest of the deck; nor is it a "space available for cargo" in the sense in which cargo is used for the purpose of measurement. The cargo underneath the covering would be deck cargo merely. Neither is it "space available for the berthing or accommodation of passengers or crew;" nor is it suggested that it has ever been used for that purpose.

On the whole, I am of opinion that this appeal fails, and I submit to your Lordships that it ought to be dismissed, with costs.

LORD HATHERLEY.—My Lords, I entirely concur. The onus of proof rests in a very peculiar manner upon the pursuer, because he seeks to alter a survey made upon a previous occasion by an official surveyor, which only requires to be revised in respect of certain alterations which had been made in the ship, of which the particular matter in question does not form part. Therefore, to decide upon the present occasion against the respondents would be in effect, as it seems to me, not only to disregard Mr Mumford's report, but to disregard the view entertained by the surveyor who originally surveyed the ship, and who certainly did not then think of including these erections as coming within either the 4th or the 5th sub-sections of the 21st clause of the Merchant Shipping Act.

LORD O'HAGAN.—My Lords, I am of the same opinion. I have not been at all affected by the considerations of public policy and the possible results of our decision, one way or the other, which have been pressed upon us, mainly by the Attorney-General. Such considerations may sometimes, but very rarely, be regarded as throwing light on the terms of a statute when they are obscure, and assisting towards an understanding of the intention of its framers. But here we

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have nothing to do but to apply to the facts the plain words of the statute, whatever may be the consequences either to the revenue or to the mercantile community.

The report of Mr Mumford seems to me to conclude the case on both its branches. He is the sole witness,—an expert named by the Court, and appealed to for his judgment by both parties. The Crown, at least, cannot object to his competency and correctness, for they have insisted that by his evidence alone the matter should be determined, and if it is to be relied on, the "Bear" is not a three-decked ship, according to the contention of the appellant. In her original certificate of registry she was described as a two-decked ship, and rightly so described, if Mr Mumford is warranted in saying that her awning-deck is not a continuous deck,—is not that which is commonly called a spar-deck,—and does not therefore constitute a third deck within the meaning of the statute. And he makes this still more clear when he states that the "Bear" cannot, without becoming unseaworthy, be loaded as a three-decked ship can and ought to be loaded. And if she cannot, it would seem that the measurement of her tonnage should, in fairness as well as in accordance with the terms of the statute, be proportioned to her carrying capacity, and that she should be dealt with as a two-decked vessel.

On the second point I should have been disposed to hold the Crown precluded from making it at all by the state of the pleadings, but it was considered by the learned Judges of the Courts below, and declared to be untenable. I concur in that opinion. I was struck by an observation of the Attorney-General with reference to the danger of allowing shipowners to escape their proper liabilities by leaving portions of their vessels in an imperfect state, so as to keep them unreached by the exact description of the statute, and yet to make them available for profit on occasion. I am not prepared to say that such a danger may not arise, and that such an evasion ought not, if possible, to be prevented. But in this case I do not find any proof of a purpose of that kind. The respondents deny it; and the sole witness, Mr Mumford, does not allege it. Upon his testimony, it seems impossible to hold that there is in the place to which the question has reference a space "permanently closed in," and suitable for the reception of "cargo or stores," or the berthing or accommodation of human beings. This is made clear by the report, which describes the place as in a condition wholly unfitting it for the reception of perishable goods, or the safe and reasonably comfortable lodgment of passengers or sailors. By that report the Crown has elected to stand, excluding all access to other evidence and means of information; and, according to its findings, I think that the judgment of the Court of Session was perfectly correct, and ought to be affirmed.

INTERLOCUTORS affirmed, and appeal dismissed, with costs.

SOLICITOR OF CUSTOMS—W. J. SANDS, W.S.—GRAHAMES & WARDLAW—WEBSTER & WILL, S.S.C.

No. 5.

Mar. 12, 1875.
M'Donald v. M'Donald.

ALASTAIR M'IAIN M'DONALD (Pursuer), Appellant.—*Cotton, Q.C.*—*Marten, Q.C.*

JOHN ALAN M'DONALD AND OTHERS (Defenders), Respondents.—*Pearson, Q.C.*—*Trayner.*

Entail—Resolutive Clause.—A deed of entail, after the cardinal prohibitions, contained a resolutive clause in these terms:—In case the heirs "shall contravene the before written conditions, provisions, restrictions, and limitations herein contained, or any of them, that is, shall fail or neglect to obey or perform the said other conditions or provisions and each of them, or shall act contrary to the said other restrictions to be hereinafter added and appointed by me, they shall *ipso facto* amit, forfeit," &c. The deed contained no subsequent restrictions against altering the order of succession, alienation, or contracting debt. The validity of the entail having been challenged, on the ground that the resolutive clause was not applied to the cardinal prohibitions, *held* (in *aff.* judgment of the Second Division) that the words "shall fail or neglect to obey or perform the said other conditions or provisions" embraced contraventions of the restrictions before mentioned, and that the entail was valid.

Ld. Chancellor (Cairns).
Ld. Hatherley.
Ld. O'Hagan.
Ld. Selborne.

(IN the Court of Session, March 20, 1874, *ante*, vol. i. p. 858.)

This action was raised by Colonel Alastair M'Iain M'Donald of Dalchosnie, institute under a deed of entail executed by his father, Sir John M'Donald, in 1837, against John Alan M'Donald and the other substitute heirs, concluding for declarator that the said deed was not a valid and effectual tailzie in terms of the Act 1685, c. 22, and that the lands belonged to the pursuer in fee-simple.

The deed of entail conveyed the lands "with and under the conditions, provisions, restrictions, limitations, exceptions, clauses irritant and resolutive, declarations, and reservations after specified, viz., with and under this condition always, as it is hereby expressly provided, that" the institute and the heirs of entail should bear the name and arms of M'Donald: . . . . "As also with and under these conditions, that the said Alastair M'Iain M'Donald and whole other heirs" should possess upon the deed and upon no other title: . . . "And with and under the restrictions and limitations after written, as it is hereby expressly conditioned and provided, that the wives and husbands of the several heirs succeeding to the said lands and estate hereby resigned are and shall be debarred and excluded from all right of terce or courtesy;" . . . . "and that it shall not be lawful nor in the power of the said Alastair M'Iain M'Donald, nor of any of the said heirs, to alter this present tailzie or the order of succession:" . . . . "And with and under this restriction and limitation also, as it is hereby expressly conditioned and provided, that it shall not be in the power of the said Alastair M'Iain M'Donald, nor of any of the other heirs succeeding to the said lands and estate hereby resigned, to sell, alienate, wadset:" . . . . "And with and under this restriction and limitation also, that the said Alastair M'Iain M'Donald, and all the other heirs succeeding to the said lands and estate, are and shall be hereby limited and restrained from doing any act and granting any deed, directly or indirectly, whereby the said lands and estate before disponed, or any part thereof, may be affected, apprised, adjudged, forfeited, confiscated, or be in any manner of way evicted."

The resolutive clause was in these terms:—"And with and under this irritancy, as it is hereby conditioned and provided, that in case the said Alastair M'Iain M'Donald, or any of the other heirs succeeding to the lands and estate before disponed, shall contravene the before written conditions, provisions, restrictions, and limitations herein contained, or any of them, that is, shall fail or neglect to obey or perform the said other

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conditions and provisions, and each of them, or shall act contrary to the said other restrictions to be hereinafter added and appointed by me, excepting as is before excepted, then and in any of these cases the person or persons so contravening shall, for him or herself only, *ipso facto* amit, forfeit, and lose all right, title, and interest which he or she hath to the lands and estate before disponed."

The only objection insisted in was that the resolutive clause did not apply to the restrictions against altering the order of succession, selling or alienating the lands, or burdening the same with debt.

The restrictions against altering the order of succession, &c. were not repeated in any subsequent part of the deed.

The pursuer contended that the resolutive clause was only applied to restrictions to be afterwards added.

The Lord Ordinary (Mackenzie) on 5th December 1873, sustained the defences, and assoilzied the defender, on the ground that the words in the resolutive clause, "shall fail or neglect to obey or perform the said other conditions and provisions, and each of them," were intended to apply and did apply to the cardinal prohibitions previously mentioned.

The pursuer reclaimed.

The Second Division adhered to the Lord Ordinary's interlocutor, but on different grounds.

The pursuer appealed.

LORD CHANCELLOR.—My Lords, there are no cases which have afforded a greater room for the exercise of the astuteness and skill of counsel in matters of construction than those cases which concern the stringency of the clauses in Scotch deeds of entail; and the present is certainly not an exception from that general observation. But I am bound, at the same time, to say, that if the questions which have been raised upon the construction of the deed now before your Lordships had been raised upon the construction of any instrument which was not a deed of entail, they would have appeared to me to have created no serious difficulty.

I cannot admit that there is to be applied to deeds of entail a rule of construction altogether differing from the rules of construction applicable to other instruments. I am quite satisfied with the expression of the principle which should guide us in such cases that fell from the late Lord Wensleydale in the case of the Kintore entail[1] when it was before your Lordships' House. Lord Wensleydale there said—"If an expression in an entail fairly admits of two meanings, both equally technical, grammatical, and intelligible, that construction must be adopted which destroys the entail rather than that which supports it. But this rule does not authorise you to put on any expression a forced, unreasonable, or ungrammatical construction in order to defeat the entail. You must first construe the instrument according to its fair meaning, and, if that leaves two courses open, freedom of disposition must prevail." I propose to your Lordships, in this case, first, to construe this instrument according to its fair meaning. If, upon a construction of it, according to its fair meaning, two courses are left open to your Lordships, by all means let that be adopted which will favour freedom of disposition.

Now, my Lords, are two courses of construction open in this case? I will

[1] *Earl of Kintore* v. Lord Inverury, April 16, 1863, 1 Macph. H. L. 34, 35 Scot. Jur. 456, 4 M'Q. 527.

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read the resolutive clause, in the first place, up to a certain point, where I will pause for a few moments:—"In case the said Alastair M'Iain M'Donald, or any of the other heirs succeeding to the lands and estate before disponed, shall contravene the before-written conditions, provisions, restrictions, and limitations herein contained, or any of them, that is, shall fail or neglect to obey or perform the said other conditions and provisions and each of them,"—there I pause. I observe, in the first place, that, in order to prevent possible ambiguity, your Lordships will, I think, construe the words "that is" as synonymous with these words, "by which I mean;" and I will read it to you again thus, "shall contravene the before-written conditions, provisions, restrictions, and limitations herein contained, or any of them, by which I mean, shall fail or neglect to obey or perform the said other conditions and provisions and each of them."

Upon that it is argued that in this deed there is a clear distinction drawn between sentences which are to be termed "conditions and provisions," on the one hand, and sentences which are to be termed "restrictions and limitations," on the other, and that in the last clause of what I have read, beginning with the words "by which I mean," the failure which is supposed is a failure or neglect to obey or perform "conditions and provisions," and that no reference is made there to "restrictions and limitations."

Now, let us inquire, in the first place, whether this is a true description of this deed. Is there a distinction drawn throughout between "conditions and provisions," on the one hand, and "restrictions and limitations" on the other?

My Lords, I arrive at a very different conclusion. You will observe that the deed commences by stating that the settlement is made "with and under the conditions, provisions, restrictions, limitations, exceptions, clauses irritant and resolutive, declarations, and reservations after specified," and then commences thus,—"With and under this condition always, as it is hereby expressly provided." There we have a "condition" ranged under the head of a "provision." Then, my Lords, in a subsequent part of the deed you will find these words,—"And with and under the restrictions and limitations after-written, as it is hereby expressly conditioned and provided." Here we have what we are in search of, namely, "restrictions and limitations," treated as exactly synonymous with, at all events as ranged under, "condition and provision." "Condition and provision" is, perhaps, not treated as being synonymous with "restriction and limitation," but as the larger and more comprehensive term of the two. Then, farther on, we find this,—"And with and under this restriction and limitation also, as it is hereby expressly conditioned and provided." There we have "condition and provision" again carrying in it "restriction and limitation." Then, again, at a subsequent part, we have that which is a restriction expressly called a provision,—"Providing always that it shall not be in the power of any of the said heirs to set any tack or rental of the manor place," &c. And again, "with and under this condition, as it is hereby specially provided and declared." That is another change, putting "condition" under the head of "provision and declaration." And, again, "and also with and under the limitation and condition,"—"condition" and "limitation" being used as synonymous. Then, again, "with and under the irritancies following, as it is hereby expressly conditioned and provided." So that you have the word "irritancy" treated as a condition or provision.

I have gone through these examples, and I dare say further examples might be given; but these will be sufficient to show your Lordships that it would be altogether a mistake to suppose that there had been any distinction drawn in an

earlier part, or in any other part, of this deed between "restrictions and limitations," on the one hand, and "conditions and provisions" on the other. They are treated as synonymous, and the word "providing" is treated throughout as the most comprehensive introduction that can be given for any and every of the clauses of the deed. If that is so,—if there is nothing in any other part of the deed which limits you in the construction which is the natural construction of a term, such as "condition and provision,"—I ask your Lordships what reason is there why, in this particular sentence, the words should be so limited?

But, my Lords, is there not something more than that? I still continue to omit, for the present, the words, "or shall act contrary to the said other restrictions to be hereinafter added and appointed by me," for the purpose of carrying your Lordships on to a clause which follows those words, namely, "excepting as is before excepted." Those words obviously cannot refer to "restrictions to be hereinafter added," because there could be no "excepting as is before excepted" from that which had not been mentioned at all before, but was to be mentioned afterwards. Those words, "excepting as is before excepted," must therefore refer to what is called "the said other conditions and provisions." But what was there in the nature of an exception in the earlier parts of the deed, and from what was the exception excepted? From nothing whatever that is mentioned before, except from restrictions and limitations. There were exceptions, two in number, from restrictions and limitations, and there were no other exceptions whatever. Therefore you have in those few words that which absolutely constrains your Lordships to give to "conditions and provisions" a meaning which would include within them "restrictions and limitations."

Now, not looking at the later words, "or shall act contrary," I ask, is there any authority which bears upon the construction of words like these? I will first ask your Lordships to observe how authority stands as to the word "other," in the sentence "shall fail or neglect to obey or perform the said other conditions and provisions, and each of them." Does that impose any difficulty in the way of holding that the failing or neglecting to obey or perform applies to all conditions and provisions which went before? My Lords, it was decided in the case of Stirling v. Moray or Home Drummond,[1] amongst other things, that in an entail which contained the words, "shall contravene the other before written conditions and provisions, restrictions, and limitations," the word "other" was not an inappropriate word—that it merely meant to express a reference to the clauses of the deed which went before, other than the resolutive clause itself. That appears to be a case which has always been approved in the Scotch Courts, and the effect of that authority would be to give a natural and proper meaning to the word "other" in this clause.

Even if there were not this authority for such an explanation of the word "other" I am not myself clear that that word might not be held here to have naturally a reference prospectively to further provisions of the settlor as to restrictions afterwards to be imposed, just as we often in language, which is, perhaps, not altogether inaccurate, speak in anticipation in the first part of a sentence, using the word "other" in contradistinction to some exception which is made in the latter part of the sentence.

I will next turn to those words which I omitted in the first instance, namely, "or shall act contrary to the said other restrictions to be hereinafter added and

[1] Stirling v. Moray, May 28, 1845, 7 D. 640, 17 Scot. Jur. 359.

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appointed by me." My Lords, other restrictions or restriction upon some minor points were or was added afterwards, to which, no doubt, the words "hereinafter added" would be applicable. Much argument took place upon these words, but I am not sure that I myself have been able to appreciate the force of that argument. It appears to me that the observations are quite just that there is a use of the word "said" in this clause of the sentence which makes that word inappropriate, having regard to what is spoken of afterwards; but, my Lords, it appears to me, in the first place, that any inaccuracy in the use of the word "said" is corrected by the words "to be hereinafter added and appointed by me." Those words are so clear and so unambiguous that there can be no doubt as to what they point to; and if, before the use of those words, you have the word "said" applied to "restriction," I apprehend that the latter words, being so clear and free from ambiguity, they must correct the earlier words. But further, even if it could be made out, as I do not think it is made out, that there was ambiguity in this particular clause, it does not appear to me that it would in any way operate to make invalid, or imperfect, or inefficacious the earlier words of the sentence, "other conditions and provisions," which, in my opinion, must be applied to the whole of the conditions, provisions, restrictions, and limitations contained in the earlier part of the deed.

Those are the observations which would have occurred to me if this case had come before us in the first instance, not governed by any particular authority. But I am unable to distinguish the present case from the case of Adam v. Farquharson,[1] which came before your Lordships' House in the year 1844. In that case the resolutive clause was this:—"It is hereby expressly provided and declared that in case the said William Farquharson, or any other of the heirs of taillie substitute to him as above, shall contraveene any of the before-written conditions, provisions, limitations, and restrictions,—that is, shall fail or neglect to obey and perform the haill conditions and provisions above sett down, or any of them, or any other after conditions and restrictions that may be added by me,—that then and in that case the person or persons so contraveening by failing to obey the said conditions, or by acting contrary to the above limitations and restrictions, or any of them, shall, for himself or herself only, lose and forfeit the estate."

Upon those words, which for all substantial purposes appear to me to differ extremely little, if at all, from the words now before your Lordships, Lord Cottenham says,—"The next objection raised was as to the sufficiency of the resolutive clause, that it does not apply to the restrictions and limitations contained in the prohibitory clause. This objection is founded upon a supposed distinction made by the entailer between the conditions and provisions stated in the deed and the limitations and restrictions which it also mentions. The resolutive clause, it is contended, is confined to the former, and does not therefore prevent the altering the order of succession or the sale of the estate or the burthening it with debts. It does not appear to me that there is any real difficulty in the interpretation of this clause. It begins by declaring that in case any of the heirs of tailzie shall contravene any of the before-written conditions, provisions, limitations, or restrictions, and then proceeds thus,—'That is, shall fail or neglect to obey and perform the haill conditions and provisions above set down, or any of them.' It is clear that the word 'provisions,'

[1] Adam v. Farquharson, Sept. 5, 1844, 3 Bell's App. 295.

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which is general enough to include limitations and restrictions, was here intended to include them." I pray your Lordships to observe the reasoning which satisfied Lord Cottenham, "for otherwise this part of the clause would be inconsistent with the former, which could not have been the intention of the framer of the deed." And Lord Brougham in the same case said,—"Next the resolutive clause is itself called a provision. It begins with these words,—'It is expressly provided and declared.' In truth, 'provide' and 'provision' are words both in legislative enactments and in the framing of deeds of the largest extent and import. They cover everything that can be enacted in a statute or enumerated in a deed."

Fortified by that authority, and supported by the considerations which I have endeavoured to express to your Lordships, I certainly arrive at the conclusion that we have here under the words "that is," and under the words that follow it, nothing whatever which falls short of a repetition of that which occurred in the first member of the sentence. The clause, "shall fail or neglect to obey or perform the said other conditions and provisions," appears to me to point to a failure or neglect to obey or perform "any of the conditions, provisions, restrictions, or limitations of the deed." My Lords, I understand that this was the view of the Lord Ordinary. The Second Division of the Court of Session arrived at the same conclusion, but by a different process. I myself am unable to adopt the construction which the Second Division of the Court of Session appear to me to have been inclined to adopt. I not only prefer the construction of the Lord Ordinary, but, in my opinion, that construction was the right construction, and the interlocutor which he pronounced was entirely right. I therefore submit to your Lordships that this appeal ought to be dismissed, with costs.

LORD HATHERLEY.—I have come to the same conclusion as my noble and learned friend upon the consideration of the whole of this instrument which is before us.

The argument for the appellant has very properly been rested by Mr Cotton almost entirely upon the question whether or not those words which profess, as it appears to me, to be words in explanation of the preceding passage, the words "shall fail or neglect to obey or perform the said other conditions and provisions," are large enough to include within themselves the same extent of meaning as the original sentence which immediately precedes them. That the original sentence is quite sufficient, I believe, has not been doubted in the course of the argument, but the point in question is whether or not the resolutive clause sufficiently embraces those cardinal prohibitions which require to be fenced by a resolutive clause. That is the point before us, and as to the original words, as I say, it is not disputed that they are sufficient. Those words are, if the heir "shall contravene the before-written provisions, restrictions, and limitations herein contained" then the resolutive clause is to take effect. Now, stopping there for a moment, I beg your Lordships to observe that these words are large enough and ample enough to cover both the restrictive clauses, properly so called, as Mr Cotton would say, and the clauses by way of condition. They embrace in their terms the whole of the cardinal points insisted upon in a Scotch deed of entail.

The argument for the appellant is that this clause is restricted in its generality by the explanation which follows the original sentence. After saying that the

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heir shall not "contravene the before-written conditions, provisions, restrictions, and limitations herein contained, or any of them," the explanation proceeds to say,—"that is" (which is equivalent to "my meaning is") "shall fail or neglect to obey or perform the said other conditions and provisions and each of them." I will stop there for a moment. The words which might at first create, and which appear to have created some degree of hesitation in the construction, are the words "said other," preceding the words "conditions and provisions." However, the meaning of these words "said other" is determined by authority, and from the very construction of this deed one sees that that authority was not unreasonable in holding the words "said other conditions" in a resolutive clause to mean other than this resolutive clause itself. In this instrument it seems to me to be very clearly brought out that that is the meaning, because the immediately preceding passage is that those persons who were to come in were to take under the "same conditions, restrictions, and irritancies to which the heirs contravening or failing were liable, and with and under this irritancy, as it is hereby conditioned and provided." Then it goes on to give the provision which I have read, and it says "that is, shall fail or neglect to obey or perform the said other conditions and provisions," that is to say, those other conditions and provisions to which all other heirs of tailzie were subject, besides this very provision contained in the resolutive clause.

That being so, the only question we have to consider is whether those words which are contained in the explanatory clause, namely, "fail or neglect to obey or perform the said other conditions and provisions," are sufficient to embrace all the limitations and restrictions which are mentioned in the deed, as well as what Mr Cotton calls specially the "conditions and provisions" of the deed.

Now, first, as regards the word "provision." It has been said by Lord Brougham in your Lordships' House, that "provisions" is one of the most general words which can be used in a deed, and will, unless it is limited by some special rule of construction which you must deduce from the frame and character of the deed itself, include every stipulation and condition that is made throughout the whole instrument. That was illustrated by the case of Speid v. Speid,[1] which, in one sense, turned upon a singularly narrow point, where the word "provision" was inserted in the sentence "shall contravene the provision," instead of the "conditions." In that case the learned Judges appear not to have doubted that if the word "condition" had been inserted it would have been adequate to cover every provision in that deed, whether called a condition, a limitation or restriction, or a provision; but the word "provision," being used in the singular, they considered it ambiguous, and they seem to have doubted whether it applied to one provision more than another, and in consequence of that ambiguity the entail was broken.

What we have therefore to look for in the deed is to see whether we find any such distinct appropriation of the word "provision" as would induce your Lordships to say that it is not used in its full generality, but in a restricted sense, and that it would be applicable only to those parts of the deed which are in the nature of conditions, as distinguished from those parts which are in the nature of restrictions. Our attention has been called with great minuteness to the deed for this purpose, and I think the Lord Chancellor

[1] Speid v. Speid, Feb. 21, 1837, 15 S. 618, 9 Scot. Jur. 324.

has pointed out how entirely that fails to prove what Mr Cotton was bound to prove in order to succeed in his argument, namely, that a peculiar vocabulary has been adopted by the framers of this deed, by which they have restricted the word "provision" with regard to its use here, have deprived it of its generality, and appropriated it exclusively to those parts of the deed which operate by way of condition, as distinguished from those which operate by way of restriction.

The first mentioned of these restrictions which are about to be inserted in the deed occurs where, after describing what we should call the limitations in the English law, that is to say, after describing the institute and substitute heirs, it says,—"But always with and under the conditions, provisions, restrictions, limitations, exceptions, clauses irritant and resolutive, declarations, and reservations after mentioned." There the vocabulary of the deed and the provisions which are contained in it seem to be brought before the conveyancer's mind; and then afterwards we have to see whether or not he has fixed and stamped upon the word "provision" that definite and limited meaning which has been contended for by the learned counsel for the appellant. The next mention of these restrictions occurs after that,—"But with and under the conditions, provisions, restrictions, limitations, exceptions." Then it goes on with the same list of words as I have just read from the preceding page.

But without fatiguing your Lordships by going through this, which has been already gone through in some detail by my noble and learned friend the Lord Chancellor, I have only now to point out one or two instances in which it seems to me to be quite plain that no such alteration in the force of the word "provision" had taken place in the mind of the draughtsman who drew this deed, as is contended for on the present occasion. We find in a subsequent part of the deed,—"And with and under this restriction and limitation also, as it is hereby expressly conditioned and provided." There the draughtsman thinks it right to express a restriction and limitation by saying that it is "conditioned and provided." It appears to me, my Lords, to be as plain as possible that he there brings all the four words "restriction," "limitation," "condition," and "provision," into operation in one clause, which is a restrictive clause.

Another passage struck me very much in the same way. After having said in the first place,—"and with and under this restriction and limitation, that it shall not be within the power of any of the heirs succeeding," and so on, "to set tacks or rentals" "with diminution of rental, and payment of a grassum," he goes on thus,—"And providing always that it shall not be in the power of any of the said heirs to set any tack or rental," and so on. There the word "providing" is used, and I cannot think that any distinction can be drawn between the use of the word "providing," and the use of the word "provision." That which is "provided" is, of course, a "provision," and in that case it is a provision which is restrictive, and therefore it is a provision which is a restriction. Consequently, instead of the word "provision" having lost its generality of application, it is here applied to restrictions just in the same manner as in the preceding passage you find "restriction" and "limitation" used in connection with "conditioned" and "provided."

A little farther on your Lordships will find this—"And with and under this condition, as it is hereby specially provided and declared." There you have the word "condition" used in connection with the words "provided

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and declared," not expressly with "restriction." But you find afterwards,—"And also with and under the limitation and condition that the land and estate before disponed shall not be affected or burdened," and so on. There you find "condition" tacked with "limitation," as you have before found "provision" tacked with "restriction."

Now, my Lords, the argument has been that in the clause before us "conditions and provisions" go together as applicable only to conditions, and also that "restrictions and limitations" go together as applicable only to restrictions. But we find in this instrument the word "provision" applied to a restriction, and we find the word "limitation" coupled with "condition." The passage I have last read says,—"Under the limitation and condition." Is it possible, therefore, to say that the conveyancer has taken upon himself, the duty of taking a word of the largest signification in its general sense (the word "provision") out of the general vocabulary, and of appropriating it to one particular portion only of the provisions, instead of to all the provisions contained in the deed, namely, to the conditions as distinguished from the restrictions? It would require a very strong case, as it appears to me, to induce your Lordships to think that you ought so to restrict the word (which in itself is a *nomen generalissimum*), and to say that it is so clearly and manifestly made out that it is restricted in that way that when used in the sentence "to obey and perform" the other conditions and provisions the word "provisions" is applicable only to those provisions which are strictly synonymous with conditions.

In this case there might, perhaps, have been something said if the words had been "obey the conditions and provisions." But the words are, "shall fail or neglect to obey or perform" the "conditions and provisions." "Obey" might be thought, perhaps, to be applicable more to a restriction than to a condition, and "perform" to be applicable rather to a condition than to a restriction. But here you have both the words "obey" and "perform," and the very use of these two words, instead of assisting the argument of the appellant in any way, rather tends to shew that the conveyancer had before his mind in explaining the word "contravene" to us two points to which he wished to draw attention, the first being that the heir is to obey that which he is subject to, namely, the restrictions, and the second being, that he is to perform what it would be his duty to perform before taking possession of the estate or enjoying its privileges, namely, the conditions attached to the possession of the estate and the acquisition of the privileges. Accordingly, you find that the word "contravene," as applied to the whole of the conditions, provisions, restrictions, and limitations is, as it appears to my mind, very well paraphrased in the sentence introduced by the words "that is" (which shews what the conveyancer was doing) "fail or neglect to obey or perform" the other conditions and provisions." Construing it in that way, you give to each of the words its proper meaning—you strike nothing out of the deed, and you make the latter sentence a clear and satisfactory explanation of what it was that the settlor, the author of the deed, intended.

Then, my Lords, come these words, which are supposed to create some ambiguity:—If the heir "shall fail or neglect to obey or perform the said other conditions and provisions, and each of them, or shall act contrary to the said other restrictions to be hereinafter added and appointed by me." Now, the whole of that comes under the head of explanation, as has been shewn by

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the Lord Chancellor, because the next words are, "excepting as is before excepted."

Therefore, the words "that is" must include the whole of the sentence which follows, or else you must refer back the expression "excepting as is before excepted" to the contravening of "the before written conditions, provisions, restrictions, and limitations," inasmuch as these words are not applicable to any restriction by way of limitation contained in the deed afterwards.

Therefore, all we now have to do is to interpret what is meant by "acting contrary to the said other restrictions to be hereinafter added." There is no difficulty whatever in that, as has been already observed, except as regards the use of the word "said," and the introduction of that word would not, in my opinion, produce any ambiguity in the sense of there being two meanings, either of which might be adopted. If there were such ambiguity the entail would fail, because ambiguity is not allowed in Scotch deeds of entail; and if words were to be found in this instrument which could not be interpreted on account of their doubtful meaning, the result would be the total destruction of the deed. But nothing of that kind occurs here. There is no doubt that "other restrictions to be hereinafter added" are intended, and therefore if other restrictions afterwards added happened to be called "said" I do not apprehend that the introduction of a word which creates no ambiguity in construction, and can only be said at the most to be inappropriate and unnecessary, can have the effect of destroying the validity of the instrument.

But, my Lords, I think it would be possible to give an interpretation to the word "said" if it were necessary to find one, which I do not think it is. It would not be straining the English language too severely to read the deed thus:—The settlor has carefully from the beginning to the end said—"Mind, every provision and limitation" (I am using that word in the English sense again) "which I introduce into my deed, every estate which I grant, every possible benefit which I confer by my deed, is to be subject to the 'conditions, provisions, restrictions, limitations, exceptions,' that follow afterwards." That is twice repeated in the earlier part of the deed; and therefore having had that very strongly impressed upon his mind, when he is saying, "I condemn by this resolutive clause every contravener," he goes on to say, "I explain what I mean by every contravener—I mean every contravener of all the limitations before contained in the deed—aye, and I mean something more too—I extend it to a person not performing those said other conditions and provisions which I have spoken of, to be hereinafter added, for all my provisions are not yet exhausted—those said other provisions mean the provisions which I have spoken of in the beginning of the deed, and which I intend to insert at the end of it." It is not an elegant, indeed it is a clumsy, mode of expression; at the same time it does not appear to me to be deficient in sense, and, what is more important a great deal, there is no other sense that can be given to the expression which can create ambiguity and thereby destroy the instrument.

Therefore, my Lords, upon the whole case, I agree in the conclusion at which my noble and learned friend the Lord Chancellor has arrived.

LORD O'HAGAN.—I am quite of the same opinion, both upon authority and upon a careful consideration of the details of this deed. After the very exhaustive criticism which the deed has undergone by my noble and learned friends I shall only say a single word upon it, and even that would not be neces-

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sary, if it were not, in my opinion, important that it should be known, that the views which I, at all events, take, are not the views of the Second Division of the Court of Session. I think the view which was presented, in a very simple, lucid, and satisfactory way by the Lord Ordinary, is the view which may fairly be sustained by your Lordships. The view upon the other side, or rather the view of the Second Division, was one which I for one cannot adopt, and if the case had been, as presented by one of the learned Judges there, a case in which this clause was wholly incapable *per se* of construction, I should have said that the decision of your Lordships ought to be the other way, and that the decree of the Court below ought to be reversed. I shall only just point to the real ground of decision of the Lord Ordinary, which I venture to adopt.

The question in the case is, substantially, to what extent, value, and effect, should be given to the word "provisions" in this deed; and all the argument which has been offered on either side, and all the observations which fell from my noble and learned friends who have preceded me, bear ultimately upon that. Of course, with a view to ascertain that, it is necessary to examine this deed through all its parts, to look at its various clauses, and carefully to dissect them. That having been done, it appears to me very clear that the word "provisions" in the resolutive clause with which we have to deal, bears the ordinary general comprehensive meaning which is attributed to it in common parlance; and if so, there is an end of this case.

The word "provision" is, as has been said by Lord Brougham and other Judges, a word of the most comprehensive character. It reaches every clause, whether it be restrictive, whether it be conditional, or whatever it may be, that the deed may contain. And unless there are other words to limit the operation of the word "provisions" in that respect we should take it in its ordinary sense. We have heard a good deal here about the special view of the Scotch Courts as to the interpretation of deeds of entail. No doubt there is a certain amount of strictness applied in such cases, but unless there be, as has been said, some difficulty or doubt in construction, some balance upon the one side and the other, we ought to take the words of a deed of entail just as we would take the words of any other deed, and interpret them according to the natural and ordinary course of things, and the common understanding of mankind.

Now, the word "provisions" in this particular instrument does not appear to me, I confess, by anything that is attached to it or that surrounds it, to be limited to something within the sphere of its common operation. The word occurs twice in this resolutive clause, and I endeavoured to ascertain from the learned counsel who so ably argued the case for the appellant what meaning he would put upon that word if it were not to have its ordinary and universal value, but I certainly was not able to learn from him, if the word was to be restricted at all, within what precise sphere it ought to be restricted, or what it would be taken to regard, unless it regarded all the clauses, whether restrictive or conditional, in this deed.

So far as the use of the word "provisions," in the first place, in this resolutive clause goes, it is used in this way: It is said that if M'Donald "shall contravene the before written conditions, provisions, restrictions, and limitations herein contained, or any of them." I see nothing, and the Lord Ordinary saw nothing, to limit the effect of the word "provisions" in that portion of the clause. It was said by Mr Cotton that the words "conditions, restrictions, and limitations" being used along with the word "provisions" it must necessarily be

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taken to have a different meaning from those other words, and to represent a particular class of things which was not described by these other words. But, at the same time, he said that if that word "provisions" were put at the end instead of in the middle of those four words it might be taken to have a universal operation. I confess, my Lords, I cannot see the force of the distinction. It is a mistake no doubt; it is a technical error; perhaps it may be an error of the transcriber of this deed. But the word "provisions" there seems to me to have precisely the same operation as it would have had if it had been placed in another portion of the sentence, and I was not able to get from the learned counsel any definition of the word on account of its particular collocation in that place.

Well, if that be so, and if the word be as it was taken by the Lord Ordinary, used in its common and ordinary sense, we come next to the words "that is." I take the view of the Lord Chancellor to be irrefragable with respect to these words. They are equivalent to "I mean to say," "shall fail or neglect to obey or perform the said other conditions and provisions." Now, undoubtedly the word "other" there did appear to me originally to present a considerable difficulty in the case, and but for the authority of the case to which we have been referred, namely, Stirling v. Moray or Home-Drummond,[1] the word "other" would still appear to me to create very considerable doubt as to the construction of this clause. But that case is decisive upon it, and shews that the resolutive clause itself, and its conditions, must be taken as the antithesis to the other clauses referred to by the word "other." That being so, my Lords, that difficulty is entirely removed.

Then, for the purpose of construction, you may read that portion of the sentence as if the word "other" were altogether omitted. Reading it in that way, how will it run? It will run thus:—"The before written conditions, provisions, restrictions, and limitations herein contained, or any of them." If, so far, there be nothing to limit the operation of the word "provisions," and if, as the Lord Ordinary held, it reached to all the antecedent provisions of this deed, then the sentence will proceed thus,—"that is, shall fail or neglect to obey or perform the said conditions and provisions;" and whatever was the meaning of the word "provisions" antecedently in this clause ought to be the meaning of the word "provisions" with the word "said" before it in the subsequent part of the clause. If that be so, the universality of the operation of the word "provisions" is preserved. It will affect restrictive clauses, and conditional clauses, and all clauses; and if that be so there is an end of the controversy, and this deed is perfectly good.

Now, my noble and learned friends have gone minutely through the clauses of the deed through which I have looked myself, and there is scarcely a portion of it in which there are not words corroborating the view of the Lord Ordinary in this respect. There is scarcely a clause in the deed, whether restrictive, conditional, or of any other kind, which does not contain the words "provision" and "provided." Those words pervade the whole instrument, shewing manifestly that there was not in the mind of the person who prepared or dictated that deed any distinction between the "provisions" of it and the restrictive clauses, or the other clauses, but that the word "provision" was intended to operate throughout the whole, affecting all the clauses equally from beginning to end.

Upon that short ground, and not going into detail, I am clearly of opinion

[1] Stirling v. Moray, May 28, 1845, 7 D. 640, 17 Scot. Jur. 359.

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that the judgment of the Court below was right. I do not think that it would have been right, upon the grounds and for the reasons stated in the Second Division of the Court, but I need not go into detail upon that. I do not think there was any right or reason to assume that there was a mistake in this deed. It is possible that there may have been; it is possible that there may have been the omission to which the learned Judges point; it is perfectly possible that that omission might be supplied in accordance with the fact upon the ingenious view which they present. But a court of construction is bound to construe; it is not to invent; and it is not to imagine; and I am very happy, in this particular case, to say that, in my opinion, there is no necessity for invention, there is no necessity for imagination, but that, taking the plain words of the instrument within the resolutive clause, and throwing the light of the other clauses from beginning to end upon that clause, there is no reasonable doubt in my mind that that clause means to extend the effect of the word "provision" through the whole of the instrument. And, that being so, the resolutive clause is good, and the deed ought to be maintained.

Lord Selborne.—I entirely agree with the very able judgment of the Lord Ordinary in this case, and with the opinion that has been delivered to your Lordships by my noble and learned friend on the woolsack; and I am so entirely satisfied with the grounds stated in that opinion, and with the general reasons on which it is founded, that I propose to add nothing.

The whole argument for the appeal appears to me to have rested upon the theory of a blank or omission of words having occurred in the latter member of the explanatory part of the resolutive clause in the deed, and I am bound to say that that view seems to me to have been adopted in the judgment of the Inner-House. With all respect for their Lordships, I cannot at all agree in that view. If, indeed, I have seen any ground on which we could judicially assume the existence of a blank or omission of words in that portion of the deed, I certainly should not have seen how, consistently with principle or with authority, we could have taken upon ourselves to fill up any such blank or omission.

The blank or omission, if well established upon judicial grounds, might, I imagine, have been fatal to the deed. But the only ground upon which this theory of a blank or omission of words in the deed appears to be founded is that, in that portion of the clause, the word "said" is either insensibly or inaccurately used. My Lords, if the word "said" there be entirely without sense it is wholly innocuous, because the rest of the clause is sufficiently sensible and distinct to leave no doubt whatever that what is there spoken is something afterwards to be done. And if it were necessary I should have no difficulty in saying that the explanation offered by my learned friend opposite (Lord Hatherley) is as reasonably probable as any which occurs to me of the circumstances which may have led to the use of that word "said;" that is to say, in the general introductory portion of the deed there is by anticipation a collecting together of all the clauses, conditions, provisions, limitations, and restrictions which are to occur afterwards throughout the deed, and it may well be that if we were bound to put a meaning upon that word "said" we might properly apply it to the antecedent mention of restrictions and conditions, which would include everything that follows.

If we were to go outside the deed and to speculate upon what may have led to this or any other inaccuracy or obscurity of language in the deed, we should

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be departing wholly from the settled principles of construction. I cannot for a moment admit that there is any impropriety in this deed with reference to the forms used by conveyancers or books of style; but to compare the language of a particular deed, said to be imperfectly expressed, with those forms and styles, in order to arrive at the conclusion that something was meant to have been introduced into the deed which would have occurred there had the common form or style been accurately followed, and then to deal with it as if in that manner it had been ascertained that the deed contained an omission or a blank, is a mode of dealing with the construction of instruments from which, my Lords, I am bound to say, I entirely dissent.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

LOCH & MACLAURIN—G. H. & S. DICKSON, W.S.—GRAHAMES & WARDLAW—DEWAR & DEAS, W.S.—WEBSTER & WILL, S.S.C.

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ANDREW JAMES SYMINGTON (Defender), Appellant.—*Sol.-Gen. Holker—Spinks.*
MRS MARY SANDERSON EDMONSTON OR SYMINGTON (Pursuer), Respondent.—*Cotton, Q.C.—Thesiger.*

Parent and Child—Custody of Children—Husband and Wife—Conjugal Rights (Scotland) Act, 24 and 25 Vict. c. 86, sec. 9.—In an action of separation and aliment at the instance of a wife against her husband, in which the husband's adultery was proved, and separation granted, *held*, in the circumstances of the case, that it was expedient that the custody of the daughters of the marriage should be given to the mother, and the custody of the sons to the father, during their respective pupillarities, so long as no other order should be made by the Court of Session, but subject to such regulations as the said Court might consider reasonable for access of each parent to the children in the custody of the other, and subject to an obligation by the parents respectively not to remove the children in their custody from the jurisdiction of the Court.

Observed, per Lord Chancellor,—"It appears to me that the Conjugal Rights Act has given the Court the widest and the most general discretion, and has purposely done so. It appears to me that it must be the duty of the Court in every case to consider the whole of the circumstances—the circumstances of the misconduct which leads to a separation no doubt, the circumstances of the general character of the father, the circumstances of the general character of the mother, and, above all, it should be the duty of the Court to look to the interests of the children, and carefully to weigh, as regards the interests of the children, the comparative advantages or disadvantages of leaving the custody of all or of any of them to the one parent or to the other."

(IN the Court of Session, 20th March 1874, *ante*, vol. i., p. 871).

Ld. Chancellor (Cairns).
Ld. O'Hagan.
Ld. Selborne.

Mr and Mrs Symington were married in July 1860, and lived together as husband and wife until January 1871.

In April 1873 Mrs Symington raised an action of separation and aliment against her husband on the ground of adultery. There was no conclusion for custody of children.

There were five surviving children of the marriage, all of whom were then pupils, the three eldest being boys, aged ten, eight and a half, and seven, the two youngest being girls, aged five, and three and a half years.

The pursuer's averments were to the effect that from the commencement of the year 1870 the defender had used familiarities towards a girl

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named Elizabeth Heron, who acted as nurse in the family, and that in the month of January 1871 he succeeded in seducing her, and carried on an adulterous intercourse with her.

The defender met the pursuer's averments by a denial, and, further, accused the pursuer of being in the habit of indulging in narcotics and alcoholic liquors to excess.

Among the documents produced was a letter addressed by the defender to the pursuer on 15th May 1871, in which, after accusing her of habitually using stimulants, &c., to excess, and, further, of being very untruthful, he wrote,—"Don't delude yourself with the false hope that the uncertainties of the future will make black white. Truth shall not and cannot be so hid. I shall look carefully to *that*; and in the event of your persisting in your present evil course the children, who as yet know nothing of all this, will, as they grow up, have to be told the *plain truth* concerning you, and be warned against you and your sinful untruthful ways, and, painful though the duty be, I *shall not* have them either misled or contaminated by the neglect of it."

On 27th August 1873 the Lord Ordinary (Shand) pronounced an interlocutor assoilzieing the defender from the conclusions of the action. At the debate before the Lord Ordinary the pursuer had moved that, in the event of the adultery being held to be proved, the custody of all the children should be committed to her.

The pursuer reclaimed, and renewed the motion for custody of the children which had been made before the Lord Ordinary. On 19th March 1874 the First Division unanimously recalled the Lord Ordinary's interlocutor, and found the adultery proved. The pursuer, accordingly, obtained decree of separation against the defender, and also a decerniture for aliment.

All the Judges, in their opinions, stated that they considered the charges made by the defender against the pursuer to be completely disproved, and that they were false charges, knowingly and wilfully made by the defender.

With reference to the custody of the children the Court pronounced the following findings:—"Find the pursuer entitled to the custody of the children of the marriage during their respective pupillarities, so long as no other or different order may be made by the Court with regard to them, or any of them, and decern and ordain the defender forthwith to deliver over the said children to the custody of the pursuer accordingly: Find the defender liable to the pursuer in aliment at the rate of £25 per annum for each of the said children," &c.

The defender appealed.

Lord Chancellor.—(After stating that the fact of adultery had been clearly established by the proof, continued)—But now, my Lords, I turn to a very difficult and hardly less painful part of the case—with regard to the custody of the children, five in number. By the 9th section of the Conjugal Rights (Scotland) Act[1] there is a provision very analogous to the provision in the English Act upon the same subject,[2] viz.,—"In any action for separation *a mensa et thoro*, or for divorce, the Court may from time to time make such interim orders and may in the final decree make such provision as to it shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates."

Reference was made in the course of the argument to authorities both in

[1] 24 and 25 Vict. c. 86, sec. 9.

[2] 20 and 21 Vict. c. 85, sec. 35.

England and in Scotland, and it was suggested that, certainly in England, the analogous provision to that which I have read had been acted upon in this way, that where a wife established her title either to a divorce or to a separation, it was either matter of course, or almost matter of course, that that should carry with it for her the custody of the children; and that having shewn good cause for severing the conjugal tie, she, not being in fault herself, should not be amerced or punished by being deprived of the custody of her children. My Lords, I should greatly regret that any general rule, so sweeping, and, as it appears to me, so inconvenient in its working, should be laid down on a subject of this description. It appears to me that the Act of Parliament has given the Court the widest and the most general discretion, and has purposely done so. It appears to me that it must be the duty of the Court in every case to consider the whole of the circumstances of the particular case before it—the circumstances of the misconduct which leads to a separation no doubt, the circumstances of the general character of the father, the circumstances of the general character of the mother, and, above all, it should be the duty of the Court to look to the interest of the children, and carefully to weigh, as regards the interests of the children, the comparative advantages or disadvantages of leaving the custody of all or of any of them to the one parent or to the other. I am at a loss to conceive how any general rule upon such a subject can be laid down. Certainly I should prefer to ask your Lordships in this case to act not upon any general rule, but upon the circumstances of the case which is now before us.

Now, my Lords, turning to those circumstances, it appears to me that your Lordships have, in the first place, the somewhat disagreeable duty of considering the charge made against the lady in this case, for the purpose of shewing that, at all events, she, from her character and habits, is not entitled to have the custody of the children, for such I understand to be the meaning of the charge in the condescendence. But before observing upon the view which was taken upon this part of the case by the Court of Session, I will state as shortly as I can to your Lordships what appears to me to be the conclusion to be drawn from the materials before us upon this point.

My Lords, the husband and wife, Mr and Mrs Symington, appear to have lived, so far as the outside world could observe, in great happiness, from the time of their marriage, which, I think, was about the year 1860, up to the year 1870, and during these ten years the five children I have spoken of, and another child who is dead, were born. In the year 1870 it appears clear that the health of Mrs Symington—possibly from the many illnesses to which, as the mother of a family, she had been subject—was considerably impaired. It appears further, that whether from her state of health and the natural consequences of it, or from some other reason, there arose in the mind of her husband, as between him and his wife, some want of that complete harmony and agreement which had prevailed up to that time; and we find the husband making suggestions in communications with his wife's family—in the first place, that the state of her health had more or less affected the state of her mind. We find that afterwards these statements by the husband assumed a different shape, and he suggested, indeed broadly stated, to the family of his wife that she had been in the habit of indulging to excess in narcotics and in the use of stimulants. I pass over a lengthened correspondence which arose upon that subject, in which the family of the wife appears to have commented mainly upon

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the statements made by the husband, and to have had no other knowledge upon the subject.

(After referring to the evidence, his Lordship continued)—Looking at the evidence in the case, I find nothing which can satisfy my mind that these charges against the wife are capable of being supported.

But I must pause there for the purpose of saying that I am unable to follow the conclusions to which, upon this point, I understand the Court of Session have come. I will not delay your Lordships by reading the judgments, which are of some length, but I understand the learned Judges of the Court of Session to have arrived at this conclusion, not merely that adultery was committed on the one hand, and that the charges on the other hand were groundless, but also that the husband, in making the charges, knew or believed that they were groundless, and made them for the sinister and most wicked purpose of so discrediting his wife in the eyes of the world that he might be left free to pursue that course of conduct which, according to this theory, he had proposed to himself, namely, the seduction of the girl Elizabeth Heron. My Lords, I am unable to arrive at that conclusion. The conduct of the husband was in all truth bad enough, but I am unable to say under this evidence that it was as bad as that which the Court of Session have in this respect imputed to him. Although he was perverse and obstinate enough to believe, with insufficient foundation, the charges which he made, yet, while I find no evidence for the charges, at the same time I find nothing which satisfies my mind that the husband did not believe that the charges were well founded.

My Lords, the result of the view which I take of the case up to this point is this, that there is nothing, in dealing with the custody of the children, established against the wife which can disentitle her to be considered a person who ought to have the custody of the children if, on other considerations, it is proper to assign that custody to her. That, of course, is a different and a separate question. I have entered upon a consideration of the charges made against her entirely for the purpose of ascertaining whether, after weighing these charges, she can be said to stand *recta in curiâ*, for the purpose of proceeding with the further question to whom, as between the husband and wife, is the custody of these children to be assigned? The children are five in number, and the three elder are boys. The boys were born in the years 1863, 1864, and 1866, and they are now, as we understand, boarders at school. The two younger children are girls; they were born in the years 1868 and 1870. The husband is engaged in business, which appears to be not otherwise than profitable. He is in middle life, and it is proved that he is affectionately attached to his children, and has always been so. My Lords, I must say also that, although deploring, and, as a Judge should do, gravely and severely reprehending the conduct established and the crime proved against the husband in this case, it is also, at the same time, to be borne in mind that, until the commission of that offence, he bore, and apparently justly bore, a high character for uprightness and morality in the world. And it is some consolation to observe that, grave as the offence proved in this case was, there appears to have been no continuance of immorality, and I trust that I am not saying too much when I say there is reason to hope for a return on the part of the husband to the paths of morality and propriety of life.

The Court of Session have removed the custody of the whole of the children from the husband and given it to the wife. With regard to the boys, I cannot, for my own part, perceive that an order which should take their custody from

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their father and hand it over to their mother would be an order which would be conducive, so far as we can judge, to the future welfare of the children. It is a very different matter with regard to the girls. I think their mother, not being proved to be in any way disqualified from having the custody and care of the girls, is the natural person to have that custody and care. On both sides there ought, as it appears to me, to be a full and careful opportunity of access, so that none of the children may grow up without as full knowledge and full intercourse as the case will admit of with both parents. I do not forget what weighed very much with the Court of Session, viz., an expression in one of the letters of the husband, which I trust fell from him in a moment of irritation, and which we have been led by the statement made by his counsel to believe he already much regrets—an expression declaring that the children would, as they grew up, so far as he could bring that about, be led to look upon their mother as open to the charges he made against her. My Lords, I trust that nothing of the kind will occur, and that, painful as are the circumstances which have arisen between this husband and wife, wherever the custody of the children may be, before the children, at all events, a curtain of oblivion will be drawn over all that has occurred.

The order which I should suggest to your Lordships—(His Lordship then read a draft of the judgment afterwards pronounced, *infra*, p. 49.)

If your Lordships should concur in the variation of the interlocutor which I now propose, I think, having regard to the fact that, upon the main question in the suit, your Lordships agree with the Court below, and also having regard to the fact that the respondent could not be made to bear costs as against her husband, the costs of this appeal should be awarded to the respondent.

Lord O'Hagan.—My Lords, in this lamentable case there are two questions —a question of fact, and a question of discretion. We are required to determine whether the adultery of the appellant has been sufficiently established, and if it has been, to what custody his children should be committed.

(After referring to the evidence of the husband's adultery his Lordship continued)—On the question of fact, therefore, I am obliged to concur with my noble and learned friend; and on the question of discretion I also concur with him. The jurisdiction as to the custody and education of children committed to the English and Scotch Courts by the Conjugal Rights Act and the Divorce Act is identical and very extensive, and involves great responsibility for its judicious exercise. We are bound, in considering a case like this, to have regard not to mere technicalities or hard-and-fast rules of practice, but to the real interests of all the parties whom our decision may affect, and to do for all what may seem best and wisest. The father's right to the guardianship of his child is high and sacred. Our law holds it in much reverence, and it should not be taken from him without gross misconduct on his own part, and danger of injury to the health or morals of the child. His proved adultery may, under certain circumstances, make the withdrawal of it inevitable; but, *per se*, bad as the offence may be, it may not necessarily involve the infliction of such injury, and there may be considerations of convenience and advantage to the children which, if that infliction be not probable, should forbid their withdrawal from the father's care.

In the case with which we are dealing the crime imputed to the appellant was

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in itself and its circumstances very grievous, and if he only were concerned would make him entitled to small consideration. But we are reasonably asked to remember that his adultery was secret, that he did not lead an openly immoral life, or do any acts which, *coram populo*, could deprive him of the character he had acquired as a religious and upright man; and that in his general dealings with his household he acted with strict propriety. Upon the evidence he is entitled to say that neither before nor after the one seduction has anything of immorality been proved against him. It is not likely that the bitter experience he has had of the consequences of a departure from the line of duty will induce him to a change of conduct calculated to justify the accusations he has so strenuously denied, and there is therefore apparently reason for expecting more careful avoidance at least of any open misconduct or ill example in the future than in the past. Then he seems to have a genuine love for his children, and to have exhibited a watchful care of them.

Considering these things, there does not seem any reasonable ground for anticipating that the male children will be injured, morally or otherwise, if their custody be continued with their father, especially as they are of sufficient age to be kept at school. And he will be subject at all times to the vigilant observation of their mother, who will have full access to them, and the continual supervision, and, if it should be necessary, the prompt intervention, of the Court for their protection from any evil. And if this be so, there are, on the other hand, patent considerations affecting the interests of the children and their prospects in the world which make it undesirable that the connection with their father should be broken off, leaving them in lifelong isolation, and depriving them of the material benefits which they may anticipate at his hands. The words of Lord Neaves in Lang v. Lang (7 Macph. 447), to which we have been referred, are sensible and just—"If we take a man's children from him we leave him a solitary being, and deprive him of the most powerful inducement to amendment of life. It is not that he has committed faults, but that he teaches or is likely to teach evil to them, and to corrupt their morals, that can alone entitle us to interfere." And, in addition, I am affected by the consideration that an absolute separation of the appellant from all his children might not only deprive them of important advantages to be derived from him hereafter, but would also destroy the possibility of that reunion of the husband and wife which, notwithstanding all that has occurred, may yet, I trust,—and perhaps through their intercourse with the children, to whom they are bound by a common affection,—be happily accomplished.

I am bound to say that I fully concur with the Lord Chancellor as to the failure of proof of the charges against Mrs Symington; and I concur with him further in his condemnation of the excessive harshness and severity with which she was treated, and which, in my opinion, would have had no adequate justification even if every one of those charges had been clearly established.

Agreeing on both the questions in the case with my noble and learned friend, I fully approve of the advice he has given your Lordships.

Lord Selborne.—My Lords, entirely agreeing as I do with the explanation which my noble and learned friend on the woolsack has given to your Lordships of the grounds for adhering to the decision of the Court of Session in this case,

so far as relates to the painful subject of adultery, I do not propose to say one word more on that part of the case.

With respect to the more difficult and not less anxious portion of the case, as to the custody of the children, I will take the liberty of making a few, and only a few, observations. As to the girls, I do not think it necessary to add anything to the reasons stated, which are obvious, for leaving them under the mother's charge. The difficulty in my mind has had relation to the boys alone. My Lords, I do not think that as to the boys the right of the father or the right of the mother stands in a position which can make it otherwise than proper for your Lordships to turn the balance, by having regard to the interest of the children. The interest of those children, of course, is to be regarded in two points of view. Their material interest obviously is not in the direction of complete separation from their father, from whom their means of support in life apparently are entirely derived. No doubt, my Lords, the moral interest is, in cases of this kind, of even greater importance than the material, and, looking to the moral interests of these boys, I am not satisfied that it will be compromised by leaving them in care of him who is *prima facie* their natural and legal guardian, and on whom their material interest must mainly depend. The offence, aggravated as it is, of the father's, was, as my noble and learned friends have rightly said, neither preceded nor followed by any generally vicious course of life. On the contrary, but for the painful proof which we have of that offence, and of the circumstances accompanying it,—to which I should perhaps add that harshness to the wife, of which mention has been justly made—but for those things, the character of this gentleman would stand in a very favourable light, if tried by all the tests that could be applied to it.

No doubt, my Lords, that fact in itself suggested the possibility of a painful interpretation. It may be said that his whole life was false, and that all the profession of good made by him is now discovered to be entirely hypocritical. It must be admitted, and I say it with great pain, that when we bring those high professions into direct contact and proximity with deliberate acts of gross vice, no other judgment can be formed of them than that at that time and on those occasions the vice was aggravated by hypocrisy. But, my Lords, I do not think it necessary or charitable to adopt that hypothesis as applicable to the whole life of the man. All who have experience of human nature know that there is in all men a constant inward struggle between the principles of good and evil; and because a man has grossly fallen, and, at the time of his fall, added the guilt of hypocrisy to that of immorality, it is not necessary therefore to believe that his whole life has been false, or that all the good which he ever possessed was insincere or unreal. I will hope better things of this gentleman, and therefore, not relying upon that which nevertheless is true, that even hypocrisy is, as it has been stated to be, a tribute paid by vice to virtue, and that a man whose mind is in that condition is perhaps not likely grossly and openly to use his opportunities of influence over the children whom he loves for their moral perversion,—not relying upon that, I am willing to believe that before these unhappy events the appellant was a man sincere in his profession, and desiring to do what was right, and that it is not beyond hope that he may afterwards live in accordance with his profession.

My Lords, in these circumstances, unless we are to be guided by that which seems to have exercised influence over the mind of the Court of Session, namely,

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the belief that his whole conduct towards his wife, all the imputations made upon her, and all the harshness exhibited towards her, were parts of a concerted scheme for the indulgence of his vicious passion towards a servant maid—unless we are to believe that—I do not see that the grounds exist upon which these boys—contrary to what, in other respects, is their own apparent interest—should be taken from the custody of the father. The Court of Session seems to have relied mainly upon that aggravated view to which I have adverted, of the motive and the purposes of the imputations upon the wife and the conduct pursued towards her, and I am not prepared to say, my Lords, that if they had been right in that there would not have been such an exhibition of deep and deliberate depravity on the part of this gentleman as, coupled with the rest of the case, might have justified the conclusion arrived at by the Court of Session. But, my Lords, entirely concurring in what has been said as to the absence of any evidence to justify the imputations upon the wife, also entirely concurring in what has been said as to absence of any justification of the husband's conduct, even upon the hypothesis that he fully believed those imputations to be true, still I am bound to say that I cannot come to the conclusion that those imputations originated in any deliberate purpose of injustice to the wife, much less in any purpose to cover, by means of that injustice, the further wrong.

My Lords, there is one fact in the case which alone has completely satisfied my mind that that portion of the view adopted in the Court of Session is not correct, and that is this: Dr Stark,—a witness not impeached, on whose own impressions as to the condition of the wife on two occasions when he saw her I do not rely, because I think it may be probable that he may have misinterpreted the symptoms from which he drew his conclusions,—distinctly proves that in the year 1866 (I think four years or more before these unhappy events, and when the husband and wife were living on terms of apparently uninterrupted affection) the husband consulted him on the same subject, being even then under the impression that the wife was injuring her health by the use of stimulants, and that stimulants were on that account forbidden. Dr Stark himself, though, as I believe, erroneously, did himself, from the appearance and manner of the wife on two latter occasions, draw a similar conclusion to that which the husband—I doubt not upon equally insufficient grounds—seems to have drawn. Those facts convince me that in the state of health of this lady, or in her habits of body connected with that state of health, there were circumstances which misled the husband at an early period, and afterwards in part misled even her medical attendants, into the belief which now proves to have rested upon insufficient foundation, that she did use (probably for medical reasons, in the first instance) stimulants or narcotics, which had an injurious effect upon her health. Now, the lady has been since placed in circumstances which have enabled her other friends to bring those views to the test, and I am happy to say the result has been to exonerate her from that construction of all or any of the appearances. But, my Lords, I cannot but believe Dr Stark, who, if he is to be believed, distinctly proves that these ideas in the husband's mind originated at a time and under circumstances which are absolutely inconsistent with the hypothesis of his motives which the Court of Session thought it right to adopt.

My Lords, in that state of things, I do not think that the conduct of this gentleman, bad as in many respects it has been, has been such as to give your Lordships good reasons for apprehending that the moral, any more than the material, interest of the boys will suffer if they are, upon the terms and under

the safeguards which have been recommended to your Lordships, left under their father's care. No. 6.

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THE House pronounced a judgment affirming the interlocutor of the First Division, with the exception of the findings and decernitures regarding the custody of the children of the parties, which were recalled. In place of these findings the House "ordered and adjudged that the pursuer (respondent) is entitled to the custody of the two youngest children (Agnes and Margaret) of the marriage during their respective pupillarities, so long as no other or different order may be made by the Court of Session with regard to them or either of them, but with such direction for access of the defender (appellant) as the said Court shall think reasonable, and subject to the obligation of not removing them or either of them from out of the jurisdiction of the said Court; and it is hereby ordered that the defender (appellant) do forthwith deliver over the said two children to the custody of the pursuer (respondent) accordingly: And it is further ordered that the defender (appellant) is liable to the pursuer (respondent) in aliment at the rate of £25 per annum for each of the said children so long as, &c. . . . . And it is further ordered that the defender (appellant) is entitled to the custody of the other children of the marriage during their respective pupillarities, so long as no other or different order may be made by the said Court with regard to them or any of them, subject to the obligation of not removing the said children or any of them from out of the jurisdiction of the said Court, and also to the burden of providing for the maintenance and education of the said children, according to such directions as shall from time to time be given by the said Court for that purpose, and also subject to such regulations for securing the access of the pursuer (respondent) to the said children, or the occasional residence of the said children with the pursuer (respondent) as the said Court may consider reasonable; reserving to both parties respectively liberty, in the event of any difficulty, dispute, or change of circumstances, to apply to the said Court for such variation on the foresaid terms of aliment, or the foresaid direction as to custody, education, and access as the said Court may consider reasonable; . . . . and it is further ordered that the cause be and the same is hereby remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment." *

WILLIAM ROBERTSON, Westminster—J. GALLETLY, S.S.C.—GRAHAMES & WARDLAW, Westminster—J & R. D. ROSS, W.S.

JAMES M'DOUALL, Appellant (Defender).—*Cotton, Q.C.—Blair.* No. 7.
THE RIGHT HON. THE LORD ADVOCATE (on behalf of the Commissioners of Woods and Forests), Respondents (Pursuers).—*Lord-Adv. Gordon—Manisty, Q.C.—Badenach Nicolson.*

April 16, 1875. M'Douall v. Lord Advocate.

Salmon Fishing—Prescription—Possession.—Held (in *rev.* judgment of the First Division) that a proprietor of lands on the sea coast under a barony title or a crown grant *cum piscationibus* may instruct a title as against the Crown to salmon fishings in the sea *ex adverso* of his lands by proof of salmon fishing by net and coble for the prescriptive period.

* For the order made by the Court of Session in applying this judgment see Court of Session report, *postea*, p. 974.

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Fishings—White Fishings in the Sea—Act 1705, *c.* 2.—*Observed* (*per the Lord Chancellor*),—"Beyond all doubt the law in Scotland is, that white fishing in the sea round the whole coast of Scotland is perfectly free, and not only is it perfectly free, but there is a title on the part of the subjects to use the shore for the purpose of conducting white fishing in a proper mode."

Ld. Chancellor (Cairns). Ld. Hatherley. Ld. Selborne.

(IN the Court of Session, June 13, 1873, 11 Macph. 688, 45 Scot. Jur. 426.)

This action was raised at the instance of the Lord Advocate against James M'Douall, the proprietor of the estate of Logan in Wigtownshire, concluding for declarator that the salmon fishings in the sea *ex adverso* of the lands of the defender, in the parishes of Kirkmaiden and Stoneykirk, specified in the summons, belonged to the Crown, and that the defender had no right to fish for salmon, grilse, or salmon trout in the sea *ex adverso* of his said lands by stake or bag nets, or by net or coble, or in any other way, or to grant leases of such salmon fishings.

The lands in question were held partly under a barony title, without any mention of salmon or other fishings, and partly under crown charters *cum piscationibus*.

The pursuers averred that the defender and his predecessors had not under their titles fished for salmon, grilse, or salmon trout *ex adverso* of the said lands for such a time or in such a way as to give them a prescriptive right to the salmon fishings in the sea.

The defender averred that he had exercised such an exclusive right of salmon fishing for time immemorial.

A proof was taken, the import of which is given in the opinion of the Lord Chancellor.

The Lord Ordinary (Ormidale) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, finds it has been sufficiently proved that the defender and his predecessors have for more than forty years, or for time immemorial prior to the institution of this action, enjoyed and exercised, under and in virtue of good and habile titles, the exclusive right of fishing for salmon, grilse, and salmon trout in the sea *ex adverso* of the following lands belonging to them mentioned in the conclusions of the summons, viz.,—All and Whole the lands forming or embraced in the barony of Logan, situated in the parish of Kirkmaiden and county of Wigtown, bounded by the sea, extending, the coast of the said barony, on the Irish Channel or western side, from Dumbreddan Bay on the north to Crummag Head on the south, and on the Bay of Luce or eastern side from Chapel Rossan on the north to Kilstay or Palwhinrick Burn on the south, and the five merk lands of Crichen, and the five merk lands of Carrachtree, also lying within the said parish of Kirkmaiden and county of Wigtown: Therefore, *quoad* the right of fishing for salmon, grilse, and salmon trout in the sea *ex adverso* of said lands, assoilzies the defender from the conclusions of the summons, and decerns; and in respect the defender does not claim and has not attempted to prove a right to fish for salmon, grilse, or salmon trout in the sea *ex adverso* of the following lands mentioned in the conclusions of the summons, viz.," &c. (as to which the Crown's claim was not opposed),—"therefore, *quoad* these last-mentioned lands, finds, decerns, and declares in terms of the conclusions of the summons: Finds that the other lands mentioned in the conclusions of the summons are not to any extent bounded by the sea: Therefore, *quoad* these other lands, assoilzies the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses," &c.

The pursuer having reclaimed, the First Division, on 13th June 1873,

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recalled the Lord Ordinary's interlocutor, and found that certain of the defender's lands were inland lands, and had no sea boundary; "and therefore, *quoad* the right of fishing for salmon, grilse, or salmon trout, concluded for as *ex adverso* of the said lands, dismiss the action, and decern: *Quoad ultra* repel the defences: Find, declare, and decern in terms of the conclusions of the summons: Find the defender liable in expenses, and remit," &c.

Mr M'Douall appealed.

LORD CHANCELLOR.—In this appeal there is not, so far as I can understand it, any question of law involved, nor is there, indeed, any controversy of any moment as to the statements of fact. The controversy relates principally to what is the proper conclusion to be drawn from the statements of fact which we have in the case. The question is as to the right to the salmon fishing in the sea on certain parts of the east and west sides of the peninsula of the county of Wigtown which terminates in the Mull of Galloway. Does this salmon fishing belong to the Crown or does it belong to the appellant? As regards the law applicable to such a case there is, as I have said, no controversy. If it were a matter of doubt before the decision of Gammell's case,[1] it is now clearly established by that decision that the right of salmon fishing in the sea round the coast of Scotland belongs to the Crown, and is *inter regalia* of the Crown, except in so far as it has been parted with by grant. Nor is there any doubt of this further proposition, that the *onus* lies upon those who maintain the right as against the Crown, of shewing that they derive that right either by express grant or by a grant sufficiently large to carry salmon fishing if connected with user and enjoyment for the requisite period. The title of the appellant, as regards by far the greater portion of the case, consists of his title to a barony in which there are no express words with regard to fishing, but as to which it is undoubtedly clear upon all the authorities that the title, being baronial, is sufficient to be a habile foundation for a claim to salmon fishing if the requisite enjoyment and user of salmon fishing is established. As regards one part of the case, a much smaller and more insignificant part, called the five merk land of Crichen, the title is not a baronial one, but a title by grant *cum piscationibus*, which upon all the authorities will be a habile title for the foundation of a claim to salmon fishing if connected with the requisite enjoyment and user.

The law, therefore, upon this point being entirely clear, it now becomes a question of fact, has the appellant in the present case, having a habile title upon which to found his claim, shewn a user and enjoyment sufficient to perfect that claim for a period of forty years and upwards? The Lord Ordinary was of opinion that he had done so. The First Division took a different view of the evidence and repelled his claim, and it is from that decision that the appeal is brought to your Lordships.

Now, I will ask your Lordships' attention to one piece of evidence, because it appears to me one the importance of which cannot be overstated—I mean the evidence of the late defender in the case, Colonel James M'Douall of Logan, the father of the present appellant. He was an old man when his evidence was taken, and it was taken by commission, about six months before the general evidence in the case was taken. The parties, therefore, had the whole of his

[1] Gammell v. Commissioners of Woods and Forests, March 28, 1859, 3 Macq. 419, 31 Scot. Jur. 431.

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evidence before them, the advisers of the Crown saw exactly what was the statement of facts which he made, and they had the whole of the intervening period between that time and the time when the rest of the proof in the case was taken to consider the statements which Colonel James M'Douall had made, and to controvert them, if any of them could have been controverted.

He says—"I am proprietor of the barony of Logan, and of the other lands mentioned in the conclusions of the summons. I am seventy-six years of age," (that was in the year 1872). "In 1808 I remember my father having a net for salmon fishing. We came from England in that year, and it was my great pleasure to go with him to the fishing. We had an old net and a new net. They were both draught nets. They were for drawing the shores of the bays. Almost every year since that year down to the time when they were let on lease for stake net fishing," (that was in 1856), "I assisted at fishing in the bays on both sides of the peninsula at the places where there were no rocks to prevent us. My father was in the habit of granting permission to other persons to fish, on condition of their paying a lordship of salmon and salmon trout to him at Logan House. We had both salmon and salmon trout. His father, my grandfather, was in the habit of doing the same thing since he came into the property in 1717. I have been told this by my father. My father died in 1834. I have, since I succeeded to the property, continued to grant permission on the same terms, and I have also stopped persons fishing without my permission. In 1856, for the first time, I let the salmon fishing for a money rent."

Then he is cross-examined for the Crown, and depones,—"The nets my father and I used were generally kept at the fish-pond, under the care of the fisherman, but not always. Sometimes they were kept at Longrig. Interrogated—Was not the object of your fishing to catch blockers and other white fish? Depones—No, salmon principally. One of our purposes was to get salmon for the fish-pond. Interrogated—What bays have you fished in? Depones—Port Logan. Port Gill we have tried, but without much success. Clangeard also, and on the other side, beginning with Chapel Rossan, which is on the farm of Auchness, all the bays, down to the Mull in which there was a sandy bottom. I was very fond of this fishing. I did it frequently. I am sure I did it every year. When I had a tutor I was here all the year round. I had a tutor for four years when I was at school; and afterwards when I was in the Guards, I was here always during the fishing season. The East and West Tarbets are in the Mull farm. Interrogated—Do you remember the names of the persons to whom you granted permission to fish? Depones—They were so many that I do not remember the names. Generally they were tenants."

I put aside for a moment the reference to the permissions given to fish, inasmuch as no names are mentioned here of persons to whom such permission was given; but I take the evidence as dealing with the acts and the conduct of Colonel James M'Douall himself, and of his father and grandfather, so far as his father could inform him of those acts and that conduct. It appears to me that this evidence, being wholly uncontradicted, is evidence of the clearest and most satisfactory kind of an exercise for the prescribed and requisite period of the right of salmon fishing round both sides of the peninsula opposite the property of the Laird of Logan by the father and grandfather of the present appellant. The facts which he speaks of are facts which were palpable and notorious. Everything done by the laird on one of the principal properties in that neighbourhood must have been observed and perfectly well known to the inhabitants of

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the neighbourhood. Six months after this evidence was given several of these inhabitants were called. They were persons who had lived on the spot. They were old men, who must have known perfectly well the accuracy or inaccuracy of the statements which I have read. The very boatman or some of the boatmen, who must have been in attendance on Colonel James M'Douall at the time he speaks of, were examined. But no single question that I can discover was asked on the part of the Crown of any one of those witnesses for the purpose of controverting these statements of fact as to what had been done by the Lairds of Logan personally in their own pursuit of salmon.

A suggestion was indeed made in the cross-examination which I have read that the primary object of the fishing had been not to catch salmon, but to catch white fish. That was denied by the witness who was under cross-examination, Colonel James M'Douall. He said,—"No, salmon principally." But that connects itself with two other pieces of evidence upon the same point. I am still dealing with the intention and the object of fishing on the part of the Laird of Logan himself. Alexander M'Craken, an old boatman, says,—"I do not remember how often in a season we might draw the net. It was drawn just when Colonel M'Douall's fishermen thought proper; when he saw the trouts jumping" (the salmon trout jumping) "along the shore, he out with the net. We just drew it when he wanted us." In addition to that one of the witnesses for the Crown, Quintin Limond, depones in his re-examination,—"It was for salmon that they drew the net at Port Logan. They never drew the net till they saw the salmon come in. I don't think they ever drew for white fish there. It might be thirty-five years ago when I saw them drawing the nets at Port Logan, but I cannot say I recollect how long ago." Therefore I think your Lordships have it established on the most satisfactory evidence that so far as regards the personal acts of the Logan family, the laird for the time being for the requisite time was in the habit of drawing the net, as it is called, along his property, for the purpose of taking salmon, and with the primary object of taking salmon.

The expression "drawing the net," which I have used, is explained at length in other parts of the evidence. As I read the explanation of the term, it describes particularly the proper mode of fishing by net and coble. I do not pause to examine what the size of the meshes of the net may have been; I shall have a word to say about that afterwards. But as regards the mode of shooting the net, and bringing it round and carrying it in, it is exactly that which has been described upon various occasions on which evidence has been laid before your Lordships to be net and coble fishing.

That being the state of the evidence with reference to the acts of the Laird of Logan, it appears to me that the only suggestion which could be made upon that evidence is this,—It is very true that the Laird of Logan has been in the habit for upwards of forty years of fishing round the coast and catching salmon for his own consumption and that of his family, but then, after all, there was a general right of fishing by the public for white fish; any one of the public might have fished for white fish, and the Laird of Logan was only doing what any member of the public might be doing; he appeared to be fishing generally, and the circumstance that he caught salmon and that his own private motive in fishing was to catch salmon, would not make the appearance of his fishing different from the appearance of any other member of the public fishing round the coast.

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That observation appeared to me to make material other evidence in the case, which is of considerable amount, and, as it appears to me upon the whole fairly given, and given without any serious discrepancy between the statements of the different witnesses. I understand that evidence to amount to a satisfactory confirmation of the general statement of Colonel James M'Douall, that he not only practised the course of fishing for salmon himself, but that he did that as a matter of right, that he asserted his right by not only following the practice himself, but by preventing others from fishing for salmon, or by making it a condition that if they did fish in a way to catch salmon they should make to him a render in return for the privilege or permission to fish. And what I read the evidence as amounting to is this—I refer particularly to the evidence of the M'Crakens, but there is other evidence of great importance, all bearing the same way—I read the evidence as establishing this fact, that there were several persons who were in the habit of fishing round the particular part of the coast of which I am speaking. They were, generally speaking, tenants of the Logan property, or retainers connected in some way with the property. They applied for permission to fish—they fished by net and coble, which is called, in the evidence I have spoken of before, draught net fishing. It is true that they caught white fish frequently and most commonly, and it is true that they appear to have been anxious to catch white fish; but they appear invariably before they fished to have sought for the permission of the Laird of Logan, or of his factor, and to have obtained that permission upon the terms sometimes that they would give up all the salmon that they caught, at other times that they would give good fish or the best fish, whether they were salmon or white fish.

Some remark was made upon the circumstance that the render was not always a render of all or some of the salmon caught, but was occasionally a render in white fish also. I can conceive nothing more natural than that arrangement. I can conceive nothing more natural than that, the Laird of Logan having in these years of which I am speaking (now long since passed) no object as regards selling, and no opportunity of selling salmon, his desire would be to have his table supplied, not always with salmon merely, but also, when he had an opportunity, with fish of other kinds, and that the natural and probable arrangement would be that his boatmen should take from those who were to give the render such fish as would be convenient to be selected, whether they might be salmon or white fish. At all events, a render there was of fish, and it was a render in return for the privilege or permission to fish. And, although there is evidence that occasionally persons fished opposite some part of the Logan property who had not received this permission, the conclusion which I draw from the evidence as to those cases is that they were doing it with a greater or less amount of secrecy, that they were doing it, feeling on their own part that they were trespassers, and that if their fishing had been known they would have been called to account, and would have been put under the same terms as the other persons were put under.

That being the result which I draw from the evidence, the question which has been raised upon the evidence which your Lordships have to consider, and the only question, appears to me to be this, on what ground was it that the Laird of Logan exercised a control over this fishing, gave the permissions which I have referred to, and insisted upon his right to prohibit fishing where the permission was not given? Was it upon the ground that he had in some way the absolute right to prevent *ex adverso* of his lands any fishing of any kind, whether white

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fishing or salmon fishing? Or was it a right of prohibition exercised and a permission given upon the footing of his property in the salmon fishing alone? If your Lordships had here a case in which, commencing with a habile title on which to found a claim of salmon fishing, you had the exercise of that right attempted to be established by a user of the right, on the one hand, on the part of the person claiming it, and a prohibition by him, on the other hand, of fishing in the sea of every kind, white fishing included, if, I say, such a case were presented to your Lordships, I am not prepared to say that the exercise on the one hand of the salmon fishing, and on the other hand the absolute prohibition submitted to, of all fishing of whatever kind, although that prohibition may have been much larger than there was any title to impose, would not have been to my mind a sufficient proof of the exercise and the enforcement of the right of salmon fishing. But it is not necessary, as it appears to me, to entertain that question, or to decide it in the present case, because I cannot, as I read this evidence, arrive at the conclusion that the prohibition to fish, where it was asserted, and the permission to fish where it was given, on the part of the Laird of Logan, was put upon any such paramount title as I have referred to,—a title to all fishing of any kind.

I cannot arrive at that conclusion, for these reasons:—In the first place, it is not asserted by Colonel M'Douall himself in the evidence which I have read, nor is it asserted in the evidence given on his behalf. Some of the old witnesses, not learned men or very accurate in their modes of expression, make general statements about leave being given to draw the nets, and so on. But it appears to me that they were speaking on the point as to which they were examined, namely, what had been done relative to the salmon fishing, and that they did not mean to lay down any general statement applicable to fishing of every kind.

But, my Lords, I will proceed on a higher ground than that. Beyond all doubt the law in Scotland is that white fishing in the sea round the whole coast of Scotland is perfectly free, and not only is it perfectly free, but there is a title on the part of the subjects to use the shore for the purpose of conducting white fishing in a proper mode. Now, it is impossible that that right, existing, as it does in Scotland, could have been a right of which the people of this locality were ignorant. They must have known perfectly well that they had the right to fish for white fish in the sea, and that no person had a right to prevent them, and I do not believe that it would have been possible at the time of which we speak for the Lairds of Logan to have asserted any such general right, or to have had that general assertion submitted to.

There is an incident which comes out in the evidence in this case which appears to me to shew this in a satisfactory way. It comes out, not in the evidence of the Laird of Logan, but in the evidence for the Crown. William M'Gan in his evidence, speaking of the time immediately after the year 1856, when the first stake net was put up under M'Creadie, says:—"After M'Creadie took the salmon fishing he interfered with me very little. On one occasion he spoke to me about my fishing. He said that I was not to come near his net or trouble it, and I said that I would not. I did not go to the Colonel about that. It was when I heard that there was no liberty to fish that I went to the Colonel to ask leave. The Colonel spoke to me about an Act of Parliament that he had about the drawing of the net. That was Queen Anne's Act. He spoke to me about that Act in M'Creadie's time. He once said to me that I was not to draw the net, but he only said that once. The Colonel when speaking about the Act

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of Parliament, said that he would allow me to draw the net, and that they could not stop me."

One of your Lordships pointed out that the Act of Parliament to which this must refer was the Act of Queen Anne, which is not perhaps the only Act, but is one of the most important Acts, affirming the right of the public to white fishing in the sea round Scotland, and to the use of the shore for the purpose of conducting that white fishing.* It appears to me to be quite impossible to suppose that the Laird of Logan at this time can have referred to this Act upon an application by one of his tenants as shewing the general right, if he had been in the habit of contending for a right entirely in opposition to the right which was declared by that Act of Parliament.

The conclusions which I draw from the evidence are, that there is on the one hand proof of the exercise of the right personally by the Lairds of Logan themselves for the requisite period of time, and proof on the other hand of no adverse exercise of the right, but, on the contrary, of a further enjoyment of the right by them through others to whom they gave permission and from whom they received their return, so that it appears to me that the enjoyment under a habile title which the law requires is clearly established. I do not find that the Court of Session arrived at any conclusion different from that which I have arrived at upon the question of fact; I do not understand that they viewed the evidence differently from the way in which I view it; and, so far, I think the Inner-House were at one with the Lord Ordinary. But I understand the ground upon which the Court of Session felt constrained to reverse the interlocutor of the Lord Ordinary was this: I understand, in the first place, that the Court of Session have taken this view, that there was not here proof of that mechanical kind or description of fishing being followed which would instruct a right of salmon fishing in the sea. I will read to your Lordships the observations of Lord Ardmillan, but I understand them to amount to this: now that it is decided that the Crown have the right of salmon fishing in the sea round the coast of Scotland it will not be sufficient to instruct a right of salmon fishing as against the Crown to shew that you have practised the salmon fishing by net and coble merely—there must be something more—there must be something of that which was called the fixed net fishing by stakes or otherwise.

Now, my Lords, this becomes an extremely important point, not merely in the present case but in other cases which may arise. Lord Ardmillan says,—"The proof of possession in the present case is, in my opinion, altogether inadequate to support the claim of Mr M'Douall to a right of salmon fishing. The ordinary and well understood mode of fishing salmon in the sea *ex adverso* of the Logan

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* The statute 1705, c. 2, entitled an "Act for advancing and establishing the fishing trade in and about this kingdom," upon the narrative that, "albeit there be several good Acts already made to encourage and carry on that trade, yet they are either in desuetude, defective, or do not answer the present circumstances," enacts . . . . "Her Majesty, with advice and consent of the Estates of Parliament, authorizes and impowers all her good subjects of this kingdom to take, buy, and cure herring, and white fish, in all and sundry seas, channels, bays, firths, lochs, rivers, &c., of this Her Majestie's ancient kingdom, and islands thereto belonging, wheresoever herring or white fish are or may be taken; and for their greater conveniency, to have the free use of all ports, harbours, shores, fore-lands, and others, for bringing in, pickling, unloading and loading the same, upon payment of the ordinary dues where harbours are built. . . . ."

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estate was certainly introduced for the first time in 1856, about seventeen years ago. We know that such fishing was first introduced on the coast of Ayrshire, a good many years before that date, I think about 1838, but not so long ago as to amount to prescriptive possession." So that his Lordship's judgment, if I understand it rightly, would go to this, that as regards salmon fishing in the sea there cannot be prescriptive possession against the Crown, because this which the learned Judge calls "the well understood mode of salmon fishing in the sea," was not introduced at the time when the prescriptive possession must be shewn to have commenced. (This was ascertained in the case of Carlton.[1])" Lord Ardmillan continues,—"Therefore unless Mr M'Douall has been able to instruct some kind of possession different from the usual and appropriate and recognised mode of fishing by net and coble, he cannot carry back his possession to a period earlier than 1856. We have here no case of salmon fishing till within twenty years, and no salmon fishing distinct from other fishing." . . . "I need not enlarge on this point; I think it free from doubt; and I concur in the remarks which have been made in the case of the Duke of Sutherland v. Ross,[2] and other cases as to requiring proof of possession by the recognised and appropriate mode of fishing."

My Lords, this appears to me to raise a question of very great importance. We all know that until the decision of this House in the Kintore case,[3] in the year 1828, it was not understood in Scotland that stake net fishing in the sea was lawful. This House decided that it was lawful; but we know, as matter of history, that a very considerable interval after that elapsed before stake net fishing became at all general in the sea in Scotland, and for this obvious reason, that at the time when there was little or no consumption of salmon, except such as was local, enough salmon could be procured to answer the requirements by the ordinary old and much more inexpensive mode of fishing by net and coble. When salmon became a more valuable commodity persons were found who were willing to go to a greater expense in establishing fixed engines and fixed nets in the sea for the purpose of taking salmon. Then, as we have had occasion to see, stake nets were resorted to; but that did not occur in the present case until the year 1856. Now, as I understand the reasoning of Lord Ardmillan, it is this:—In the Sutherland case, the case of the Shinn river, it was held, as it has been held in many other cases, that the proper mode for a river, of practising salmon fishing under a title, being by net and coble, any fishing by rod goes for nothing. It is not the appropriate mode by which to gain a prescriptive title. Then, says Lord Ardmillan, stake net fishing in the sea having now become the great and wholesale way of catching salmon, stake net fishing in the sea stands towards fishing by net and coble in the same relation that net and coble fishing in a river stands to rod fishing. Rod fishing in a river will not give you a prescriptive title where you have not net and coble fishing. So in the sea, net and coble fishing will not give you a title where you should have the greater and larger mode of fishing by stake net.

I must say this is a principle which is, to my mind, altogether novel. I do not know any authority for it, and I look with some anxiety upon the introduction of such a principle. Its introduction would, I fear, lead to a repetition of

[1] Lord Advocate v. Cathcart, May 19, 1871, 9 Macph 744, 43 Scot. Jur. 500.
[2] Duke of Sutherland v. Ross, June 11, 1836, 14 S. 960, 16 Scot. Jur. 420.
[3] Earl of Kintore v. Forbes, 1828, 3 W. and S. 261.

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the remark once made by Lord Eldon in this House with regard to the salmon fishing decisions in Scotland, that they had gone to lengths which it was extremely difficult to justify upon any other hypothesis but that the Judges had introduced principles of law, for the first time, applicable to salmon fishing alone. My Lords, I cannot recognise this principle which I find here laid down, that stake net fishing is "the ordinary and well understood mode of salmon fishing in the sea," and the mode by which a prescriptive title is to be obtained. It is perfectly true to say that you have this incident with regard to net and coble fishing in the sea that you have not in a river. Net and coble fishing in a river can be only for the purpose of catching salmon, but net and coble fishing in the sea may be, and very often is, for the purpose of catching both salmon and white fish, and it may be a very proper inquiry to make in every case, was the net and coble-fishing in the sea, upon which you rely, intended and used for the purpose of taking salmon, or was it merely used in pursuit of white fish, and was the taking of salmon merely an accident and not part of the object or aim of the fishing? That may be a very proper inquiry, but even as to that the same observation may be made with regard to stake net fishing, because stake net fishing, as you have heard in the present case from Mr M'Creadie, results in the capture not only of salmon but also of white fish, and although the probability is that so expensive a mode of fishing would not be used for white fishing, still there is nothing to prevent its being so used. Therefore, my Lords, I am bound to express my dissent from the first ground of the decision of Lord Ardmillan, though it is agreed to by the other Judges.

The second ground, as I understand it, is this, that with regard to the ownership claimed to be exercised by the Lairds of Logan in connection with permission given and prohibitions to others, that was done not with reference to the salmon fishing, but with reference to all fishing of every kind. I have already commented upon the evidence as to that. It appears to me to be neither a necessary nor a fair inference from the evidence, and to be one which ought not to be drawn.

The third ground of the decision of Lord Ardmillan is this, that in the year 1856, after the tack was made to Mr M'Creadie, and the stake net fishing introduced, persons were allowed by Mr M'Creadie to go on fishing with draught nets (the net and coble) as they had done before, at all events, to some extent as they had done before. My Lords, it appears to me to be impossible to say that that can alter in any way the rights, whatever they were, of the Laird of Logan. It was for Mr M'Creadie, having got the tack which he had received, to consider how far he would insist upon his extreme rights. He may have been satisfied with the quantity of salmon he was able to catch in his stake nets, and may have been quite indifferent as to one or two or more persons doing their best with their draught nets, or net and coble. That, to my mind, cannot possibly alter the rights of the Laird of Logan.

My Lords, those are the grounds which I find in the judgment of the Inner-House. They do not take a different view of the facts from the view which I take, and which is taken by the Lord Ordinary. They take a different view as to the conclusions and inferences to be drawn from those facts. I arrive in the result at the conclusion that the interlocutor of the Lord Ordinary was in the main correct.

There are two minor questions which I have to advert to before I have done. An argument was raised whether, if this right was established on the part of

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the Laird of Logan, it was a right extending along the whole of the coast belonging to him on either side of the peninsula. It was pointed out, and truly, that there were parts of the coast, certainly on the west side, and perhaps on both sides, where no salmon fishing had taken place. We find that the coast is, very much on the west side and partly on both sides, so constituted that there are parts of it where no salmon fishing can take place, and other parts where salmon fishing can be conducted, namely, in bays and smoother parts of the coast where it is not rocky and iron-bound. If your Lordships find that a right of salmon fishing was exercised on both sides in all the bays and places where salmon fishing could be conveniently exercised, I think your Lordships will arrive at the conclusion that it would be quite impossible to make a division between different parts of the coast, and to say that the exercise of the right of salmon fishing in all the places where salmon fishing could possibly be carried on is not a sufficient proof to carry the right for the whole of the coast which is held under the same title.

My observations as to the larger part of the case where there is a baronial title will apply also to the smaller piece of land called Crichen, which, although not held under a baronial title, is held under a title which contains the words "*cum piscationibus.*" But there appears to be in the interlocutor of the Lord Ordinary a reference to another piece of land called "the five merk land of Carrachtree." It appears to me not to be controverted on either side that that is an inland piece of ground upon which there can be no salmon fishing; therefore it seems to have crept into the interlocutor *per incuriam*, and it must, as it seems to me, be excluded.

Upon the whole case I submit to your Lordships that the interlocutor appealed from must be reversed, and the interlocutor of the Lord Ordinary restored, omitting that reference to "the five merk land of Carrachtree," and of course there should be a declaration that the reclaiming note to the Inner-House ought to have been refused, with expenses.

LORD HATHERLEY.—I fully concur in the view which has been expressed by my noble and learned friend the Lord Chancellor with reference to the decision which it is incumbent on this House to arrive at upon the evidence before the House, and upon the state of the law applicable to that evidence.

It would have been extremely to be regretted if this case had been entirely, as I at first thought it was, a matter on which the House had to arrive at a conclusion on conflicting evidence. Nothing, I think, could be more inexpedient than that it should be reserved for the Court of last resort to decide upon conflicting testimony, instead of upon facts ascertained either by a jury or by a Court below, before whom witnesses have been examined.

But it appears to me that there is not the slightest conflict of evidence of any substantial character in this case. The difference between the Lord Ordinary and the Inner-House seems to be mainly reduced to that point which was indicated by Lord Ardmillan—namely, whether or not the evidence as it was given on the part of the defender, and taken as undisputed on the part of the Crown, was sufficient to instruct such a possession of the right claimed as is necessary by the law of Scotland. Now, that law sanctions a right of salmon fishing as vested in an owner of property under a habile title when possession of the salmon fishing has accompanied that habile title. And that possession, the Lord Advocate told us, in addressing the House, must be a possession for forty years,

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shown by the user of taking the fish continually during that time in the accustomed mode, and exclusive of the right of all other parties, including, of course, the Crown. I have not much to object to in the law as laid down in that proposition, beyond saying that the question of the "accustomed mode" is open to observation, and it is upon the question of the accustomed mode that the difference will probably be found to exist between the conclusion of the Inner-House and the conclusion of the Lord Ordinary, to which your Lordships are, I believe, unanimously of opinion that we also ought to arrive.

That there is evidence here of taking salmon, and evidence of the right to take salmon being claimed by exclusive title, is, I think, beyond all possibility of contradiction.

What is there wanting to make out a complete title, unless it be with reference to a requirement of the law as laid down by the Lord Advocate, namely, that the exercise of the right must be in the accustomed mode? I apprehend, my Lords, that that term "accustomed mode" cannot be held to mean that for all time a particular mode and no other shall be used for catching fish. The mode must vary from time to time as improvements are suggested. What seems to have led to some degree of misapprehension on that subject is this,—In order to establish this right you must shew that you have fished in a lawful mode. I have no doubt also that it must not be a mode which simply indicates, as fishing by an angle would, that some persons have been allowed to fish for pleasure. Non-interference with an angler will not have the same effect as non-interference by the Crown with a person who is sweeping the whole body of the fish into his net, and therefore the simple fact that people have from time to time been allowed to angle will not be enough to instruct an exclusive right as against the Crown. That is reasonable enough, but what is proved in this case? You have fishing proved first of all by draught net and then by stake net, when it was found that stake nets could be used in the sea. I apprehend that the notion of your being obliged to prove that the fishing has been in the accustomed mode only comes to this, that in order to instruct the right, the user must be of a character such as would be necessary in an exactly analogous state of things in a claim to a right by custom in this country. It must not be a right exercised *tam Marte quam Mercurio*. The right cannot be acquired by fishing by an unlawful mode. The right cannot be acquired by a casual casting of a line to take fish here and there, or angling for sport. It is to be a right plainly asserted of catching fish in a lawful and effective manner, shewing a distinct intention to claim the right of exercising your power over all the fish that you claim under the habile title which you produce.

Lord Selborne.—My Lords, I agree with the rest of your Lordships.

It is said that in cases of this class the evidence of the right to salmon fishing ought to be "clear, continuous, exclusive, and unequivocal." I do not inquire whether this really means more than that there is a strong *onus probandi* laid upon the person making the claim. But in the present case, taking these words most strictly, if the evidence satisfies the last condition, that of being "unequivocal," it satisfies all the rest. It is clear, because there is in truth no real controversy as to the facts,—continuous, because it extends over the whole period from 1808 to the commencement of the action in 1872, and exclusive, because the right of excluding the public from these fishings was unquestionably asserted and exercised by the owners of the Logan estate, and was practically submitted

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to by the general public. Does, then, the evidence also satisfy the condition of being unequivocal? I apprehend that what is required for that purpose is only that the evidence should relate specifically to salmon fishing carried on in a lawful and proper manner, as distinct from fishing of any other kind. The accidental capture of salmon by persons fishing for other fish would, no doubt, be insufficient to satisfy this condition, but, on the other hand, the capture of white fish by those claiming the right of salmon fishing, or by other persons fishing with their leave, would not prevent acts done for the express and specific purpose of taking salmon from being unequivocal.

It appears to me that the evidence of Colonel James M'Douall (confirmed as to Port Logan by that of James Goudie) proves unequivocally (if credit is given to it) the habitual capture of salmon as of right by the proprietors of Logan from 1808, or earlier, till 1856, and it is not disputed that since 1856 the same right has been claimed and exercised in a manner which, if connected with a sufficient length of previous user, would be enough to establish the appellant's title. The evidence of Colonel James M'Douall is not only itself unshaken, but it is confirmed by other witnesses who speak of acts distinctly and specifically referable to the assertion and exercise of the right of salmon fishing by the proprietors of Logan at various places on both coasts, and at various times, extending over more than the necessary period. Some of the witnesses who prove these facts are witnesses for the Crown. The evidence of David M'Clymont (applicable to the year 1825), that of Alexander M'Craken (applicable, as to the west coast, to the six years from 1825 to 1831, and as to the east coast, to the whole subsequent period), that of Quintin Limond as to Port Logan, applicable to 1837, appear to me to be distinctly and emphatically of this character, and the rest of the evidence, interpreted in the light of the facts which these witnesses prove, is consistent with and confirms and strengthens it. The known state of the law as to the public right of fishing and drawing nets for white fish is also inconsistent with the supposition that the claim of a right to exclude the public from fishing and drawing nets upon the shores of the Logan estate was referable or could have been understood as referring to anything else than an exclusive claim to salmon and salmon fishing, which would render necessary the permission of the proprietor in all cases in which any salmon might be caught and brought to shore, whether by persons fishing for white fish or by those whose principal object might be the capture of salmon.

Interlocutors appealed from reversed: The Lord Ordinary's interlocutor of the 16th January 1873 restored, with the omission of the "five merk lands of Carrachtree:" Declared that the reclaiming note in the Court of Session against the Lord Ordinary's interlocutor of the 16th January 1873 ought to have been repelled, with expenses.

PRESTON KARSLAKE—HUNTER, BLAIR, & COWAN, W.S.—HORACE WATSON—DONALD BEITH, W.S.

No. 8.
May 3, 1875.
Learmonth, &c. v. Miller.

THOMAS LEARMONTH AND OTHERS (Mr and Mrs Finlay's Marriage-Contract Trustees), Defenders and Appellants.—*Lord-Adv. Gordon—W. Pearson, Q.C.*
JOHN MILLER (Finlay's Trustee), Pursuer and Respondent.—*J. Pearson, Q.C.—J. T. Anderson.*

Husband and Wife—Postnuptial Contract—Provision—Mutual Contract—Retention—Conjugal Rights Act, 1861 (24 *and* 25 *Vict. c.* 86), *sec.* 16—*Bankruptcy.*—By postnuptial contract in 1852 a husband and wife who had no antenuptial marriage-contract conveyed to trustees £2600, to which the wife was entitled from her deceased father's estate, while the husband became bound to pay in 1862 a sum of £1999 to the trustees for the purposes of the trust, and in the meantime to grant security therefor, either heritable or by insuring his life to the amount, and assigning the policy to the trustees, and paying to them an annual premium, or, in their option, a single payment sufficient to redeem the annual payments. The purposes of the trust were to pay the liferent of the trust-funds to the husband, and after his decease to the wife if she should survive him, and the fee to the children *nati* and *nascituri*. These provisions were declared to be alimentary. The husband did not implement his obligation by granting security or otherwise, and he became bankrupt in 1860.

In a question between the marriage-contract trustees and the trustee on the bankrupt's estate, *held* (*aff.* judgment of Second Division), (1) that the husband's right to the annual proceeds of the £2600 was vested in the trustee on his sequestrated estate; (2) that the marriage-contract trustees were not entitled to retain the income, on the ground that the husband had failed to fulfil the obligation he had undertaken; and (3) that the wife was not entitled to a present provision under the Conjugal Rights Act out of the income of the £2600 so payable to the husband.

Ld. Chancellor (Cairns).
Ld. Hatherley.
Ld. O'Hagan.

(IN the Court of Session November 21, 1871, 10 Macph. 107.)

In 1845 John Finlay married Mary Anne Alexander, eldest daughter of Mr Alexander, proprietor of the Theatre Royal, Glasgow. There was no antenuptial contract of marriage entered into between them.

Mr Alexander died on 15th December 1851, leaving considerable estate. As there was no contract of marriage between him and his wife, his daughter, Mrs Finlay, had right to her share of legitim out of her father's moveable estate.

On 28th February 1852 Mr and Mrs Finlay executed a postnuptial contract, whereby they conveyed to the defenders as trustees the whole estates, heritable and moveable, belonging or which should belong to Mrs Finlay, and particularly "all right, title, and interest which she or the said John Finlay, her husband, now have or may hereafter have in the succession or estates" of her deceased father.

By this deed Mr Finlay bound himself to pay, on or before 1st January 1862, £1999 to the trustees for the purposes of the trust, and to open and keep up policies of insurance on his life or to grant security over his heritable estate in their person for that sum.

He also thereby renounced his *jus mariti* over the estate then belonging or which should thereafter belong to his wife, declaring the same unaffectable by his creditors or by his debts and deeds.

The second purpose of the trust created by the postnuptial contract was "for payment of the free yearly proceeds of the trust-estate to the said John Finlay during his life, for his liferent use allenarly, and, after his death, in the event of his being survived by his said wife, in trust for the payment to the said Mrs Mary Anne Alexander or Finlay, in like manner, of the free yearly proceeds of the trust-estate during her life, for her liferent use allenarly; and after the death of the survivors

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of the said spouses, in trust for the whole children born and to be born of the marriage between the said John Finlay and Mrs Mary Anne Finlay."

The deed contained the following clause:—"It is hereby expressly provided and declared that the whole of the foresaid provisions, as well those in favour of the spouses as those in favour of the children of this present marriage, and their interest in the present trust, shall be nowise attachable for debt, but that the same shall be considered alimentary."

Mr Finlay did not implement the obligations undertaken by him in the marriage-contract by granting security or otherwise. His estates were sequestrated in 1860, and Mr John Miller, accountant, Glasgow, appointed trustee thereon.

In an action raised in 1863 by the defenders, as trustees under the postnuptial contract, against Mr Finlay and the trustee on his sequestrated estate and others, it was decided by judgments of the Court of Session and of the House of Lords that the defenders were entitled to recover and receive the sum of £2600, being the amount of the legitim due to Mrs Finlay from the estate of her father, with interest from 15th December 1851, the date of his death; and to hold and administer the same for the purpose of the trust declared in the postnuptial contract between Mr and Mrs Finlay, all questions in reference to the right to the interest or annual proceeds of the said legitim fund from that date being reserved.[1]

The present action was then raised by the trustee on Mr Finlay's sequestrated estate for the purpose of having it found and declared that he had right to the whole annual proceeds of the said sum of £2600 from 15th December 1851, and so long as the sequestration should subsist during Mr Finlay's life, and of obtaining decree against the postnuptial contract trustees ordaining them to make payment of the same to him accordingly.[2]

The pursuer pleaded;—1. The legitim to which Mrs Finlay became entitled on her father's death vested absolutely at that date in the said John Finlay *jure mariti*, and, having so vested, the said John Finlay had no power to confer on himself and place beyond the diligence of his creditors a liferent alimentary provision out of the same. 2. The liferent provision conferred by the said John Finlay on himself by the postnuptial contract in question fell under the sequestration of his estates, and was carried to the pursuer as trustee in the sequestration by virtue of his act and warrant. 4. The defenders' plea, founded on the Conjugal Rights Act, ought to be repelled, in respect that (1) Mrs Finlay succeeded to the legitim in question before the said Act came into operation; (2) the right to the said legitim had vested in Mr Finlay *jure mariti*, and was in the possession of him, and of the pursuer, as trustee on his sequestrated estate, within the meaning of the said Act, before Mrs Finlay's claim for provision out of the same was made; (3) it is incompetent to claim such provision in this action; (4) the said claim is excluded by the marriage-contract; and (5) the provision claimed is excessive.

The defenders averred,—"Mr Finlay, in consequence of his bankruptcy and ill health, has been unable to fulfil the obligations undertaken by him in the marriage-contract. He has neither supported his wife and

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[1] Miller v. Learmonth, H. of L., May 17, 1870, 42 Scot. Jur. 418.

[2] Another case between the parties to the present action in relation to another part of Mr Alexander's succession is reported under the name Miller v. Finlay's Trustees, Feb. 25, 1875, *supra*, House of Lords cases, p. 1.

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children in a manner suitable to their station in life, nor has he paid over to the defenders, the marriage-contract trustees, all or any part of the sum which he undertook and bound and obliged himself by the contract to pay. He failed to procure the policy or policies of insurance on his life required by the contract. And neither he nor the pursuer has offered or is now willing to fulfil any of these obligations."

The defenders pleaded;—1. The postnuptial contract being a mutual and onerous deed, the liferent alimentary provision thereby constituted for behoof of Mr Finlay, in which his wife and children have an interest, must receive effect; and, *separatim*, the moveable fund, which has become available for the purposes of the trust having been a portion of Mrs Finlay's patrimony, the disposal of the interest thereof, during Mr Finlay's life, was an equitable and reasonable provision, in which Mrs Finlay had an interest, and was therefore not revocable and not affected by the sequestration of Mr Finlay's estates. 3. Mr Finlay and the pursuer having failed to aliment and educate the children of the marriage, or to procure the policy or policies of insurance, and fulfil the other obligations in said contract, the defenders are entitled to retain the sums sued for as against them. 4. Mrs Finlay, and the defenders, her marriage-contract trustees, are entitled at common law, as well as under the Conjugal Rights Act, 1861, to the liferent of the legitim fund in question, which is no more than a reasonable provision out of her own patrimony, and of which neither Mr Finlay nor the pursuer have ever obtained possession.

A proof was led before the Lord Ordinary, who afterwards pronounced the following interlocutor:—"Finds that the life interest or provision made in favour of John Finlay by the postnuptial contract of marriage between him and his wife libelled on fell under the sequestration of the estates of the said John Finlay, and is vested in the pursuer as trustee for behoof of the creditors in the said sequestration: Therefore finds, declares, and decerns in terms of the declaratory conclusion of the libel, in so far as regards the whole interests, dividends, or other annual profits or proceeds which have accrued upon the sum of £2600 libelled, from and since 15th December 1851, and also in so far as regards the whole interests, dividends, or other annual profits or proceeds which shall accrue or become due upon the said sum of £2600, so long as the said sequestration shall subsist during the life of the said John Finlay, together with any interest which has or shall become due upon the said interest, dividends, or other annual profits and proceeds: And appoints the cause to be put to the roll, in order that it may be proceeded with in accordance with these findings."

The defenders having reclaimed, the Second Division pronounced the following interlocutor:—"Recall the following words in said interlocutor, 'so long as the said sequestration shall subsist': *Quoad ultra* adhere to the said interlocutor, reserving to the defenders any claim of retention they may be able to instruct over the fund in question in respect of expense incurred in the administration of the trust: Find the pursuer entitled to expenses since the date of the Lord Ordinary's interlocutor, and reserve all other question of expenses."

The defenders appealed.

LORD CHANCELLOR.—My Lords, the first question argued at the bar related to the character and the effect of the provision contained in the postnuptial contract of marriage of the 28th of February 1852, between Mr and Mrs Finlay, so far as regards the life-interest of Mr Finlay. At the time that the postnuptial settlement was executed, Mr Alexander, the father of Mrs Finlay, had died,

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and as one of his children she was entitled to a certain sum under the head of legitim, a sum which was afterwards ascertained to be £2600. The legitim to which she was entitled was in law the property, at the time to which I am referring, of her husband. He might have done anything that he pleased with it. It was as much his money, and disposable by him, as any other sum of money of the same amount which might have been in his possession.

I shall first refer to the trust which was declared in the deed of 1852 concerning this sum, and I shall read the deed as if it related to this sum only, in the first instance. Reading it in that way, the second head of the trust is this—"In trust for the payment of the free yearly proceeds of the sum of £2600 to the said John Finlay during his life for his liferent use allenarly, and after his death, in the event of his being survived by his wife, in trust for the payment to the said Mrs Mary Anne Alexander or Finlay in like manner of the free yearly proceeds of the £2600 during her lifetime, for her liferent use allenarly, and, after the death of the survivors of the said spouses, in trust for the whole children born or to be born of the marriage between the spouses." Then it says further on,—"It is hereby expressly provided and declared that the whole of the foresaid provisions, as well those in favour of the spouses as those in favour of the children of this present marriage, and their interest in the present trust, shall be nowise attachable for debt, but that the same shall be considered alimentary."

A question was raised upon this by the Lord Advocate, which, as I understand it, was of this nature: Whether this condition that the provisions of the trust should be considered alimentary amounted to a stipulation that the liferent use of the husband should be considered alimentary, not merely for his own benefit, but for the benefit of the wife and children. My Lords, I apprehend that no such construction could be put upon the deed. There is a cumulative provision that all the trusts should be considered alimentary, and the meaning of it is that they should be considered alimentary for each of the persons in succession who were to benefit by the trusts. Applying it to the case of the husband, it is a stipulation with regard to his liferent use that that liferent use of his should be in nowise attachable for his debts, but should be considered alimentary for his benefit.

That being the construction of the deed, there arises the question,—Is a stipulation of this kind in a postnuptial contract permissible and valid according to the law of Scotland? According to the law of England it clearly would be invalid, and, as I understand the law of Scotland, it is invalid equally by it. It is an attempt made by an owner of property to place his property in such a position that on the one hand he shall have the benefit of it until he becomes bankrupt, and on the other hand he shall prevent his creditors or his trustee in bankruptcy from taking it for the payment of his debts.

My Lords, I asked whether there was any instance where the owner of property in a contract for valuable consideration was found entitled to make a provision of that kind. I do not desire to express any opinion whether it could or could not be done, but no instance has, as a matter of fact, been adduced at your Lordships' bar where it has been held valid. Even although it may be considered that this postnuptial contract is an onerous contract, and has consideration in it for some of its provisions, yet it appears to me that it cannot be maintained that for this provision made by Mr Finlay with regard to his own property and for his own benefit, there was any consideration whatever moving

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him or influencing him in making that disposition. It was a disposition in trust made and created by him for his own benefit, and which he was not moved to create by any consideration paid to him for so doing. It was therefore a disposition to be viewed in every respect as one of those dispositions not admitted by the Scotch law, where a man withdraws or attempts to withdraw his own property from the reach of his creditors.

I arrive therefore at the conclusion that this is a case in which the proviso against the right of creditors in the liferent provision of the husband cannot be held to operate.

Then, say the appellants, here is a contract containing various provisions,—There is the provision for the liferent of the husband—there are provisions by the husband by which he is bound to give a bond for £1999, payable, that sum, for the purpose of the settlement at the end of ten years, and to insure his life in the meantime, or give heritable security for the purpose of implementing his obligation,—and the husband not having done any of these things it is not right that he should claim the advantage and benefit of the postnuptial contract, and at the same time be a defaulter in the fulfilment of the obligations which it imposes upon him. Now, my Lords, there is no doubt that there is a principle in the Scotch law, as there is a principle in the law of England as administered in the Courts of Equity, that any person who is a party to a complex contract or obligation cannot be permitted to take the benefits of that contract, carry them away, and enjoy them, and at the same time repudiate the obligations placed upon him by the contract. That is a principle depending not upon any technical rule of law, but upon the first principles of equity and of justice.

But let us see how it is proposed to apply that rule to the present case. I turn to the pleas in law for the defenders, and I find the first plea describes very aptly the process of reasoning by which that proposition is sought to be supported. That plea says,—"The postnuptial contract being a mutual and onerous deed, and neither the husband, nor the pursuer as coming in his place, having fulfilled or being ready to fulfil the obligations thereby undertaken by him as the consideration and counterpart of the liferent alimentary provision, the pursuer is not entitled to recover the sums sued for."

Now, my Lords, is it the fact that the obligations undertaken by the spouse in this case, viz., to provide the £1999, and to insure his life, and to give heritable security, were undertaken by him "as the consideration and counterpart of the liferent alimentary provision,"—that is to say, that in order to bribe and induce him to undertake to provide the £1999 he retained for himself and put in trust the liferent provision of his own money? The statement of the proposition in this compendious form shews at once how absurd it is. If the liferent had been given him by some one else, then it might well have been said that that was valuable consideration for the obligations which he undertook. But when your Lordships consider that the truth and substance of the matter is this, that he merely failed to denude himself to the extent of his liferent of that which was his own absolute property, you see at once that there was no consideration whatever moving him as the counterpart of the obligation which he undertook.

Suppose that in place of its being a case where there was a carving out of a life interest, and a disposition by way of trust of the remainder *ultra* the life interest, this legitim fund of £2600 had been divided into two halves, and suppose that the deed had provided that the trustees of this postnuptial contract

should receive the £2600, and then, having the whole in their hands, should pay over to the husband one-half of the whole, and should hold the other half in settlement for the wife and for the children,—in that state of things, could any person contend for a moment that that £1300 of the husband's own money, simply placed in his own hands, where it ought to be, was a consideration paid to him to induce him to enter into the obligation to pay £1999, and to insure his life? And, my Lords, what difference does it make that the division of the interest of the £2600 is not made by way of placing £1300 upon the one side and £1300 on the other, but is made by way of carving out a life interest and disposing of the remainder?

The general principle upon which this argument is founded—a salutary and well recognised principle—has really no application to the present case, and is only attempted to be applied from the circumstance that this deed may perhaps rightly be called an onerous deed as regards some of its provisions. But it does not by any means follow that the consideration of the deed governs the carving out of the life interest which was reserved to the husband. When the matter is considered in its true bearing the trustee in the sequestration is not claiming this money—the life interest of the husband—under the deed, he is claiming it as that interest which no doubt is mentioned in the deed because it was necessary to mention it to shew the succession in which the property was to be enjoyed, but is mentioned in the deed only for that purpose, and is nothing more than a portion of the original absolute *dominium* which the truster, the husband, had over the whole of the property.

That brings me to the question whether the appellants are entitled to something under the Conjugal Rights Act. That Act came into operation in 1861. The bankruptcy in this case occurred in the year 1860. If we were to look to those dates alone, it appears to me that the bankruptcy having occurred before the Conjugal Rights Act, it would almost be impossible, if not altogether impossible, having regard to the mode in which that Act is worded, to apply it to a bankruptcy which had occurred previously, because what it provides is this,—"When a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband, or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife if a claim therefor be made on her behalf." Then there is a proviso,—"Provided always that no claim for such provision shall be competent to the wife if before it be made by her the husband, or his assignee or disponee, shall have obtained complete and lawful possession of the property; or, in the case of a creditor of the husband, where he has, before such claim is made by the wife, attached the property by decree of adjudication or arrestment." And then we have the Scotch Bankruptcy Act,[1] providing that the title of the trustee in the sequestration was to be judged of on the hypothesis that he had obtained possession of the moveable property. I apprehend that if it were necessary to decide the question it would be found that these considerations would make it altogether impossible to apply the Act of 1861 to a bankruptcy which occurred in the year 1860.

[1] 19 and 20 Vict. c. 79, sec. 102.

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But I doubt whether it is necessary to consider that question, because the husband was entitled to the legitim fund during his lifetime *jure mariti*. He might have possessed and spent the whole of it. In place of that, by an arrangement between him and his wife, covering other property, covering the £1999 which I have referred to, which he covenanted to provide, covering all other property which the wife might become entitled to or was entitled to at the time, it was arranged that the husband, according to the view I have already expressed, should retain upon the £2600 a life interest out of his *dominium*, that then that trust fund should be limited in liferent to the wife in remainder, and then the fee of it to the children of the marriage. It appears to me that thereby there was effected by the parties themselves, when they were competent to do so, and when the husband was solvent, an arrangement which operated as a settlement of this £2600, and that thereby out of that sum the wife obtained that amount of provision which she was satisfied to take, having regard to all the provisions of the deed of trust.

It appears to me that it would be impossible to maintain that the Conjugal Rights Act was intended to undo an arrangement of that kind, to make a new settlement of property which had thus been settled once for all, and to give to the wife a greater amount of interest in property of that kind than she obtained in virtue of the settlement. Upon that ground alone, I submit to your Lordships that it would be impossible to apply the Conjugal Rights Act to the present case.

Upon the whole, therefore, I advise your Lordships that the interlocutors appealed from ought to be affirmed, and the appeal dismissed, with costs.

Lord Hatherley.—I entirely agree in the opinion that has been expressed by my noble and learned friend the Lord Chancellor. It is certainly greatly to be regretted that this point could not have been determined once for all when the previous appeal was before your Lordships' House. It seems not to have been decided on that occasion what should be done with reference to the income of the trust fund under this settlement, and there being some little variation between the interlocutor of the Lord Ordinary and the interlocutor of the Judges of the Inner-House as to the question of the right in this income, there appearing to be at all events a possible conflict as to the wording of the interlocutors in that respect, this House, I think upon the suggestion of my noble and learned friend the present Lord Chancellor, inserted a special saving clause in deciding upon the former appeal, which has now left it open to the parties to raise the present contest, namely, an express reservation of all rights as regards the interest of the legitim fund.

Now, as regards the matter in dispute here, namely, the interest of the husband by way of liferent in the sum of £2600, the moment it is distinctly understood how that sum was affected by the deed it appears to me that there must be an end of all controversy, because there is no question of law really in dispute upon the present occasion. It is admitted on all hands that the law of Scotland allows that to be done which cannot be done *modo et forma* in the same way in this country; the law of Scotland allows provision *aliunde* to be made for a man, which shall at the same time vest in him the property, and declare that the provision is alimentary and not attachable by creditors. On the other hand, it is equally clear that by the law of Scotland a man cannot so deal with his own property as to make a provision of that description to the

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detriment and defeating of his creditors. Is this a provision coming *aliunde* as a part of the bargain made between the parties to the deed, or is it simply a portion of his own *dominium* over his own property, which portion he has not alienated, and which therefore remains of the same quality as it was before he proceeded to deal with the property by the deed? My Lords, the House by its former decision has affirmed the validity of the deed as regards the wife and children.[1] But the question as to the husband was left open. However, when you look to what was done by the deed it is impossible, as it appears to me, to contend that the husband has parted with anything more than all the right to the fund which may accrue after his death, for the benefit of the parties who are to take it, subject to his reserving to himself a life interest in it. He parts, in other words, with the reversion; he retains the life interest; and that life interest so retained remains his property, as it appears to me, just in the same manner (as it was put by my noble and learned friend the Lord Chancellor) as if it were half the fund instead of being the life interest in the fund.

The law that a man cannot make an alimentary provision out of his own property for his own benefit effectual against his creditors does not apply to this case, because this is not a fund which can be taken as having been so disposed of by virtue of the deed; in other words, it is his old interest which remains in it. It is that portion so remaining in it which is not touched or affected by the deed. He retains that life interest, and so retaining that life interest it passes to his trustee in the sequestration. That trustee says, —"I do not want anything whatever under the deed. I claim that which the deed has not disposed of, namely, that which remains in my debtor undisposed of, that is to say, the life interest in the fund the whole of which he had originally, but the reversion to which he has parted with by the operation of the deed."

That being so, my Lords, the second question does not arise—that is, the question as to the retaining the fund on the part of the trustee to answer some other obligations under the deed. The trustee under the sequestration is in a position to say, as the owner would have said previous to his bankruptcy—I do not come here to claim anything by virtue of the deed. I come here to claim all that which, notwithstanding the deed, still remains in me, and to which I have an unquestionable right.

Mr Pearson raised an ingenious argument, which is absolutely untenable He said that by the law of Scotland a man may renounce the *jus mariti*, and he may renounce it as against creditors; then having renounced the *jus mariti*, as he does by the anterior part of this deed, any right coming to him through the medium of his wife ceases to be his and becomes the wife's, and becoming the wife's it is settled in such a way as to give him a life interest in it under the deed. That is transparent, and no Court could for a moment be misled by it. It is quite clear that he cannot by that sort of shifting of his cards make that to be not his which is his. If he renounces his *jus mariti* on the one hand, and takes it back immediately on the other by means of a life interest, I apprehend that is not such a settlement of property on his behalf as could possibly be maintained as a settlement made for him by some third party, upon which he could rely as being a protection in consequence of the particular form of the donation, namely, a donation of an alimentary character.

[1] Miller v. Learmonth, &c., May 17, 1870, 42 Scot. Jur. 418.

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As to the third and only remaining point, with reference to the Conjugal Rights Act, it is a sufficient answer to say that that Act was passed in 1861, and that the bankruptcy in this case took place in 1860; because, although the Act may be held to have been retrospective as to a woman married before the Act, yet it would he very difficult to suppose that the Act could have been intended to have such effect as this (no such effect being pointed at by it)—that although a right had actually become vested in the trustee under the sequestration, just as if he had purchased the right for valuable consideration from the liferenter, yet he should be divested of it and a fresh settlement made. But perhaps a still more complete answer is that given by my noble and learned friend the Lord Chancellor, who says that the Act does not contemplate cases where deeds of arrangement have been previously entered into between the husband and wife, but only those cases where, no arrangement having been made, it was thought proper that the wife should not be deprived of all interest in the husband's property without some provision being made for her. But when the parties have themselves made such provision there is no necessity for calling in the Act.

On these grounds, therefore, my Lords, I think the appeal should be dismissed.

Lord O'Hagan.—My Lords, I am of the same opinion. The case appears to me to be tolerably clear in all its branches.

On the first and main question the law is not disputed, and there is no controversy of fact. An eminent Judge (Lord Deas) in Ker's Trustees v. Justice,[1] states the legal principle very lucidly—"No one is entitled to protect his own income against his own onerous obligations and the claims of his lawful creditors." That principle is adopted equally by Scotch and English jurisprudence, and is so based on common sense and justice that it must find acceptance in every rational system of law. But the argument of the Lord Advocate invites us to violate it by holding that the undoubted property of the bankrupt here has been relieved by his own act from the just demands of his creditors. It cannot be so. The words of the deed are unequivocal. The trustees are to hold "in trust for the payment of the free yearly proceeds of the trust estate to the said John Finlay during his life for his liferent use allenarly." It is impossible to deny that the liferent so became his own, his own absolutely; and if so, it could not be enjoyed by him disburthened of the obligation to answer honest demands against him. The subsequent clause on which so much stress has been laid operates so far as it can have legal operation, but no further; and it was erroneously argued that because the deed generally had been sustained, every provision in it must be legally effective.

Applying, therefore, plain principle to plain words, I am of opinion that the Court below was well warranted in refusing to defeat the claims of the creditors, and I think the authorities produced by the Lord Advocate and Mr Pearson sustain the conclusion at which it arrived. In Lewis v. Anstruther[2] the facts bore no resemblance to those with which we have to deal. There, for abundant consideration, a son obtained an annuity charged on his father's property. In

[1] Ker's Trustees v. Justice, Nov. 7, 1866, 5 Macph. 4, 39 Scot. Jur. 11.
[2] Lewis v. Anstruther, June 11, 1852, 14 D. 857, 24 Scot. Jur. 514.

Macdonald v. Macdonald's Trustees,[1] a provision for a wife and children was most properly protected. But in neither of these cases, nor in any other case, has a man been permitted to filch his own income from the hands of his creditors. On the main question, therefore, it seems to me that the decision of the learned Judges was perfectly correct.

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The second question seems to me to be answered by the reply to the first, and on the third I can add nothing of value to the observations already made by my noble and learned friends; and, on the whole, I have no doubt that the appeal should be dismissed.

INTERLOCUTOR appealed from affirmed, and appeal dismissed, with costs.

W. ROBERTSON—WILLIAM OFFICER, S.S.C.—LOCH & MACLAURIN—FERGUSON & JUNNER, W.S.

ROBERT HENDERSON AND OTHERS (Defenders), Appellants.—*Milward, Q.C.—E. C. Clarkson.*
CHARLES HENRY STEVENSON (Pursuer), Respondent.—*Cotton, Q.C.—Thesiger, Q.C.*

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Henderson and Others v. Stevenson.

Ship—Passengers' Luggage—Carrier—Reparation—Contract.—Held (in *aff.* judgment of the Second Division) in a case not falling within the provisions of the Railway and Canal Traffic Act, 1854, that special conditions limiting the common law liability of a carrier were not imported into a contract of carriage by merely printing them on the back of the ticket delivered by the carrier in exchange for the fare, the person receiving the ticket not having actually read the conditions, and not having had his attention directed to them by anything printed on the face of the ticket, or by the carrier himself when issuing it.

Carrier—Ship—Passenger.—A steam packet company plying between England and Ireland printed on the back of its passenger tickets this condition:—"The company incurs no liability whatever in respect of loss, injury, or delay to the passenger or to his or her luggage, whether arising from the act, neglect, or default of the company or their servants, or otherwise."

Question, whether such limitation of the company's common law liability was legal, and whether, if a passenger declined to agree to the condition, they could refuse to carry him.

Opinion (*per* Lord Chelmsford) that the company could discharge themselves of liability for negligence, or even for the wilful misconduct of their servants, by notice, assented to by the passenger, but that the exclusion of such liability could not be established without very clear evidence of the notice having been brought to the knowledge of the passenger, and of his having expressly assented to it.

(IN the Court of Session, 25th November 1873, *ante*, vol. i. p. 215.)

Ld. Chancellor (Cairns). Lord Chelmsford. Ld. Hatherley. Ld. O'Hagan.

This action was brought by Charles Henry Stevenson, Lieutenant in the 18th Royal Irish Regiment, against Robert Henderson and others (the North British Silloth Steam Packet Company), owners of the steamer "Countess of Eglington," which in the summer of 1871 was plying between Dublin and Silloth, to recover damages for the loss of his luggage, owing to the steamer having, on 14th July 1871, while he was a passenger on board of her, been wrecked off the Isle of Man through the fault of the defenders' servants.

[1] Macdonald v. Macdonald's Trustees, July 10, 1863, 1 Macph. 1065, 35 Scot. Jur. 628.

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The defenders denied that the vessel was wrecked through the fault of their servants, and also pleaded that their contract with the pursuer exempted them from liability.

The pursuer had paid his fare at the defenders' office, North Wall, Dublin, and had received from the booking-clerk a ticket, which bore on its face the initials of the defenders' company, and the words "Dublin to Whitehaven." On the back of the ticket there was printed,—"This ticket is issued on the condition that the company incur no liability whatever in respect of loss, injury, or delay to the passenger, or to his (or her) luggage, whether arising from the act, neglect, or default of the company or their servants, or otherwise. It is also issued subject to all the conditions and arrangements published by the company."

The following notice was also inserted in the time bills issued by the defenders, and hung up in their booking office:—"The North British Silloth Steam Packet Company give notice that they carry passengers, passengers' luggage, live stock, and goods on the following conditions only, namely, . . . that the company . . . are not liable for any loss of or damage to passengers, passengers' luggage, live stock, or goods, arising from . . . any act, neglect, or default whatsoever of the company, or their agents or servants, . . . it being an express condition that the passengers, and owners of the passengers' luggage, live stock, and goods, undertake all risks whatsoever."

The pursuer pleaded;—(2) The defenders are, *quoad* the pursuer's luggage, subject to the liabilities of common carriers, and are, as such, liable to make good the loss and damage thereby sustained.

The defenders pleaded;—(3) In the event of its being held that the defenders were under contract, or the liabilities resulting from contract, with the pursuer, they are entitled to absolvitor, in respect of the condition which, as above mentioned, formed part of such contract.

In the course of a proof, the pursuer deponed that he had not read the condition printed on the back of the ticket at the time of taking it, and this was not controverted by the defenders. The defenders further failed to prove that any one on their behalf had drawn the pursuer's attention at the time of booking, either to the conditions on the back of the ticket, or those in their time bills and general notices.

The Lord Ordinary pronounced this interlocutor:—"Finds that it is sufficiently instructed in point of fact that on or about 14th July 1871 the steamship 'Countess of Eglinton' got upon the rocks off Langness Point, near Castletown, in the Isle of Man, and became a total wreck, and that in consequence thereof certain luggage and articles belonging to the pursuer, who was a passenger on said steamer, were lost and injured: Finds that the loss of the said steamer, and the loss of the pursuer's luggage and property, was occasioned by the fault of the defenders, or of those in charge of the said steamer, and for whom the defenders are responsible: Finds in point of law that the defenders are liable to make good to the pursuer the loss and damage which he has sustained by and through the loss of the said steamer and property thereon: Assesses the said damage at £50 sterling: Therefore decerns and ordains the defenders to make payment to the pursuer of the said sum of £50 sterling in full of the damage concluded for: Finds the pursuer entitled to expenses," &c.

The defenders reclaimed, but the Second Division, on 25th November 1873, adhered,—the Lord Justice-Clerk and Lord Benholme holding that there was no evidence of assent on the part of the pursuer to the special contract alleged by the defenders limiting their liability,—Lord Cowan and Lord Neaves holding that such assent must be presumed from ac-

ceptance of the ticket; but the whole Judges concurring in holding tha the wreck of the vessel was due to the negligence of those in charge of her, and that liability for the loss incurred by the pursuer through the non-completion of the voyage owing to the fault of the defenders was not excluded by the terms of the conditions imported or attempted to be imported into the contract between the parties.

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The defenders appealed.

LORD CHANCELLOR.—Two questions have been argued before us on this appeal, the first question being whether the contract between the pursuer and the Steam Packet Company was one incorporating in it certain conditions printed on the back of the ticket which has been referred to, the other being a question which arises only upon the supposition that those conditions were incorporated into the contract, and taking then the form of the question whether those conditions were in themselves legal conditions and what was their proper construction. Upon the second question I do not propose to make any observations, but will confine my attention to the first question, the answer to which appears to me sufficient to dispose of this case.

The pursuer appears to have been an officer of one of Her Majesty's regiments, who desired to travel from Dublin to Whitehaven. The defenders, the present appellants, are the proprietors of a line of steamers carrying passengers and goods between Dublin and Whitehaven. He took a ticket for the voyage from Dublin to Whitehaven, going, as appears from the condescendence and the evidence, into a shed or ticket office on the wharf at the North Wall of Dublin, alongside of which the steamship "Countess of Eglinton" was lying. He paid the fare for the voyage, and obtained the ticket in return. On the face of the ticket which was handed to him there are letters indicating the name of the Steam Packet Company, and the words "Dublin to Whitehaven." If the matter ended there that would clearly be evidence of a contract on the part of the Steam Packet Company to carry the person to whom the ticket was handed, in consideration of the money which he had paid to them, from Dublin to Whitehaven, and to use all reasonable care in the course of their undertaking so to carry him.

On the back of this ticket there were printed these words,—"This ticket is issued on the condition that the company incur no liability whatever in respect of loss, injury, or delay to the passenger, or to his (or her) luggage, whether arising from the act, neglect, or default of the company or their servants, or otherwise. It is also issued subject to all the conditions and arrangements published by the company." There were also hung up in the office a time bill, a list of fares, and a general notice, to which I need not further refer, inasmuch as no evidence whatever was given that Mr Stevenson, the pursuer, saw, read, or indeed had an opportunity of reading them. But the question arises, what was the effect of handing to the pursuer a ticket having the words which I have mentioned upon the face of it, and having those further sentences which I have read upon its back.

With regard to the knowledge of the pursuer of what was printed upon the back of the ticket, we have the pursuer's own evidence, which is not controverted, and upon which he does not appear to have been cross-examined or challenged, that in point of fact he did not read and did not know what was printed upon the back of the ticket. There was nothing upon the face of the

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ticket referring him to the back, and there was nothing said, as appears by the evidence, by the clerk who issued the ticket, directing his attention to what was printed upon the back of the ticket. Your Lordships may take it, therefore, that as a matter of fact the pursuer was not aware of that which was printed upon the back of the ticket. Consequently, so far as any intelligent knowledge of what was there printed is concerned, he cannot be taken intelligibly to have agreed to the terms printed upon the back of the ticket.

The question, therefore, resolves itself simply into this: Is the mere fact of handing a ticket of this kind to an intending passenger, at the time that he pays his fare, sufficient to hold him so affected by everything which is printed upon the back of the ticket that, even without seeing or knowing what is printed on the back, he is to be held to have contracted in the terms indicated upon the back of the ticket?

I asked with some anxiety what was the authority for the proposition that a member of the public was to be supposed to have contracted under these circumstances in that way, and I have listened with great attention to all the authorities that have been cited. A great number of those authorities are cases where there was no question at all arising as to what the nature of the contract was. They were cases in which it was assumed, either by the admission of both sides, or by the pleadings, that terms similar to those which I read in the present case as printed on the back of the ticket formed part of the contract between the parties. Those cases have, therefore, no relation whatever to the present. There were a considerable number of other cases, in which a ticket or paper for the conveyance of animals or of goods had been issued actually signed by the owner of the animals or by the owner of the goods. With regard, again, to these cases, there might, indeed, be a question what was the construction of the contract, or how far the contract was valid. But there could be no question whatever that the contract, such as it was, was assented to and was entered into by the person who received the ticket.

Of all the cases cited the only one which could be said to approach the present case was a case that was tried in the Passage Court of Liverpool, with regard to a ticket issued upon the occasion of an excursion train. And even with regard to that case the observation is obvious, that when it is examined it is not an authority at all to decide the present case. There a ticket had been issued to an excursionist, which had upon the face of it "Ticket as per Bill." Therefore on that part of the ticket, which the excursionist must have seen, he was referred to some bill or other upon the subject of the ticket. It was in evidence, further, by the admission of the excursionist himself, that he had seen and had read in the office a large bill on the subject of the arrangements with regard to the excursion, and that in that large bill he had seen a reference to some smaller bill or bills, but he had not referred to the smaller bills which were so mentioned. In that state of things, although the jury in the Passage Court found, and probably found rightly, that the excursionist was not aware of the contents of the smaller bills, the Court above, having leave to draw inferences of fact, came to the conclusion that under the circumstances which I have mentioned the excursionist must be taken to have submitted himself to all the terms contained in the smaller bill, and to have been content to do that without reading in detail what those terms were.

I express no opinion upon that decision, beyond saying that it does not in any way govern or cover the present case. The present case is a case in which

there was no reference whatever upon the face of the ticket to anything other than that which was written upon the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract complete and self-contained without reference to anything *de hors*. Those who were satisfied to hand to the passenger such a contract, complete upon the face of it, and to receive his money upon its being so handed to him, must be taken, as it seems to me, to have made that contract, and that contract only with the passenger, and the passenger on his part, receiving the ticket in that form, and without knowing of anything beyond, must be taken to have made a contract according to that which was expressed and shewn to him in that way.

It seems to me that it would be extremely dangerous, not merely with regard to contracts of this description, but with regard to all contracts, if it were to be held that a document, complete upon the face of it, can be exhibited as between two contracting parties, and without any knowledge of anything besides, from the mere circumstance that upon the back of that document there is something else printed which has not actually been brought to and has not come to the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him. I am glad to find that there is no authority for such a proposition in any of the cases which have been cited, and I agree entirely with the observation of the Lord Ordinary in the present case, where he says in his note—"It has not been shewn that the pursuer's attention was called either to the bills in the office or to the notice on the back of the ticket, or that the pursuer knew either of the one or of the other. There is no reason to doubt the pursuer's word when he says he never read the conditions on the back of the ticket. Now, it seems fixed that, in a case like this, mere notice, not brought home to and not assented to by the pursuer, is not enough." I apprehend that the words "mere notice" there means not notice to the pursuer, for there was no notice to the pursuer, but that a mere printed notice upon the back of a ticket is not sufficient.

The question in this case does not, as it seems to me, depend upon any technicality of law, or upon any careful examination of decided authorities. It appears to me to be a question simply of common sense. Can it be held that any person—unless he is in default, unless something is said to him referring him to some place where he will find terms applicable to the contract he is entering into—has entered into a contract containing terms which, *de facto*, he does not know, and as to which he has received no notice that he ought to inform himself upon them? It appears to me to be impossible that that can be held. The interlocutor of the Lord Ordinary, affirmed as it was in all respects by the Second Division of the Court of Session, appears to me to have been entirely correct, and I therefore move your Lordships that this appeal be dismissed, with costs.

LORD CHELMSFORD.—The sole question upon this appeal is, whether the appellants are exonerated from all liability to the pursuer in this action by reason of the notice on the back of the ticket delivered to him at the time of paying his passage money. The Lord Ordinary held that there was no proof that the re-

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spondent assented to this notice, and therefore that the appellants were responsible for the loss of his luggage, the vessel in which he was a passenger having been wrecked by the default of the appellants' servants. The Lord Justice-Clerk and Lord Benholme also thought there was no assent to the notice. Lord Cowan and Lord Neaves both thought that the terms and conditions endorsed upon the back of the ticket must be held to have been assented to, and to have formed part of the contract between the parties. But the whole of the Judges of the Second Division of the Court of Session held that the loss sustained by the respondent by the termination of the voyage before the vessel reached her destination, owing to the default of the appellants, was not embraced by the words of the notice.

The Steam Packet Company was established for the carriage and conveyance of passengers, passengers' luggage, live stock, and goods. Their liability by law to a passenger is to carry and convey him with reasonable care and diligence, which implies the absence, on the part of the company, of any carelessness and negligence. Of course, any person may enter into an express contract with them to dispense with this obligation, and to take the whole risk of the voyage on himself. And this contract may be established by a notice excluding liability for the want of care or negligence, or even the wilful misconduct of the company's servants, if assented to by the passenger. But by a mere notice without such assent they can have no right to discharge themselves from performing what is the very essence of their duty, which is to carry safely and securely, unless prevented by unavoidable accidents. I think that such an exclusion of liability for negligence cannot be established without very clear evidence of the notice having been brought to the knowledge of the passenger, and of his having expressly assented to it. The mere delivery of a ticket with the conditions endorsed upon it is very far, in my opinion, from conclusively binding the passenger.

The Lord Chief-Justice, in the case of Young v. the South-Eastern Railway Company (Law Reports, 4 Queen's Bench, 544), which has been referred to, thought himself bound by the authorities to hold that, when a man takes a ticket with conditions printed on it, he must be presumed to know the contents of it, and must be bound by them. I was extremely anxious to be referred to the authorities which influenced the judgment of the Lord Chief-Justice, but although numerous authorities were cited by Mr Milward none of them go the length of establishing that a presumption of assent is sufficient. Assent is a question of evidence, and the assent must be given before the completion of the contract. The company undertake to convey passengers in their vessels for a certain sum. The moment the money for the passage is paid and accepted their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage money, the ticket being only a voucher that the money has been paid. Or, if a ticket is necessary to bind the company, the moment it is delivered the contract is completed, before the passenger has had an opportunity of reading the ticket, much less the endorsement. It may be a question whether, if a passenger were to read the endorsement and decline to agree to the terms, the company could refuse to take him as a passenger. Holding themselves out as undertaking to convey passengers by their vessels, it might be held that they are bound to carry upon the terms of their common law liability alone, unless a special contract be entered into with the passenger. But it is unnecessary to consider this point.

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I have expressed a view of the case which places the right of the respondent to an interlocutor in his favour on a different ground from that which was assumed by the Court of Session; but I agree in the reasons which led them to their conclusion, because I think that a limitation of the legal liability of the Steam Packet Company as carriers ought to be most strictly construed, as well as the assent to it distinctly proved. Therefore I agree with my noble and learned friend that the interlocutors ought to be affirmed, and the appeal dismissed, with costs.

LORD HATHERLEY.—I entirely concur in the opinion of my two noble and learned friends who have preceded me.

There are two questions only in this case. The first is, Has there been in fact any negligence on the part of the defenders? That is a point upon which the Lord Ordinary and the learned Judges of the Second Division of the Court of Session are perfectly clear, and as to which we should have great hesitation in differing from them if there was any doubt upon the subject; but as we can have none upon the evidence before us, it is not necessary for me to pursue the point. I assume, therefore, that the loss sustained by the pursuer was entirely occasioned by the negligence of the defenders.

The other point was as to whether the pursuer had entered into a contract by which he agreed to be his own insurer, so to express it, not only against loss occurring in the course of the passage, but even against any neglect or default on the part of the servants or agents of the defenders with whom he contracted. Now, he entered into a contract as a passenger for the conveyance of himself and his luggage from Dublin to Whitehaven. In the absence of any restriction of his right assented to by him he was entitled to consider himself as assured of that passage in safety from Dublin to Whitehaven, except so far, of course, as an obstacle might have arisen from any absolutely unavoidable accident. The carriers were obliged to use all due precaution and due care and diligence in carrying him and his luggage when once they had completed a contract as common carriers for the purpose of so carrying him. They delivered to him a ticket, he having, in the first place, paid his money for the passage from Dublin to Whitehaven.

I agree with the observation that was made by my noble and learned friend who has just preceded me, that the money having been paid and the ticket having been taken up, a contract was completed upon the ordinary terms of conveyance for himself and his luggage, unless it can be made out that he had entered into any special contract to the contrary. A ticket is in reality in itself nothing more than a receipt for the money which has been paid. Of course, terms may be imposed by the carriers, and parties may agree to such terms in derogation of their rights. Numerous authorities were cited by the counsel for the appellants, but all those authorities, I may say, either shewed (which the majority of them did) an actual signature of the party, binding him somewhat stringently to certain conditions, or they consisted of cases in which the pleading had been that, whether there had been a signature or not, there was an agreement, and that was admitted; and the case turned and was decided upon that admission, which was, of course, as good as if a contract had been signed. Really the only exception among the authorities was that noticed by my noble and learned friend the Lord Chancellor—the case in the Passage Court of Liver-

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pool with regard to an excursion train—and I do not think it necessary to add any further observation upon that case.

In the present case, the Steam Packet Company having received the pursuer's money, and having given him a receipt for that money in the shape of a ticket which bore upon the face of it simply a heading with the initials of the title of the company, and the words "Dublin to Whitehaven," what was Mr Stevenson's position? He was entitled to consider that he had got a good and valid contract from common carriers to carry him upon the ordinary terms from Dublin to Whitehaven. That was his position, unless it can be shewn that he had in some way varied that position by a special contract. Now, it happens in this case, fortunately, that there can be no doubt as to whether he did or did not read or inquire further into those conditions which were on the back of the ticket. He positively swears in one part of his examination to not having read the notice printed on the back of his ticket; and in his cross-examination he is in nowise shaken on that subject. But not only that, your Lordships have one of the defenders themselves called on the other side—namely, Mr Robert Henderson—and this question is put to him in his cross-examination—"Did you give any instructions as to directing passengers' attention to those conditions?" and he says, "Yes, a large notice, embodying the conditions, appears on the bills we issue each month." Then he is asked, "Did you give any instructions to the clerk who issued the tickets on your behalf to direct the attention of passengers to what was printed on the back?" and his answer is "No." So far as to Mr Robert Henderson. Then we have the clerk himself called, Mr Thomas Carmon, and he says in his cross-examination, "I cannot say who bought the cabin ticket for Whitehaven. I was not in the way of drawing the attention of passengers to the condition on the back of the ticket or to the notice." That is clearly an admission of the fact that it was not this clerk's habit to call the attention of passengers to that which the defenders seek to set up as part of the contract. It is an admission that that condition being printed, not on the face of the ticket, but on the back of it, he did not actually see to the passengers' attention being in any way called to it.

Now, we have here a very clear case, plainly set forth in all its circumstances, and it is a very wholesome rule, and one which, I think, should be understood to have been decided and acted upon by this House, that a contract cannot be made in this fashion,—that a contract cannot be made by simply printing on the back of a ticket delivered to a passenger something by which the company may seek for their own selves a better contract than that by which he with whom they engaged conceives himself to have been bound.

Lord O'Hagan.—Two questions have been raised in this case, and have been the subject of decision in the Court below, but in the view which I take of it the ruling of the first will dispense with any consideration of the second. The respondent's loss through the default of the appellants is plain, and now undisputed.

The appellants rely upon a contract relieving them from liability, but the respondent says that he never entered into such a contract, that the terms of it were never, in fact, made known to him, and that his assent to them was neither asked nor given. The question is one of evidence. Did the respondent enter into such a contract? With the majority of the Judges in the Court below, and

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the learned Lords who have preceded me, I am of opinion that he did not; and I have reached that conclusion substantially for the reasons which have been lucidly stated by them, and which it is not needful to repeat at length.

Proof of the respondent's knowledge and assent might have been given in various ways. In certain circumstances, denial of them might not be permissible; in others, a jury or a Court might be satisfied of their existence from antecedent dealings—notoriety of custom, publication of notices, verbal communication, and so forth; but I agree with the Lord Chancellor that the mere receipt of a ticket under such circumstances, and with such an endorsement as we have before us, is not shewn by the authorities cited at the bar to furnish *per se* sufficient evidence of such assent or knowledge. We have positive and uncontradicted testimony that they did not exist; and in declining to discard that testimony on the strength of a false presumption, your Lordships will act in the spirit of the legislation which would have pronounced the contract we are asked to enforce void if the case had come within the statute.[1] Of course, as it does not, we must deal with the facts as we find them; but it is satisfactory that we are enabled to decide in harmony with the policy of Parliament, which has relaxed the stringency of judicial decision in the interest of the public, and limited the power of companies to escape the proper consequences of their own misconduct or neglect.

We were asked by Mr Milward, in the course of his able argument, what more could the appellants have done to furnish notice of the terms on which they proposed to contract? One answer, and there might be many more, was supplied by some of the cases which he cited, and in which the signature of the passenger or consignor demonstrated conclusively his conscious and intelligent assent to the bargain by which it was sought to bind him. When a company desires to impose special and most stringent terms upon its customers in exoneration of its own liability there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted, and that the acceptance of them shall be unequivocally shewn by the signature of the contractor. So the Legislature have pronounced as to cases of canals and railways, scarcely distinguishable in substance and principle from that before us; and if the effect of your Lordships' affirmation of the interlocutor of the Lord Ordinary be to compel some precaution of this kind, it will be manifestly advantageous in promoting the harmonious action of the law and in protecting the ignorant and unwary.

On the second question raised I make no observation. The appeal, in my opinion, should be dismissed, with costs.

INTERLOCUTORS appealed against affirmed, and appeal dismissed, with costs.

GRAHAMES & WARDLAW, Westminster—HOPE & MACKAY, W.S.—THOMAS COOPER, Westminster—MACONOCHIE & HARE, W.S.

[1] Railway and Canal Traffic Act, 1854.

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FRANC NICHOLS STEUART, Appellant (Defender).—*Southgate, Q.C.*—*Balfour.*

MARGARET WILSON OR ROBERTSON AND HUSBAND, Respondents, (Pursuers).—*Karslake, Q.C.*—*Scott*—*Macrae Moir*—*Brand.*

Husband and Wife—Constitution of Marriage—Proof.—A declarator of marriage, with conclusions of count and reckoning, was raised by a woman upwards of three years after the death of her alleged husband against his representatives, founded upon an alleged *de præsenti* exchange of matrimonial consent, said to have taken place six years before the date of the action.

The following facts appeared from the proof:—The alleged husband, Major S, was of ancient family, and the next heir to large entailed estates. He had served with distinction in the army, but had fallen into dissipated habits. The pursuer was the daughter of a fishing-tackle maker in Edinburgh, with whom he had become acquainted from seeing her in her father's shop. After a few months' acquaintance he was taken into her father's house as a boarder. About six months after the Major had gone to live there a supper took place in the house in honour of his birthday, at which, besides the pursuer's family and the Major, the only person present was a young woman, a friend of the pursuer, who had been sent for to dress her hair. After supper, according to the evidence of the pursuer's brother and the hair-dresser, the only surviving witnesses, the following scene took place:—The pursuer's father said to Major S, "You will have to hook it. I am getting a bad name with your staying in my house among my three daughters." Upon which the Major said, "I will shew you what I can do to shut up people's mouths. I am poor now, and cannot marry, but I will marry her in the Scotch fashion," or words to that effect, and thereupon went down on one knee, took a wedding-ring from his pocket, put it on the pursuer's finger, and said, "Maggie, you are my wife before Heaven, so help me, oh God!" They then kissed one another, and the pursuer said, "Oh, Major!" The health of the couple was then drunk. After some time the proceedings were closed by Major S and the pursuer being "bedded" according to an obsolete Scotch fashion.

After the date of the alleged ceremony they cohabited as man and wife in the house of the pursuer's father for some weeks, and for various short periods at different places. There was no direct proof of any previous familiarities. About fourteen months after the alleged marriage the pursuer had a child, of which Major S was admitted to be the father. There was some evidence that Major S had shortly before the alleged ceremony intimated his intention of marrying the pursuer, and that within a few days after that date he had said that he was married to her. It was proved that during the remaining two years and a half of his life he sometimes stated that the pursuer was his wife and sometimes that she was not. On his death-bed, being asked by an intimate friend whether he was married, he replied in the affirmative, and mentioned that he had a son, but he did not say to whom he was married.

Letters written by Major S to the pursuer (extending from the date of the child's birth to within a few months of the Major's death) were uniformly addressed, both outside and inside, to "Miss W," and in none of them, nor in any other letter by Major S, was there any indication that he regarded the pursuer as his wife. No letters from the pursuer to Major S were recovered. So far as it appeared from letters and other writings by her during the Major's life and thereafter she subscribed herself by her maiden name. Not only did she not during the Major's life, on any occasion on which writing could be appealed to in evidence, claim the status of his wife, but on a variety of occasions her conduct indicated that she did not consider herself to be his wife. She registered her child in her own name as illegitimate, the registrar having refused to register it otherwise without the presence of the father, which she failed to obtain, although registration was delayed at her request for this purpose. After the death of Major S she raised an action against his executor, in her maiden name, for aliment for her child, the summons containing an allegation of paternity but not

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of marriage; she subsequently granted receipts for aliment as for an illegitimate child; and two years after the death of Major S. she was married under her maiden name.

Held (*rev.* judgment of Court of Session) that the alleged marriage had not been instructed.

(In the Court of Session Feb. 27, 1874, *ante*, vol. i. p. 532.)

This was an appeal from a judgment of the First Division of the Court of Session, pronounced in conformity with the opinions of a majority of the whole Court, finding that the pursuer, Mrs Robertson, was the lawful wife of Major W. G. D. Steuart, who died on 19th October 1868.

The facts of the case are fully narrated in the report of the judgment of the Court of Session.

Lord Chancellor.—My Lords, in the litigation in Scotland out of which this appeal arises a majority of the learned Judges have determined that a marriage, valid according to Scotch law, was proved by the female respondent, Margaret Wilson, now Robertson, to have taken place between herself and the late Major Steuart.

The late Major Steuart was the eldest son of Sir William Drummond Steuart of Grandtully and Murthly, Baronet, now deceased, and the heir in tail of landed estates of considerable value. The question of the marriage might and would have involved the title to succeed to those estates had a son of the respondent by Major Steuart lived. That son died an infant, and the present litigation, although deeply important as regards the status of the parties, and the view which it presents of the law of marriage, involves a moderate amount of personal property only. The contest as to this is between the respondents and the appellant as the general disponee and executor of Sir William Steuart. The appellant disputes the fact of marriage.

The marriage sought to be established is what is termed an irregular one. It is not founded on habit and repute, or on a promise *subsequente copula*. It is said to have been made *per verba de præsenti*, and the words constituting the marriage are said to have been uttered in a few sentences after a supper on the 13th February 1866, six years before the institution of the present proceedings. There is no written evidence which supports the marriage, but in the parole evidence of what is alleged to have taken place on the 13th February 1866, and in the parole evidence adduced either to corroborate or to throw discredit on what is alleged to have taken place on that night, three hundred pages or more of the print are occupied, and in the hearing of the case in the Courts of Scotland your Lordships were informed that upwards of twenty days of judicial time had been consumed. The argument at your Lordships' bar, which was not longer than the materials required, extended over at least a fourth of that time.

At the time of the alleged marriage the female respondent (whom I will term the pursuer) was about sixteen or seventeen years of age. She was the daughter of George Wilson, a fishing-tackle maker, who had a shop in Waterloo Place, Edinburgh. Major Steuart appears to have been at the same time between thirty and forty. He had served as an officer in the 93d Highlanders throughout the Crimean war and in the Indian mutiny, and had received the Victoria Cross as a reward for his bravery. After returning to Scotland, however, he appears to have led a dissolute and dissipated life. Two women are mentioned

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in the proof, besides the pursuer, with whom he had cohabited, and by each of whom he had an illegitimate child. His habits of drunkenness were such that several witnesses state they seldom saw him sober; and he gave way to this vice in low company, and in a manner attracting attention and outraging decency in public places. By these habits, which appear to have been confirmed before, and to have continued after the alleged marriage, he undermined his constitution, became subject to fits of *delirium tremens*, and died on the 18th October 1868, after passing out of an attack of *delirium tremens*, and apparently in consequence of an injury inflicted on himself during its continuance. I will subsequently examine the relations which appear to have subsisted between Major Steuart and the pursuer prior to the 13th February 1866; but, in the first place, I will direct your Lordships' attention to the evidence of what took place on that night. I will merely premise that it is not averred or proved that before the alleged ceremony of that night any promise or engagement of marriage existed between the parties.

The words constituting the marriage are said to have been spoken in the presence of Mr and Mrs Wilson, both of whom are dead, and of George Wilson, their son, and Mrs Kellet. And it is stated that Major Steuart and the pursuer cohabited from that time forward, and had not had any sexual intercourse previously. I will refer first to the evidence of George Wilson. He is an elder brother of the pursuer. He was himself married at the time, and living in a house or lodgings of his own. On the evening in question he was at the residence of old Wilson, his father, which was a flat in Clyde Street, Edinburgh. There were living there at the time the father and mother of the pursuer, two younger sisters, Georgina and Mary, aged respectively fifteen and fourteen, and a brother Alfred, still younger, a servant named Agnes Forbes, and Major Steuart, who was lodging in the house under circumstances which I shall afterwards mention. The supper began about nine o'clock and finished about ten. George Wilson states that there were plenty of eatables and drinkables, and among the latter champagne; that after supper old Wilson sent the three younger children to bed, Mrs Kellet going out of the room with them; that after the children left the room old Wilson told the Major that he would have to leave his house, because he had been too long in it, and it would not do to stay longer, as the people were making complaints, and his daughters were not to have their names ruined by him staying in the house; that the Major sat quiet for a minute or two, and tears came into his eyes; that he then said, "Wilson, I will shew you what I can do; I am poor now and cannot marry, but I will marry her in the Scotch fashion," or words to that effect; that he then went down on one knee, put his hand into his waistcoat pocket, and took out a wedding ring, which he placed on the third finger of her left hand, and said, "Maggie, you are my wife before Heaven, so help me, oh God;" that the two kissed one another; she said, "Oh Major," and put her arms round his neck; that he then said he wished this to be kept private, that when he got his money he would make it public; he would buy a house out at the Grange till his father died; that everybody then shook hands and drank their health; that he left the party still in the dining-room when he left the house. The same witness, on cross-examination, says he supposes his father first thought there was to be a marriage that night when the Major got up and said "Wilson, I will shew you what I can do."

Mrs Hannah Kellet appears to have been a friend of the Wilsons, and a

confidential companion of the pursuer. She had been married to her present husband just before the day in question. She had been in the habit of going to balls with Mrs Wilson, and being employed at a hairdresser's shop she came on the evening in question to dress the pursuer's hair, and remained for supper. She had gone out of the room to put the younger children to bed, and after a short time she says she was called in, she thinks by Mr Wilson. When she went in, the Major, she says, "was saying that he could not do what he would wish to do at the present time, but he said, 'I will shew you, Wilson, what I will do,' or 'can do.'" Then he filled up the wine glasses, went in front of the wardrobe beside the pursuer, went down on his knee, and took a ring out of his pocket, put it on the third finger of her left hand, and said, "'Maggie, you are my wife before Heaven, so help me great God,' or words to that effect. They then kissed each other. The Major said he wished what we had seen that night to be kept secret until such time as he would be in a position to make it public. Mrs Wilson gave them a blessing, and said she hoped the Major would be kind to Maggie, and she hoped God would bless them. Perhaps these were not her exact words, but they were her meaning." She continues—"I remember the bedding taking place. I assisted at it. I threw a pillow at them. Mrs Wilson threw one first, and then I threw one. I hit the Major on the head with it. After seeing them bedded we all left." On cross-examination, being asked "How long did the ceremony last?" she replied, "So long as the Major spoke, and he spoke a good bittie. I have stated all he said, as far as I can remember."

This is the whole of the direct testimony to the words by which the marriage is said to have been constituted, and I will assume that there is no doubt that if the words were used in fact, seriously, and with the intention of constituting a marriage, they were sufficient for the purpose. The question is, were the words used at all, and were they used in this way, and with this intention? This is a question of fact involving for its determination the credibility, the accuracy, and the intelligence of witnesses. No direct evidence can be adduced to contradict them, for no other persons now living were present. They are, the one the near relative, the other the friend and intimate companion of the pursuer, and both of them deeply interested for their own character and that of the pursuer in maintaining the pursuer's case. They furnish us with one or two sentences spoken at a sitting which continued for an hour or two, and even as to these sentences they only profess to give their effect, and not the precise words. It is necessary, therefore, to try the evidence of these witnesses rigidly by all the tests to which it can legitimately be subjected. They speak of several other facts and occurrences as to which their evidence can be contrasted with undoubted testimony, and it will be necessary so to contrast it. Your Lordships have spread before you the life of Major Steuart and of the pursuer, their sayings, writings, and doings, from the date of the alleged marriage onward, and the sayings, writings, and doings, of those present at the alleged ceremony of marriage, and it will be for your Lordships to consider whether these sayings, writings, and doings can be reconciled with the hypothesis of a marriage having taken place, or having been supposed to have taken place.

It is unnecessary to consider minutely whether all that appears to have been said by Major Steuart subsequent to the alleged marriage can be admitted in evidence, irrespective of the question whether the pursuer was or was not present. It is evident from what fell from members of this House in the case of

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Jolly v. M'Gregor, 3 W. and S. 179, that a very wide range of evidence under this head is open; but in the present case no objection has been taken to any of the evidence to which I have to refer, and your Lordships were told at the bar that it was not desired to exclude any part of that evidence.

I will therefore address myself to the history of the case subsequent to the alleged marriage. Major Steuart continued to live in the Wilsons' house until the 24th of February 1866, when he went to live in St Patrick Square, to conceal himself from his creditors. The pursuer remained at her father's house, although there was no reason on the score of secrecy that she should not have cohabited with Major Steuart if his wife, inasmuch as it is stated she went to see him daily.

It is during this time that the first letter of Major Steuart which we have in evidence, that of the 11th May 1866, was written. It is written to old Wilson, whom the witnesses for the pursuer say the Major was accustomed after the marriage to call "father," or "old boy." It is addressed "My dear sir," and signed "yours truly," and contains no trace of familiarity.

While Major Steuart was in St Patrick Square he had some communications with Mr Rigg, which appear to me to be of considerable importance. Mr Rigg is a priest of the Roman Catholic Church, to which Church Major Steuart belonged. He was an old friend of the Major and of his father, and he was in the habit of seeing Major Steuart frequently in Edinburgh. He says,—"He called upon me pretty frequently, and on many occasions I saw him on the street intoxicated. My house is not far from Clyde Street. He was frequently in an excited state when he came to my house, and I thought more frequently under the influence of liquor than not. I have seen him not under the influence of liquor, but I rather think that was the exception." He continues,—"I remember him going to St Patrick Square to live. I think his object was to be out of the way of creditors. I visited him there several times, and my recollection is that he was not under the influence of drink, at least not in any degree that could be observed. (Q.) Not to the extent you had seen previously? (A.) No, certainly not. (Q.) On that occasion had you somewhat serious conversations with him on the subject of his connection with this woman? (A.) I had. (Q.) What occurred? (A.) I stated that in my former evidence. I told him that there was every probability that a marriage would be proved against him, that he would so commit himself that a Scotch marriage would be proved against him from the way in which he was acting with the girl. He told me that he was quite upon his guard, that the family had made many attempts to get something written from him, but that he was always upon his guard never to give them anything whatever, anything written whatever. He said he had been particularly upon his guard, and that he knew well how easy it was for a man to get entrapped in that way. (Q.) Did you say to him that it was merely by writing that a Scotch marriage might be proved against him? (A.) No. (Q.) Did you understand that he was referring to writing? (A.) Certainly not; he said he would be on his guard, not only in regard of writing, but in regard of anything else that could constitute a Scotch marriage. (Q.) Did he say they would endeavour to entrap him? (A.) He said that they had done so, that they had tried to obtain some writing from him. (Q.) Did he also use the expression that the family had tried to entrap him into a marriage? (A.) I cannot say that he said they had endeavoured to do so by anything else than writing, but he certainly said that they had endeavoured to procure something written from

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him. (Q.) So far as you recollect, did he use the words 'entrap him into a marriage?' (A.) Yes."

From the 12th May to the 3d July 1866 Major Steuart was a prisoner for debt in the Calton Jail. During that time he was, of course, kept in a state of sobriety. Dr Simson, the physician attending at the jail, gives the following evidence:—"I was in the habit of seeing him frequently, but one day I went and expressed my regret at seeing a person of his position there, and I said that if he would give up drinking, and have nothing to do with Miss Wilson, I was authorised to pay all his debts. He asked me how that was, and I said he had no business to know anything about it, but that I would undertake to have them paid, and that he might take my guarantee for it. I shewed him what a respectable man he might be if he gave up his dissipated habits and his connection with Miss Wilson. After reasoning the matter, he admitted the whole of it. (Q.) What did he say? (A.) He said that certainly drink was a very bad thing, but that I was not aware of the pleasure now and then of getting drunk; and as to his connection with Miss Wilson, I said that a man who drank as he did, and got involved as he did, would be sure to be taken in for a marriage. He said, 'Ah, they have tried that often before, but they have never succeeded.' I said, 'But they may succeed.' He said, 'Ah, I will take care of that.' (Q.) Who did he refer to as having tried? (A.) I said the relations would do it, and he said, 'Oh, they have tried that again and again.' (Q.) Did you use the word 'relations'? (A.) I have no doubt I used the word 'relations.' He did not use the word 'relations,' but he said 'they' have tried. (Q.) Whose relations did you refer to? (A.) Miss Wilson's, of course. After he got out of prison I have frequently seen him going about in the streets. He was very different on the street from what he was in prison. He was very often shabbily dressed, and also under the influence of drink. (Q.) Was it quite obvious that he was under the influence of drink? (A.) He was sometimes very bad. (Q.) Was he so bad as to attract the notice of the public? (A.) I was walking one day with a lady when he came up to me, and after he went away she said, 'What blackguard is that you were speaking to?' He was very bad that day, both in dress and appearance. (Q.) Have you seen him very frequently under the influence of liquor? (A.) I would not say very frequently, but frequently. (Q.) During the day? (A.) Yes."

After leaving Calton Jail on the 3d July 1866 Major Steuart would appear to have returned to the house of the Wilsons in Clyde Street. About the middle of September 1866 Major Steuart and old Wilson went to Birnam, close to the residence of Sir William Steuart, for the purpose of fishing. On the 25th of September Mr Wilson sent a telegram to his wife to send some fishing materials, and the next day the pursuer, uninvited, brought them to Birnam. Major Steuart and old Wilson were lodging in Birnam at the house of Mrs Hutton.

Major Steuart introduced the pursuer to Mrs Hutton as Miss Wilson in the presence of her father. I do not go through the details of the twenty-four hours during which the pursuer remained at Birnam, of their ejection from Mrs Hutton's house, of their irruption in the middle of the night into the residence of Sir William Steuart, and of the pursuer's departure the next day by railway to Edinburgh.—[557, *et seq.*] *

* The figures within brackets refer to the pages in the report of the case in the Court of Session, *ante*, vol. i.

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The evidence as to this part of the case leaves no doubt on my mind that neither the pursuer nor Major Steuart supposed or represented that they were husband and wife.

It is at this point of the narrative that the episode as to the portmanteau, founded on in the condescendence [536], and to which some of the Judges have attached more or less weight, comes in. The true version of what occurred as to this portmanteau might have remained in some doubt on the parole evidence, but, fortunately, the letter of Major Steuart to Mrs Wilson [561], the date of which is fixed by the internal evidence to be about the 1st of October 1866, puts the matter beyond controversy, and shews that the story told in the condescendence, and attempted to be supported by some of the evidence of the pursuer, is absolutely without foundation. But I cannot look upon this episode as if it had never been introduced. It was made a part of the pursuer's case, and it is impossible that she can have believed in its truth. It appears to me to have been a reckless attempt to provide facts which might be fitted on to some silly gossip about missing or abstracted documents, which had prevailed at Birnam, and the attempt having failed cannot but suggest a distrust of the manner in which the pursuer's case has been put forward.

The pursuer returned, as I said, to Edinburgh, and Major Steuart continued to reside at Birnam until the beginning of the year 1867. During this time no letters from him to the pursuer are produced, but there are several letters from him to Mrs Wilson, the mother. In none of them does he address her otherwise than as Mrs Wilson, nor in any of them is there any trace whatever of any connection by marriage with her daughter.

During the residence of Major Steuart at Birnam a remarkable incident in the history of the pursuer occurred. Alexander Laing and his wife, neighbours of the Wilsons, were proceeded against in the Police Court of Edinburgh by the pursuer, styling herself Margaret Wilson, on the ground that they had behaved to her in a disorderly manner and had used opprobrious epithets. The evidence of the pursuer states that the epithets used were words suggesting that the pursuer was the kept mistress of Major Steuart. This complaint was met by a cross complaint from Mrs Laing against Jane Wilson (who is stated to have been a sister of the pursuer) for throwing earth upon her out of one of the windows, and committing a breach of the public peace. These two complaints were heard on the same day. Jane Wilson was fined £1 sterling, and the complaint against Mrs Laing was dismissed. What, however, is important is, that the witness Torry states that while he was defending the case for Mrs Laing, the pursuer on her oath admitted that she cohabited with Major Steuart in the house, and being asked whether she was married to him said she was not.—[561-2] The witness Alexander indeed states that when Torry put this question the pursuer replied she was lawfully or legally married to Major Stewart [563], and Agnes Forbes, the Wilsons' servant, says that she was in Court and heard her say she was legally married to Major Steuart. Agnes Forbes, however, says she was not in Court when the pursuer's case came on, and that it was in Jane's case she heard the pursuer say she was legally married, and that her statement that she was legally married to Major Steuart was not made in answer to any question put to her by any one in the case, but in reply to a remark which was made by a man there.—[563]

Mr and Mrs Laing, on the other hand, state distinctly the details of the examination, and corroborate Torry's evidence, and so does the witness Hunter

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[562-3], and it is indeed obvious that that evidence must be correct, for if the pursuer had stated that she was legally married to Major Steuart she would at once have been met by her own complaint, which was taken out in her name as spinster.

I cannot but attach great importance to this incident. It was an occasion on which the pursuer would at once have established her case and cleared her character by shewing that she was Major Steuart's wife. She evidently desired to support her case by denying cohabitation, and it was only when she found that Torry was in possession of evidence as to that cohabitation that she abandoned that ground and did not replace it by the assertion of the marriage.

Major Steuart appears to have been in Edinburgh from the beginning of 1867 until the 22d of March of that year, when he returned to Birnam.

The evidence of Dr Dunsmure is material at this point. Major Steuart consulted him frequently, and always in connection with the effects of drinking. He was summoned to him at Clyde Street on the 17th of February 1867. He told him he had sent for him to examine Miss Wilson to know whether she was in the family way. "He called her Maggie Wilson. I told him she would not allow me to examine her, and that I could not do it without her permission. He said, 'Oh, but I will insist on it.' I made an examination and satisfied myself that she was pregnant. Major Steuart asked me to attend her during her confinement. Before I gave him any answer I asked him whether he was married to her. He said, 'No, certainly not; that he would be very sorry,' or words to that effect. This took place in the house in Clyde Street on 17th February 1867. (Q.) Did he say anything else indicating the nature of his relationship with her? (A.) When he had told me what he had sent for me for he said, laughing, 'A man must have a companion,' or something of that kind. When he told me they were not married I refused to attend at her confinement, and I did not do so. If he had said they were married it is possible I might have attended her, but I did not care about doing so. (Q.) When you went to the house did anything strike you about the appearance of it and its inmates? (A.) I did not like the appearance of it; it was such a house as I was not accustomed to go to, and I did not like it. (Q.) What struck you about its inmates? (A.) I did not like the appearance of the people or of the house. (Q.) What do you mean? (A.) It is difficult to say. I did not like its appearance. (Q.) Did they look respectable, or the opposite? (A.) I did not know where I was going to at first, but when I got there my impression was that I had got into an improper house. (Q.) Was that from the appearance of the house and the inmates? (A.) That was my impression. (Q.) Did you see girls going about? (A.) I did not see them going about; I saw them in another room, and I did not like their appearance. (Q.) Were they loose looking? (A.) Well, I thought so." We are told that Dr Dunsmure was lately President of the College of Physicians in Edinburgh. His evidence, which is beyond criticism, is of importance as shewing that on an occasion of great interest, and apparently in the presence of the pursuer, the idea of marriage was repudiated, even where doing so deprived the parties of the professional service which they desired.

In connection with this part of the case I turn to the evidence of Dr Balfour, who was the physician that did attend the pursuer in her confinement. He had been in the habit of attending the Wilson family professionally, and he visited the pursuer on the 2d of April 1867, when her child was born, and for some days subsequently. The name entered in his book is simply "Wilson, 27 Clyde

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Street." He says if he had supposed she was a married woman he would have put her married name. He was engaged to attend her about a month before the birth, and he remembers quite distinctly that Mrs Wilson said to him the Major intended to marry her. He does not remember whether the pursuer was present when she said so or not. She was present during part of the conversation, but he does not know whether she was present at that particular time.—[564]

Major Steuart was at Birnam when the child was born. He had gone there on the 22d of March, and remained there till the 30th of June. On the 3d of April old Wilson wrote him a letter in these words:—"Major Steuart.—Dear Sir,—I drope you those few lines to let know that our Maggie has been very bad, and brought forth a son—a stout healthy child, on Tuesday night, about 12 o'clock p.m. Hoping you are well, I remain, your humble servt., GEORGE WILSON.—In haste, Wednesday, April 3, 67." The letter of Major Steuart, which has the Dunkeld post-mark of the 8th April, appears from its internal evidence to have been written on the 7th, and to be an answer to the letter of old Wilson.—[564] Both these letters appear to me to be absolutely irreconcileable with the idea that either Major Steuart or old Wilson supposed that the pursuer had been married, or that the child was legitimate. Major Steuart continued at Birnam, as I have said, till the 30th of June, and during that interval, on the 28th April, Mrs Wilson, the mother of the pursuer, died. There are two letters written by Major Steuart from Birnam to Mrs Wilson before her death, and three to old Wilson, and all of them open to the remarks which I have already made on the letter before adverted to.

How was this child registered? As the illegitimate child of the pursuer. She attended the registrar herself, and signed the entry stating it to be illegitimate, and giving its surname as Wilson. The registrar states in his evidence that she wanted it to take the father's surname; that he explained to her it could not be so registered unless the father acknowledged the paternity and signed the books in company with the mother. She then wanted to have it delayed to see if she could get the father to accompany her. He delayed for some days, when she came back without the father and signed the books.—[565-6] It is clear, looking at the Act of Parliament[1] on the subject, and at this evidence, that there was no allegation or suggestion of marriage. If there had been the child would have been entered as a legitimate child of the marriage. The question was as to its paternity without reference to marriage, and I cannot look on the evidence of Collett as throwing any serious doubt on the statement of the registrar.

It is to this part of the history that eight of the letters addressed by Major Steuart to the pursuer appear to belong. There is considerable ground for doubting whether all the letters to the pursuer from Major Steuart which were in her possession at his death have been produced. Mr Galletly states that she handed to him to read, and he returned to her, from thirty to fifty such letters [583]; only fourteen are now produced, and in the eight written before the 30th June 1867 there is not a word which would suggest the relationship between the parties. In every one of them he addresses her as "My dear Miss Wilson," and there is not a reference in any one of them to the child. Some suggestion was made that Major Steuart desired to avoid committing himself in writing to anything which would be evidence of a marriage. It is not likely such a course would have been submitted to by the pursuer without remonstrance, and the

[1] 17 and 18 Vict. c. 80.

suggestion is entirely at variance with the character attributed to Major Steuart by the pursuer and her witnesses, nor would it account for the style of old Wilson's letter, which is as inconsistent with marriage as those of Major Steuart.

On the 17th of June 1867 the pursuer paid Major Steuart a visit at Birnam. She came at twelve o'clock in the day and left at six in the evening. Mrs Hutton, in whose house he was lodging, says she announced her as Miss Wilson; that she remained in the sitting-room all the time; that the Major went into his bed-room, rang the bell, and desired her to ask Miss Wilson if she would take a cup of tea. She left by the train, and the Major did not go to the train with her.

About the 1st of July 1867 Major Steuart went to Edinburgh and lived with the Wilsons in a flat in Leith Street Terrace, to which they had removed, and he remained there till some time in August of the same year. It was during this period that a circumstance took place to which I attach considerable importance. Mr Rigg tells us that some messages came to his house asking him to go to Leith Street Terrace, and he refers to a letter which he wrote at the time to Mr Condie, giving an account of the circumstance, which is in these words,—"St Mary's Catholic Church, Edinburgh, Thursday evening.—Dear Mr Condie,—I am sorry to say that poor Major Steuart is again making a sad hand of himself here. On Tuesday three several messages were brought requesting me to go to see him at Wilson's, 5 Leith Street Terrace. Of the first two I took no notice, but by the third messenger I sent a note asking what the Major wanted, and telling him that he knew my dislike to visit him in such lodgings. To this he returned no answer. In the evening, however, I met him in Register Street very very drunk, and looking as if he had come down a chimney. His appearance was truly deplorable, and I could not help saying, 'could nothing be done to rescue the miserable man from such a state of degradation.' He made some incoherent remarks about marrying the girl Wilson, which made me suspect that she and her friends had wished me to go to the Terrace regarding some affair of that kind, but he was so bad that I could really make no sense out of anything he said."

Simpson, who was employed in the shop of old Wilson, speaks of the same occurrence; and though he fixes the date in June 1867 that must be a mistake for July, because in June Major Steuart was at Birnam.—[568] He says,—"I remember George Wilson coming to my house in Farquharson Place, Preston Street, just at the back of seven o'clock in a summer morning. I was just out of bed. I had not got breakfast, and I told him so. He said, 'Never mind, come away, you will have a breakfast in our house.' (Q.) Did he tell you what he wanted? (A.) He said, 'The Major is going to marry Maggie.' He told me that in the lobby. He wanted me to come away directly. I went with him. (Q.) Was he in a very excited state? (A.) No, I cannot say that he was. (Q.) Did he seem anxious that you should come at once? (A.) Yes, he wished me to come at once. (Q.) Did he shew great interest in what he wanted? (A.) Apparently he did. (Q.) When you got to the house did he tell you that the Major was going to marry Maggie? (A.) Yes, and he asked me to go to a place at St Mary's Chapel for the Rev. Mr Rigg. He said, 'Go down and tell Mr Rigg to come up, that the Major wished to see him very particularly.' I went for Mr Rigg before I got breakfast. I went at half-past seven o'clock in the morning. I did not see Mr Rigg at that time. I then went back to Wilson's

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and got breakfast. He then told me to go down again for Mr Rigg. I saw Mr Rigg that time. I also saw him on a third occasion. I went down three times that day. I gave him the message that Major Steuart wished to see him very particularly. The third time I went was just before dinner, some time before one o'clock, I think. The second time Mr Rigg said he would be up shortly. (Q.) Are you sure of that? (A.) I am almost sure of it. The first time, as far as I recollect, he said he would be up in a short time. (Q.) Did you see him at all the first time? (A.) No; I saw him the second time; and the third time he said he would be up immediately. I had no communication with anybody except George about that. I had none with the Major."

Mrs Hutton tells us of a conversation she had with the pursuer in February 1868, to this effect:—"I said to Miss Wilson, 'Are Major Steuart and you married, Miss Wilson?' She said, 'No.' I then said, 'It is a wonder you never tried to get Major Steuart when he had got whisky.' She said that he would never write when he had got drink, but that the priest had been sent for once to come to the house to get them married, but that it did not take place." Now, my Lords, I ask for what purpose was Mr Rigg on this occasion sent for? It could not have been to celebrate a public marriage, for no preparations had been made or steps taken for a public marriage. It could not be to superadd a religious ceremony to a marriage already validly contracted, for the Wilsons were Presbyterians, and Mr Rigg a priest of the Roman Catholic Church. It must have been in order to make an irregular and clandestine marriage between the pursuer and Major Steuart, which, if her evidence is to be believed, had been already accomplished in a manner satisfactory to all the family.

The baptism of the child occurs next in order of date. It was baptised by Mr Rigg, and the certificate of baptism, dated the 4th August 1867, describes it as the illegitimate son of Margaret Wilson. Neither father nor mother were present at the baptism. There were present Mary Wilson, now Mary Wyke, the sister of the pursuer, who is not produced as a witness; Margaret Clarkson, who was employed in old Wilson's shop; and a young man, a billiard-marker—the two latter being sponsors for the child. What makes this more important is a conversation which Mr Rigg states had previously taken place between him and Major Steuart. Major Steuart, he says, told him the girl Wilson had had a child that he believed was his. "Afterwards he asked me to baptise it. I said to him we had a decided objection to baptising illegitimate children when the improper connection was continued between the parties. I also said we considered baptism as essential, and were most unwilling to allow a child to die without baptism, therefore I would baptise the child; but he must understand it was simply for the child's sake, and not for the sake of the father or mother." —[568] It was after this intimation from Mr Rigg that Major Steuart and the pursuer sent the child to be baptised in the manner I have mentioned.

Major Steuart appears to have continued with the Wilsons till some time in August 1867, when he went again to Birnam, and remained there till about the 1st October. He lodged on this occasion with Mrs Maclagan. Some Highland games took place at Birnam in the last week in August, and during this week the pursuer came to Birnam and remained for four days, lodging at the house of William Harris. The character in which she was received by Harris I prefer to take from the account rendered by him to Major Steuart rather than from his own evidence, to which, after reading his cross-examination, I am unable to give much weight. The account charges for apartments for Miss Wilson for four

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days and attendance, and Harris states that this account was made out with the name of Miss Wilson by her own desire, as it was to be rendered to Mr Melville Jameson, and the marriage was not to be made public before the Major had a home to take her to.—[569-570] But Mr Melville Jameson was the Major's own confidential adviser, as the pursuer very well knew, and whatever reasons she may have assigned to Mr Harris, it appears much more probable that the account, if rendered in any name but that of Miss Wilson, would not have been received or paid by Mr Jameson.

I may now refer to two witnesses whose evidence in connection with the residence of Major Steuart at Birnam appears to me most deserving of attention. One is Dr Culbard, a doctor of medicine practising at Birnam. Dr Culbard says,—" While he stayed at Birnam I saw him very frequently. I should think he never was in Birnam without my seeing him. I saw him very frequently, both professionally and otherwise. He used to come to my house frequently. His habits gradually got more and more dissipated. I remember his living in the house of James Hutton. I have known the Huttons all the time I have been in Dunkeld. They are respectable people. I visited him in that house frequently. It was the only house in which I visited him as his lodgings. I have frequently seen him very much the worse of drink, and that for a length of time—for days. I have seen him in that state both in the house and going about the streets. I remember seeing Miss Wilson, but I cannot mention the date when I first saw her. (Q.) Was it within a couple of years of his death? (A.) It was not so long previous to his death, but I cannot give the date. I have seen Major Steuart and her going about Birnam, but not frequently. I have frequently heard people in Birnam speak of them. She was spoken of as Miss Wilson by the people in Birnam. I never heard her called anything else. I have seen her going about with him when he was the worse of drink ; but I have not seen that repeatedly. I heard it reported that there was a marriage between them. (Q.) Was it after that that you spoke to him on the subject? (A.) I cannot condescend on whether it was before or after. (Q.) Where was it that you spoke to him first of Miss Wilson? (A.) I spoke to him in his own lodgings, and also in my house. It was a subject of frequent conversation. As stated in my former evidence, Major Steuart introduced me to her in her lodgings. She occupied separate lodgings from Major Steuart, in Harris the coachbuilders. It was late in the evening when I was introduced to her. I received a message to call on the Major, and went to his own rooms, but found that he was out. I remained there for some time, and then Mrs Hutton sent to Harris' lodgings to say that I had called. I then went to Miss Wilson's lodgings, and he introduced me to her as Miss Wilson. I had previously spoken to him about her frequently. (Q.) What had you said to him? (A.) I frequently urged on him the propriety of marrying the girl—that was the substance of our conversation. (Q.) Did you say why? (A.) Because, having had possession of the woman, I thought he ought to do what was right and proper by her. (Q.) What did he say in reply? (A.) He said, ' No, that he was not married to her, and that he never would be married to her.' On the occasion when he introduced me to her by the name of Miss Wilson I said, ' Miss how much?' He turned with a very significant look and shrug of his shoulders, and answered, ' Miss Wilson.' Then the conversation got general, and continued general during the few hours that I remained with him that evening. (Q.) Did he say that quite distinctly? (A.) Quite distinctly—markedly. She must have heard it.

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(Q.) Did it strike you that Major Steuart treated her as his wife that evening? (A.) Most certainly not. (Q.) Was his conduct to her at all such as you would have expected from a husband towards his wife? (A.) I would have hardly expected such conversation and conduct before a wife. (Q.) Did that strike you at the time? (A.) Very much so. (Q.) What was the view you took of the relation between them from the way in which he acted towards her? (A.) That she was simply his mistress. When I left that evening the Major and I walked about on the road for a considerable time, and he then asked me to go into his rooms at Hutton's. He did not stay with Miss Wilson that night. (Q.) Was it about the time of the Birnam games, in 1867 or in 1868, that this conversation took place? (A.) I am sorry I cannot condescend upon dates, I saw him so frequently. (Q.) When you went into his lodgings what took place? (A.) Previous to entering the room Major Steuart seemed as if he had quite enough of drink, and immediately on our entering he turned and locked the door, and said to me, 'What did you mean by putting the question so directly?' I understood that he referred to the question I had put, 'Miss how much?' I said that I wished to test him. He got rather angry, and said, 'Did I not believe him; did I not believe the previous conversations we had had; had I ever found him out telling me a falsehood; and was that the reason why I should put the question so pointedly to him? (Q.) Did he say that angrily? (A.) Yes, but apparently perfectly soberly. (Q.) Seriously? (A.) Yes; he seemed to think that I had not trusted him. Nothing further was said about it, and I sat and smoked a little with him. It was early in the morning that this conversation took place. (Q.) In any of the conversations you had with him about Miss Wilson did he ever say in so many words that he was not married to her? (A.) Distinctly, and that he never would be. He appeared perfectly sincere when he said so. I have had such conversations with him both when he was sober and otherwise. (Q.) Have you ever spoken to Sir William Steuart about his son living in the way he was with this woman? (A.) Not with reference to this woman, but it was my endeavour frequently to reconcile father and son. At first this woman was not referred to in our conversation. (Q.) Did Sir William know quite well of the connection with Miss Wilson? (A.) Distinctly. (Q.) Did he ever express to you a wish that his son would marry? (A.) Yes; he said there might be a prospect of his settling down if he got married. (Q.) What did he say as to the person that he should marry? (A.) Latterly he was indifferent. I mentioned to the Major the conversation which I so had with Sir William. I told him that his father would be pleased if he would marry, whoever he might marry. The Major said he would choose for himself, and take his own time to marry. I have spoken to him about this boy; he owned the paternity, and was proud and very fond of him."

John B. Pople is the owner of the principal hotel at Birnam. His evidence is this,—"I knew the late Major Steuart, Sir William Drummond Steuart's son. He called at my hotel occasionally, and I had frequent conversations with him. I have heard him speak of a Miss Wilson. I never heard him speak of her as Mrs Steuart. He always called her Miss Wilson. (Q.) On the last occasion he was at Birnam, about the end of 1867, did he make any remark to you about the Wilsons thinking to get hold of him? (A.) Yes; he stated to me that he had no doubt they were desirous of getting hold of him, but that he was not married to Miss Wilson, neither did he intend ever to get married. I know that they lived in separate lodgings in Birnam. I have seen them walking together.

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I never on any occasion heard Major Steuart speak of Miss Wilson as his wife."

I will now pass rapidly over some months of Major Steuart's life. He sold his commission in the army in September 1867, and out of the proceeds paid old Wilson £150 on account of his claims against him for board and lodging, and articles supplied in his trade. He then made an excursion to Paris, accompanied by the pursuer, the child, old Wilson, and the sister Georgina. He returned to Edinburgh in November, and about the 24th of December Major Steuart went alone to Birnam. For some weeks previous he had not been with the Wilsons, and no one appears to have known where he was. He came up from Birnam about the 1st January 1868 to the Wilsons, remained there till the 7th February 1868, and then went back to Birnam, accompanied by the pursuer and the child.

There is the evidence of Dr Middleton, applicable to January 1868, which I ought not to pass over. Dr Middleton was acquainted with the Wilsons for more than twenty years, and had been old Wilson's medical attendant. He was attending old Wilson in January 1868, and was then asked to prescribe for Major Steuart, who was in bed suffering from bronchitis. He says—"It appeared to me there were none but young females about him, and I thought they were not proper persons to attend him. I therefore asked the Major who was to attend him, to make the poultice and put it on. He turned and said, 'Mrs Steuart.' I said, Who is that, Mr Steuart? He said, 'Maggie.' She was standing beside him at the time. That was the first time I knew about a marriage."—[575] Now, what makes this evidence remarkable is, that Dr Middleton states also that he was asked to visit Major Steuart's child, and did so on December 9th, 10th, 12th, and 14th, 1867. He knew the family, and knew the mother of the child. He knew it was called Major Steuart's child, and yet, although intimate with and attending upon the family, he never was told or knew anything about a marriage before January 1868.

When Major Steuart arrived at Birnam, on 7th February 1868, Mrs Hutton says—"When he came he was very much the worse of drink. He brought Miss Wilson into the house. I gave them dinner in the dining-room. They did not stay long in the house after dinner. Miss Wilson went to Mr Harris's for lodgings. I thought she wished to stay at my house, and I went to Major Steuart and asked him if they were married; if they were, I was quite willing to give them a room in my house. He said they were not married; that I might please myself about giving her a room, but that he did not ask me to do it. She then went to the Harris's." On this occasion also the pursuer is described in Harris's account as "Miss Wilson." On the 20th February 1868, Major Steuart left Birnam and Scotland, and never saw the pursuer again. He left without telling the pursuer, or taking leave of her.

I may now refer to the correspondence between the pursuer and Mr Melville Jameson, the agent of Major Steuart. One of the letters is in October 1867, acknowledging £10 sent to her on account of Major Steuart, and signed "Margaret Wilson." Besides this, there are twenty-seven letters passing between Mr Jameson and the pursuer from the 27th February till the 19th October 1868, when Major Steuart died. All these letters address the pursuer, and are written by her, as "Miss Wilson," and "Margaret Wilson." They concern her relations with Major Steuart and her claims upon him, but they nowhere suggest that those relations or claims are in any way founded on or derived from marriage.

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Major Steuart died, as I have said, on the 18th October, and I shall have presently to refer to some of the evidence connected with his death, but I proceed to complete the written and undisputed evidence. Among the undisputed facts, I take to be an interview which the pursuer had a week or ten days after Major Steuart's death with Mr Robert Steuart, a cousin of his father's. This interview is spoken to by Mr Robert Steuart and by his housekeeper; but it is also spoken to by Georgina Wilson, the pursuer's sister, after the evidence of Mr Robert Steuart had been taken in the action of declarator.—[582-3] I think it clear from this evidence that the pursuer announced herself as Miss Wilson, a friend of Major Steuart's. She wished Mr Robert Steuart to induce Sir William to make some provision for her child in bringing it up, and I think it clear upon the evidence that she stated she was sorry to say there was no marriage between her and the Major; and even if the exact expression was, as Georgina represents, "she was sorry she had no documents to shew there was a marriage," it was the same idea that these words were meant to convey. Both Mr Steuart and Georgina agree that the pursuer said that if the Major had lived it would have been all right, which again tallies with the evidence of Christina Kay, that in a letter to Mr Steuart from the pursuer, written about the same time, she said she would swear that had Major Steuart lived he intended to make her his wife.

On the 18th December 1868, in reply to a letter written on behalf of the representatives of Major Steuart, inquiring whether he had any property which belonged to Major Steuart, old Wilson stated that he had nothing, Major Steuart having taken all his property with him at various times when going to the North. He added these remarkable words—"He got away several articles which belonged to me, also some books and two pictures, one of his son's and one of my daughter's, the child's mother, which was a New Year's present." Can this letter have been written by a witness at a ceremony which he believed to have constituted the pursuer the wife of Major Steuart? Old Wilson died on the 11th July 1869. His testamentary disposition, dated the 1st March 1869, takes notice of all his children. The daughter, Mary, who was married at the time, he styles—"Mary Wilson or Wyke, wife of Frederick Wyke, presently residing in Liverpool;" but the pursuer he styles throughout "Margaret Wilson," as if she were unmarried.—[584]

We come next to a multiplepoinding raised for distribution of the succession of Major Steuart, in which a claim was lodged by Robert Denholm as testamentary trustee of old Wilson. Denholm claimed for goods sold to Major Steuart, for moneys lent, and for board and lodging. The seventh article of the condescendence lodged by Denholm states as follows:—"While boarding in Mr Wilson's house Major Steuart became very intimate with his said eldest daughter, Margaret Wilson. The claimant believes and avers she had a son to him, who is still alive, and is now about three years of age. Major Steuart and Margaret Wilson were in the habit of sometimes travelling about and living together. During his residence in Mr Wilson's house Major Steuart was extremely irregular and drunken in his habits, so much so that frequent efforts were made to get him to leave the house, but without avail, tillfinally an exposure of his conduct was threatened, when he left." As to this statement, Denholm depones that the claim was made on information given him by Wilson before his death, except perhaps as regards the insertion of the word "extremely." Copies of this record were communicated to pursuer and the

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other members of the family, and no objection appears to have been taken to them.

In June 1870 the pursuer was imprisoned on a decree obtained against her by Mackay, a jeweller, for articles supplied to her after Major Steuart's death. She was proceeded against by the name of "Miss Maggie Wilson," and in that name she presented a petition for aliment under the Act of Grace, signing it as "Maggie Wilson," and on making oath that she had no means to pay her debts she was released.—[585]

In the same month of June 1870 the pursuer raised a summons of aliment in her unmarried name as Margaret Wilson against Sir William Steuart, as executor of Major Steuart, of inlying expenses and aliment in respect of her child. The claim in the condescendence in that action is made upon the footing, not of marriage, but of illicit connection, and a decree upon that footing was made by the Lord Ordinary, and a receipt signed by the pursuer in her name as Margaret Wilson for the sum awarded to her. The subsequent receipts for aliment are signed by her quarterly in the same name.—[585]

In the same month of June 1870 Sir William Steuart raised an action of declarator and putting to silence against the female pursuer and her child, in which she did not appear. Evidence was adduced in that action, and a declarator against the marriage was made, which in the present action is sought to be reduced.—[534]

I have only further, on this part of the case, to refer to the marriage of the pursuer with her husband, Lieutenant Robertson. This took place on the 12th March 1871. She avers in her condescendence that before her marriage she fully acquainted him with the whole state of matters between herself and the deceased Major Steuart. The certificate of her marriage is in evidence signed by herself. She is married as "Margaret Wilson," aged twenty-two years, spinster.

I have now, my Lords, gone through the evidence in the case founded on written documents, on facts and conduct as to which there is no dispute, and on the evidence of witnesses whose credibility and accuracy cannot be questioned. It is scarcely possible to conceive a stronger body of negative testimony against a marriage. Nothing, in my opinion, could countervail such a body of testimony except the clearest affirmative evidence, consistent with the probabilities of the case, and coming from witnesses impartial and unprejudiced on the score of interest and sympathy, shewing that they spoke with accurate recollection, and consistent in their narrative of the facts to which they depose. I return to the evidence by which the alleged marriage is attempted to be established, in order to see whether it complies with all or any of these conditions.

Before, however, making some observations upon that evidence, I ought to remind your Lordships of what we are told as to the relative position and as to the character of the two persons principally concerned. Of the character of Major Steuart I have already spoken. His conduct in a moral point of view entitled him to nothing beyond a very low place in the social scale; but as the heir of an old family, and the future possessor of large estates, his worldly position was greatly above that of the pursuer. He appears to have been at least double her age, and although he appears to have admired her, there is little if any trace on either side of any romantic attachment between them. Of the character of the pursuer I do not desire to say more than that, looking to the evidence before us, the life which she appears to have led, the atmosphere in which she lived, the scenes which she witnessed, the language which she heard,

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and in which, unfortunately, she sometimes seems to have joined, cannot be supposed to have been otherwise than unfavourable to the development and cultivation of moral principle and conduct. The acquaintanceship between her and Major Steuart, looking to their relative age and position, their character, and the temptations which were certain to accompany it, was one from which her parents might well have been expected rather to have withdrawn her than to have encouraged her in it; but they appear to have promoted the acquaintanceship by every means in their power. The evidence of the brother and sister of the pursuer, though given with a manifest desire to tone down the facts as to this part of the case, sufficiently shews that Major Steuart was permitted by the parents of the pursuer to take away the pursuer for hours at a time, sometimes on foot, sometimes in carriages, when and where he pleased. The narrative of an excursion to Murthly by Major Steuart, the pursuer, and her father, in December 1865, when they arrived at Perth at midnight, drove on through the night to Murthly, got into the house of Gold, the land steward, at three o'clock in the morning, the men being under the influence of drink, and continuing to drink whisky there, and ending by breaking open the door of Murthly Castle, is a narrative which cannot be read, especially in connection with the conversation which took place, without astonishment and pain.—[543-4] When to this your Lordships add that old Wilson, knowing the character of Major Steuart, and that he was ejected by reason of his conduct from the hotel in Edinburgh where he had been living, received him without remonstrance, and certainly without any reason or arrangement which could justify so unusual a course, into the small floor of rooms where Major Steuart and the pursuer might at any time, and must have been, left together alone, and would always naturally be closely associated, your Lordships will, I think, be of opinion that the utmost which could have been done was done to place danger and temptation in the way of the pursuer, and opportunity in that of Major Steuart.

The history of all that occurred from August 1865, when Major Steuart was received as an inmate in Clyde Street, until February 1866, is either not forthcoming, or is spoken of by witnesses who are obviously reticent. Before February 1866 Major Steuart had an illness which confined him to his room. It appears to have been of the usual description. He was, as Georgina Wilson says, "coming off drink." He was nursed by the pursuer, who sat with him in his room. Georgina accompanies this fact with the statement that the door was always open, so that anybody passing could see into the room, and the bed was facing the door. But as to this, inasmuch as she was at school from half-past eight in the morning, her evidence does not do more than exhibit a natural desire to exclude inferences which are sufficiently obvious. The conclusions which the neighbours appear to have drawn are not to be wondered at. One of the pursuer's witnesses, Mortimer, the butcher, living at the corner of the street, says he told Major Steuart on the 14th February 1866 that there was no person he had a better right to marry than the pursuer, seeing that they were already living as man and wife; and Mrs Janet Forman or Wilson, a sister-in-law of the pursuer, lets fall in her cross-examination this singular admission, that when her mother told her on the 14th February, "Maggie Wilson is married," she said, "I could have told you that six months ago." There might, perhaps, be some further inferences of the same kind drawn from other parts of the evidence, but it is enough to say, that although there is no sufficient ground to hold it established that sexual intercourse had taken place between Major Steuart and the

pursuer before the 13th February 1868, there was every opportunity for it to have taken place, and it is impossible to hold that the allegation of the pursuer, which is the very foundation of her case, that carnal intercourse between her and Major Steuart took place on the 13th February after the alleged ceremony, and did not take place before, is established.

Then, my Lords, there are some general questions connected with the alleged ceremony of the 13th February 1866 which are upon the surface, and to which no satisfactory answer has been, or, I think, can be, given. Why, even if an irregular marriage were necessary or desirable, was no witness outside the family brought to be present? This appears to have been the first observation of Mortimer, the neighbouring butcher, when he was told of a marriage the next morning; and if he could be told of it the next morning, it is difficult to see why he could not have been made a witness of it the night before; and if a witness was not to be obtained, why could some exchange of writing not have taken place? But further, and above all, what is the theory of the pursuer as to the reason why an irregular marriage was resorted to? The case made on the part of the pursuer in the evidence is, that the intention and arrangement was that the marriage should be kept secret until, either by his father's death or by the recovery of some property then in litigation, Major Steuart should be in a better position to maintain a wife, or that it should be kept secret in order that Sir William Steuart might not know of it; and the irregular character of the marriage is attempted to be accounted for by this necessity for secrecy. The same evidence also asserts that the marriage was brought about at the time it was said to have occurred in order to put an end to the scandal which had arisen ("to stop people's mouths" is the expression of George Wilson) from Major Steuart living with the Wilsons and associating as he did with the pursuer. These suggestions are attended with difficulties which appear to me to be insuperable. If the object was to stop people's mouths, this could not be done by a secret marriage. The cause of the scandal was open and notorious; it was intended to continue, and nothing but a marriage equally open could terminate the scandal. The course, therefore, which is said to have brought the marriage about ought to have brought about a regular and public and not a clandestine marriage. But, on the other hand, can we accept the motive for secrecy which is suggested, so far as Sir William Steuart is concerned? He appears to have placed no impediment in the way of his son marrying any person whomsoever, and although it may appear singular, he is even shewn to have expressed a desire, when he found that his son was going about with the pursuer in 1865, that he should marry her, and this expression of Sir William Steuart had been communicated to old Wilson.—[Gold's evidence, 544.] As regards his means for supporting a wife, Major Steuart does not appear to have been much embarrassed by the consideration of what his social position required from him. Living as he was content to do with the pursuer, he would not have been subjected to a greater expense after a regular than after an irregular marriage. And it even appears that, as regards the provision of a residence by his father, he would have benefited, and not lost, by marrying.

I now come to make a few observations on the witnesses as to the alleged ceremony. The witnesses are two, George Wilson and Kellet. If the bedding is taken as part of the whole ceremony, neither witness was present at the whole. George Wilson left before the bedding. Kellet did not come into the room till after the conversation had commenced. The evidence of George Wilson,

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being that of a relation, would not, according to the former state of Scotch law, have been admissible; and both as to this and as to the evidence of Kellet your Lordships will, I think, agree with the force of the remarks made by Lord Neaves in the case of Roxburgh v. Watson, 23d October 1868, 7 Macph. 19.

His Lordship says with reference to the evidence in that case:—"But, although admitted, it is not only competent, but incumbent upon the Court to look upon such evidence with great jealousy, and to weigh it in the most scrupulous manner, to see what is the character and position of the witnesses generally, and whether they are corroborated to such an extent as to secure confidence that they are telling the truth. Nothing would be easier than for a vicious and designing woman to fasten a marriage on a man by the evidence of her own relations and associates, and this more particularly when the man was dead, and his representatives are necessarily at a great disadvantage in disproving the alleged facts, and detecting the imposture. Still more, if the man who is the subject of the fraud has led a libertine life, and is of drunken habits, and if the woman who forms the scheme against him has been his mistress, additional facilities for fraud and falsehood are afforded, which make it specially the duty of a Court to look with suspicion on the case. It is obvious, too, that a false marriage may easily be trumped up in this way, not merely by inventing the whole story, but by taking as a foundation some facts that in reality may have occurred, quite insufficient to make a marriage, but which admit of being so coloured and dressed up by a liberal *suppressio veri*, and a very slight *suggestio falsi*, as to assume a relevancy and importance not truly due to them."

I now turn to the evidence of George Wilson. In order to test the credibility and accuracy of this witness in points as to which he cannot be contradicted, it is necessary to consider carefully his evidence where he can be contradicted. His object throughout his testimony is to represent Major Steuart as a moral and well conducted man. He says,—"I never saw him the worse of drink at any time. I have seen him take a glass or so, but I have never seen him the worse of it. He was tidy in his appearance so far as I saw. During the whole time I knew him I never saw him the worse of drink. All the drink I ever saw in my father's house was a glass of ale for supper, and sometimes a glass of toddy before bed. I never saw him the worse of drink. I never saw him drink a great deal. He was a very small drinker to my idea." My Lords, if there is one thing which is established in this proof beyond the possibility of a doubt it is that Major Steuart was a confirmed and notorious drunkard, and that he was generally in his appearance disreputable and untidy, and it is quite impossible but that George Wilson, who had constant opportunities of seeing him, must have known that this was the case.

In his narrative of what occurred after supper on the 13th February he states that Major Steuart was sitting in a chair crying, the tears coming over his eyes. He says he was perfectly sober at the time—as sober as when he himself was giving his evidence. It is scarcely possible that both these statements can be correct. In a strong man in middle life there was nothing in what occurred which could account for tears except a maudlin imbecility arising from drink, and your Lordships have no security that the state of Major Steuart at the time was not that which, recurring constantly at other periods, George Wilson describes to be one of sobriety, but which a host of other witnesses call drunkenness.

But there is another detail of the narrative to which both George Wilson and

Mrs Kellet give a conspicuous place. George Wilson says Major Steuart went down on one knee, put his hand into his waistcoat pocket, and took out a wedding ring, which he placed on the third finger of the pursuer's left hand. Mrs Kellet says he went down on his knee, took a ring out of his pocket, "I do not remember which pocket, and put it on the third finger of the pursuer's left hand." So far the narratives agree, even in the detail they mention the third finger, which might well have been overlooked or forgotten. It must, however, be borne in mind that the supper of the 13th February was not in any way connected with a marriage pre-arranged or expected on either side. It was intended to celebrate Major Steuart's birthday, which was really the 11th of February, but that being a Sunday the supper was postponed till the 13th. George Wilson says he did not believe a marriage was thought of till Major Steuart got up and spoke of stopping people's mouths. It is true that George Wilson says that his mother had told him something about what she expected, but this is not corroborated by any other testimony, and Mrs Kellet, the confidant of the pursuer, does not suggest that the pursuer had said or hinted to her anything about a marriage. But if the marriage was not pre-arranged or anticipated, how could it have happened that Major Steuart should have a wedding ring ready in his pocket? No answer has been given to that question. Where did he get it? Did he buy it? He was a man perfectly well known in Edinburgh, and all his movements seem to have attracted attention. Evidence, one would suppose, could have been procured to shew how he had become possessed of the ring, if indeed the ring came out of his possession. But the matter does not rest there. The condescendence of the pursuer in its present form tallies, as to the ring, with the evidence of George Wilson and Mrs Kellet, but the original condescendence, we find from the judgment of Lord Shand, was in this form:—"For some days previous to the marriage after-mentioned Major Steuart went to various shops, at which he ordered sundry articles, and in various other ways made preparations for the said marriage. About this time Mr Wilson was pressing Major Steuart to say finally when he would marry the said pursuer. Accordingly, Major Steuart determined to enter into a private contract of marriage with the said pursuer in her father's house, and this resolution was carried out on the evening of Tuesday, the 13th day of February 1866. On the afternoon of that day he caused the pursuer to put on a black silk dress which she had received from him in a present, to have her hair dressed by a hairdresser, and otherwise he prepared for his wedding. Supper was then served up in the sitting-room, and when it was over, and in the presence of Mr and Mrs Wilson, the pursuer's brother George, and Mrs Kellet, Major Steuart filled the wine glasses all round, he then went down on his knees, and for the purpose of carrying through a marriage between him and the pursuer, he said to the pursuer, 'Maggie, will you be my wife.' The said pursuer replied 'Yes,' and then and there accepted the said Major Steuart as her husband, and they became married persons. He then took a plain gold marriage ring from his vest pocket, and placed it on the third finger of her left hand, after which he held up his right hand, and, while still on his knees, said, 'I swear by the Almighty God that I take you for my wife.'" This was a story into which the narrative of the ring fitted without inconsistency, and this story must have been told, in the first instance, from the instructions of the pursuer. It seems impossible to avoid the conclusion that it was found that this story, as told in the original condescendence, could not be made to square with the story of a marriage brought about unex-

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pectedly by the pressure of old Wilson, and that the greater part of the story was changed to meet this altered aspect of the ceremony, but that, unfortunately, the incident of the ring was left unerased.

Of Mrs Kellet's evidence I need not say more than I have done already, beyond remarking that she varies from George Wilson's evidence as to Major Steuart weeping. She says,—"I did not observe him weeping on the night of the ceremony. I did not notice tears in his eyes. I am not very good at seeing unless I have my glasses on." Under these circumstances it might perhaps be asked, how is she able to say the ring was placed on the third finger?

There is some further evidence, not of any one present at the alleged ceremony, but closely connected with it in point of time, to which I should refer. One of the witnesses who gives evidence of this kind is Agnes Forbes. She was a servant of the Wilsons on the 13th February 1866, and at the time of the trial it appears she was living with the pursuer. I attach little importance to her evidence. She is, I think, discredited by the testimony allowed to be adduced after the case passed into the Inner-House.—[595] But, in addition to this, she is contradicted on several important points. She places the visit of Caw, the bailiff, about ten o'clock on the morning of the 19th February, whereas Caw says that it was at four in the afternoon, and from the nature of the visit it is not likely that he could be mistaken.—[555] She says, further, she never in her life saw Major Steuart drunk. She says also she heard the pursuer, in the case in the Police Court to which I have referred, say she was legally married to Major Steuart, the contrary being, as I think, clearly proved. But there is a portion of Agnes Forbes' evidence which suggests a further difficulty. I have already commented on the allegation of the pursuer that the marriage was to be kept secret, and Mrs Kellet says Mrs Wilson was very particular in saying it should be kept quiet lest it might hurt the Major, and the Major used to say to Mrs Kellet he liked her "because she was not a blab." Agnes Forbes, however, states that the pursuer was called Mrs Steuart quite publicly in the house, and to everybody who came out and in, and that in speaking of her outside she always spoke of her as Mrs Steuart. It is in fact extremely difficult to know not only what reason can be suggested for keeping the marriage, if it had taken place, secret, but also whether, wherever and whenever a marriage was talked about, it was talked of as a secret. In my opinion, where a marriage was talked of, it was talked of openly, and in order to serve a purpose which could not be attained except by speaking of it openly.

I must notice the evidence of three other members of the family. Georgina Wilson was about fourteen years of age at the time. She was not present at the alleged ceremony. She states, as Agnes Forbes did, that the day following she saw a wedding ring on her sister's finger, but some part of her evidence is important, as shewing how little reliance can be placed on the evidence of interested relatives in such a case. She is asked—"(Q.) On what footing did you understand that he came to the house? (A.) I understood that he was engaged to my sister. (Q.) From the time he was turned out of the hotel? (A.) Yes. (Q.) And before he came to the house at all? (A.) Yes. (Q.) Have you heard both your father and mother speak of that? (A.) Yes. (Q.) Did they say that there was an engagement before he came to the house at all? (A.) Yes. (Q.) Then you did not understand that he was in the house as a boarder or lodger? (A.) Yes he was, but he did not pay—I understood he was to pay. (Q.) Did your sister and the Major act all along from the time he came

to the house as engaged people? (A.) Yes, they used to go out together. They frequently went out alone. I cannot say where they went—perhaps for a drive, and sometimes for a fish dinner at Newhaven." It need hardly be said that this is inconsistent, both with all the other evidence in the case, and with the condescendence. Again, after much fencing, she says it was from her mother, and not from the pursuer at all, she understood that the pursuer was married. She always "took it" she was married. "She did not say anything to me about it. She never made me her confidant." Finally, in order to establish a difference of treatment before and after marriage, she tells us this—"He gave my father presents to give her. The Major never kissed my sister in my presence; he was more of a gentleman than to do that. I don't think lovers do that until after the night of the marriage. Until after the night of marriage he never kissed her in my presence. He gave the presents to my father to give to her. If my father was standing beside her he would perhaps give them to herself. If it was a Steuart tartan dress or a scarf he gave it to her before my father; he came into the shop and gave it to her before my father. After the marriage he always gave the presents direct to herself." Alfred Wilson was still younger than Georgina. He is brought forward to say that he, though not ten years of age at the time, noticed the marriage ring on her finger after she came out of her bedroom the next morning, and that he saw them in bed together the next morning (the fifth person, if we are to believe the evidence, brought into the room for that purpose). There was another sister in the house, who was older than Alfred, Mary Wilson, now Mrs Wyke. She, for some reason, is not examined, although the pursuer obtained a commission under which she might have examined her in England, where she was residing.

Janet Wilson is sister-in-law of the pursuer. She also, as she says, saw the pursuer and Major Steuart in bed on the morning of the 14th February. This was between ten and eleven—a singular circumstance, when we remember that Georgina Wilson states that before she went to school at half-past eight on that morning she had seen the pursuer leave her bedroom. Janet Wilson, however, says that Major Steuart then told her that the pursuer was his wife.—[553] The same, or the next day, Major Steuart went with the pursuer to Leith, to Janet Wilson's house, and said to Janet Wilson of the pursuer, "This was his wife, Lady Steuart,"—again a statement difficult to believe if he had told her that she was his wife a few hours before. The cross-examination of Janet Wilson, however, and the circumstance that neither a Mr nor Mrs Forman, who are said to have been present during the visit to Leith, are produced, make it impossible to rely on the accuracy of the statements of this witness.

I pass over without any detailed observation the evidence of a number of witnesses in the case who speak to statements of conversations with the Major or the pursuer, or both, in hotels, in places of amusement, in casual conversations, in drinking parties, in the course of which the Major called the pursuer his wife, or Mrs Steuart, or spoke of her as such, and spoke of her child as his boy. These would in any case be equivocal acts, and would have to be considered with reference to the circumstances under which the statements were made, and in the present case, in a number of instances, the statements were obviously made in places and under circumstances where for the purposes of the moment it was necessary that the pursuer should appear to be Major Steuart's wife. The statements made upon these occasions are not, taken altogether, nor are any of them, for a moment to be put in comparison with the deliberate statements made

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on important occasions, when no object was to be gained, to Dr Dunsmure, Mr Rigg, Dr Simson, Dr Culbard, Mr Pople, and others.

But there is in the present case a further peculiarity with regard to the statements relied upon by the pursuer. I have submitted to your Lordships the points on which I think the evidence of the alleged ceremony is not to be taken as trustworthy, but I am far from saying that I think there was no foundation for that evidence. I do not believe that a valid marriage *per verba de præsenti* took place, or was supposed by any of the parties to have taken place. That something took place which was not a marriage, but which yet might be represented, and was meant to be represented, in a way "to stop people's mouths," to use the expression of George Wilson, is, I think, very probable. The places where this would be used, and the persons to whom it would be used, were places where the Wilsons were known, and the persons with whom they were accustomed to associate. Those were the persons whose "mouths" were "to be stopped," and if it answered the purpose of "stopping their mouths," that was all that was required. It may well be that the Wilsons hoped for and desired something more, but they may have been content to wait for the chance of getting something more at a future time, or of the cohabitation gliding, if they could make it do so, into a marriage by habit and repute. If this is a just view of what occurred on the night of the 13th February it would account for the statements as to the pursuer being married made to Mortimer, the butcher, and to other persons in or about Edinburgh with whom the Wilsons were associating, and for the statements of a very different kind made upon all serious occasions by Major Steuart.

I have now only to refer to the circumstances, so far as they are material, connected with the death of Major Steuart. He was living at Hythe, in the south of Hampshire, in 1868. He had been drinking, his servant Budd tells us, "very heavily," and had a very bad attack of *delirium tremens*. While labouring under that attack he pushed a stick through his windpipe on Thursday the 15th October, and he died the following Sunday night, the 18th. On the 15th October, that is, on the Thursday, Budd, his servant, telegraphed by his desire to Thornby Hall, near Rugby, for Captain Cooper, who had been a brother officer of Major Steuart in the 93d Regiment, and with whom he had kept up a correspondence, although they had not met since 1859. Budd also telegraphed for Mr Jameson, the law-agent of Major Steuart. Captain Cooper arrived on the evening of Friday the 16th, and the arrival of Mr Jameson took place at mid-day on Saturday the 17th. It is to be observed that it does not appear that Major Steuart desired the pursuer to be sent for, or in any way to be communicated with. Mr Jameson says he informed Major Steuart of his success in the litigation relating to some personal property in the Court of Session, that he appreciated this success, that he was intelligent up to his death, and was not in delirium, but that speaking appeared to occasion difficulty to him, and there was no prolonged conversation. He says he alluded to his son, and referring to the money which would come under the decree of the Court, said, "Well, Cooper and you will take charge of the matter, and pay my debts and see to the boy." Mr Jameson says that, of his own accord, and without any instructions, he prepared the draft of a settlement that might have been executed if approved of by the Major, but it cannot now be found. He says it must have been prepared on the Saturday night, or probably the Sunday forenoon, but that on the Sunday the Major was not in a fit state to sign it. Mr Jameson cannot remember that he spoke to Major Steuart of the pursuer. He cannot remember whether

the Major at the time he said "the boy," may have added "and the mother." The impression of the conversation on his mind was that the boy was the individual who was favoured. This is the evidence of Mr Jameson, given by him when called as a witness for the pursuer.

To this, however, must be added a description of the state in which Major Steuart was, which was given by Mr Jameson at the time in a letter which he wrote to Mr Galletly in Edinburgh, and from which description I do not understand that Mr Jameson now desires to recede. It is dated "Bath, Monday, 19th October 1868," and is in these words—"My dear Sir, our poor friend the Major, to whose death-bed I was called by a telegram on Friday, died at Hythe this morning. With the exception of an occasional look and word of intelligence he was not in a state to make any settlement of his affairs, and unless his father, whom I have seen here, is disposed to give effect to his verbally expressed wishes, gathered from occasional moments of isolated responses, the executry must be arranged by law. He intended that his friend Captain Cooper (a very excellent man, who was also at his death-bed) and I should be his executors, that we should get the money now due to him, pay all my advances and expenses and his debts, and then retain the remainder for behoof of the boy. I had prepared such a document, giving effect to his understood wishes, but he was not so long conscious as to be able to execute it."

Captain Cooper describes the interviews which he had with Major Steuart in these words—"I went into the Major's bedroom, which was shewn to me by Budd. I found the Major in bed when I went in. He mistook me for another officer who had been in the regiment, and said, 'Hillo, Goldsmith.' The room was dark—duskyish. There was an officer of that name in the 93d. I was not in the least surprised at the Major so addressing me, for I had often been mistaken for Captain Goldsmith before. I am like him, and have been mistaken for him on several occasions. I said to the Major, 'I am not Goldsmith; I am Dick Cooper.' The Major recognised me then, and said, 'Oh! how are you?' He was very unwell. I sat up with him most of the night. I had very little conversation with him; I did not like to have any that night. On the Saturday morning I again saw the Major. He was considerably better. He had slept and taken some nourishment. When I went in he recognised me at once. I was in his room from time to time throughout the day, twenty minutes or half-an-hour at a time. I spoke to him occasionally. I remember that on that day the Major made a rather pointed observation to me. He said, 'You are married, aren't you?' I said, 'Yes, I am, and so are you, aren't you?' He said, 'Yes, I am.' He also said, 'Have you got a son?' I said, 'No, not yet.' He said he had one, and he said something which led me to believe that he was very proud of his son. That was the whole conversation."

It is remarkable that in this statement it is not suggested that the pursuer was referred to, or her name mentioned, and the only words which can be relied upon are the words "Yes, I am," the weight to be attached to which would depend on the amount of intelligence of the dying man as to the question, and of the accuracy of the listener as to the answer. But the question put by Major Steuart to Captain Cooper, "You are married, aren't you?" is remarkable, because it appears that Major Steuart had received not long before a letter from Captain Cooper, dated the 24th February 1868, speaking to him of his wife, and sending him a message from her. I own that, even if no further light could be thrown upon these three monosyllables spoken to Captain Cooper, I should

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not, bearing in mind the silence of Major Steuart on the subject of the pursuer to his confidential agent Mr Jameson, have been disposed to attach to them the weight which they seem to have carried in the Court of Session.

But there is some subsequent evidence of Captain Cooper which requires to be taken in connection with that to which I have already referred. He says:—"Mr Jameson came that Saturday afternoon. I did not know him by sight, and asked Budd to point him out to me as soon as the packet arrived, which he did. (Q.) Did you speak to Mr Jameson about the marriage? (A.) I told him, first of all, that I knew everything connected with Major Steuart. (Q.) It was in that way you put it? (A.) Yes; I told him I was his most intimate friend. I learned from Mr Jameson that the Major had recovered a sum of money from Sir William Steuart. I think the amount was £11,000 or £13,000, or something like that. That was the first time I had ever heard of it. I saw the Major after learning that fact, but I did not make any reference to the money to him except in this way, that I said he ought to make provision for his wife and child. I did not like to allude to the money because the Major himself had not told me about it, but I suggested that he should make provision for his wife and child. (Q.) Did you use the word 'wife'? (A.) Yes. (Q.) What did he say? (A.) He said it would be all right. (Q.) What did you understand by that? (A.) I understood that he would do something with Mr Jameson so as to make a provision for his wife and child. I stipulated with Mr Jameson that his just debts should be paid first. I had some conversation with Mr Jameson on the subject afterwards. My conversation about the debts was not with Major Steuart, but with Mr Jameson. (Q.) Did you tell Mr Jameson anything about Scotch marriages? (A.) I said I disliked Scotch marriages. (Q.) Did you say anything about the son of a fishing-tackle maker's daughter not succeeding to Murthly Castle? (A.) Yes; I said I did not care about that. I understood that some papers were drawn out by Mr Jameson on the Saturday night. I saw him with some papers that looked like legal documents. We thought the Major was doing better on the Sunday morning. I went to church that morning, and when I returned I thought he was better. He spat a good deal and passed blood from his throat. A medical man saw him, and we thought him somewhat better on the Sunday morning. I cannot tell why the paper was not signed. I expected from what had taken place that it would be signed. Nobody told me that it was signed, and I did not think it my business to ask, as Major Steuart's agent was there. Eventually I found it was not signed."

There is in this a statement of much that Captain Cooper thought or said, but little that was said by Major Steuart. Captain Cooper suggested that he should make a provision for his wife and child, although Mr Jameson thought him not in a state to execute an instrument for the purpose of making such a provision. Major Steuart said "it would be all right," a phrase which, even if he understood what he was saying, might be interpreted in many different ways. But the best insight into the impression really produced on the minds of both Captain Cooper and Mr Jameson by what occurred at Hythe is to be found in two letters which passed between them a few days subsequently, after they had had the conversation to which Captain Cooper refers as to Scotch marriages. Mr Jameson writes to Captain Cooper from Perth on the 2d November 1868 as follows:—"My dear Sir,—There is no word from Sir William Steuart in reply to mine, and I now expect none. Mr Condie sent to me to-day for the address of the medical attendant, and I gave him Mr Giles' address. It has struck me that

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it may be to communicate with him to ascertain if the Major during his last illness was ever able to say a word intelligibly as to his affairs, or to indicate with a serious mind his wishes in regard to them, as represented by me. I have written to Mr Giles by this post requesting a certificate as to the state of Major Steuart's mind when I was with him. I told him that I was aware that he frequently wandered when sleeping or dreaming, but that when aroused and spoken to he seemed to recognise the persons addressing, and answered intelligibly on the subject of conversation; that these were of course quite casual and momentary, there being a reluctance on your and my part to fatigue him with any continuous conversation, but that these were quite sufficient to indicate to me the intentions he had, namely, that you and I should take the charge of the money, pay his debts, and see to the boy; the money, the debts, and the boy being all severally the subject of conversation before between him and myself. I presume Mr Giles can have no hesitation to give such a certificate, and if he sends it to me good and well. My letter will at all events caution him, I should think, against saying anything imprudent to Sir William, or his agent Mr Condie. I had your letter, and am glad you approve of mine to Sir William. Unfortunately, in the absence of any written document duly signed by our late friend, the law confers the right of administration on the father, and we cannot legally compel him to recognise any expression or wish on the part of his son. My letter was simply meant, as any other appeal can solely mean, as an appeal to his honourable feelings. The money was the Major's is not denied by the father—the father had no claim to it. He had not even paid him an allowance for a long time, and any one might suppose that under these circumsnances he would at once say 'I won't touch it. Let Captain Cooper and Mr Jameson, my son's only friends, do with it according to my son's wishes. I refuse to avail myself of the advantage given me, namely, by the absence of any legal will.' The debts of course he must pay, and the boy will have a claim for aliment, but it would be covered, so far as the law is concerned, by an annuity of £20 per annum, perhaps less, so that £400 would do for this, instead of £4000, the half of the succession which he ought to give, and this will be pocketing for himself £4000. The girl, Miss Wilson (the mother of the boy), has no legal claim, and we would fail in any attempt at law in her behalf. If we get the £4000 we would be able to do something for her, if we found her deserving, by the allowance of a suitable board for the boy."

Nothing can be clearer than that Mr Jameson, the writer of this letter, knew and expected Captain Cooper to recognise that there was no question of marriage in the case. There appears to have been another letter from Jameson to Captain Cooper, and then, on the 12th November 1868, Captain Cooper replies in these words:—"My dear Sir,—I am in receipt of yours of the 11th, and enclose you a letter I received in reply to one of mine from Dr Bond. I should like to know how far we can legally force Sir William, for I fear that as he has not treated you with common courtesy he might refuse to see me. I would give him one more chance, and if you think fit, might mention that I will be happy to call on him and explain matters, and that if he will see me I will go and wait on him at any hour or day he may think fit. If he won't do this I should be inclined to enter an action against him. Believe me, yours, &c., RICHARD COOPER."—I cannot read this letter as referring to any claim of the pursuer or her boy founded on marriage. The letter appears to me in effect to concur in Mr Jameson's statement that on this head there was no legal claim, and to sug-

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gest an action against Sir William Steuart, on the only foundation on which Mr Jameson had said it could be maintained, namely, for aliment.

I do not delay your Lordships by an examination of the conflict of testimony between Budd and Captain Cooper as to whether the former told the latter at Hythe that Major Steuart was "married right enough." Budd denies that he made any such statement, and it is due to him to say that he has been called as a witness on behalf of the pursuer as well as of the appellant, and although he lived for a considerable time in the service of Major Steuart it is not pretended that he ever said to any person else of his master that he was married. It may well be the case that Captain Cooper believed the meaning of Budd to be that which he expressed in his evidence, but a very slight variation of expression, or a qualification of tone or gesture, would have greatly modified the effect of the answer of Budd, and it is remarkable that Captain Cooper himself admits that Budd immediately afterwards spoke to him of the pursuer, and said that "Miss Wilson" had not been telegraphed for.

I have now, my Lords, at much greater length than I could have desired, adverted to such portions of the volumnious evidence in this case as appeared to me to require notice. I could have been well content to have rested my decision upon the grounds expressed by the minority of the learned Judges, and especially Lord Deas and Lord Shand, with nearly the whole of whose very able judgments I concur, but I have deemed it necessary, owing to the respect I entertain for the learned Judges who compose the majority, to indicate the grounds upon which I am compelled to differ from their opinions. The burden which lay upon the pursuer to establish a marriage in this case I think she has not discharged. On the contrary, her opponents have been able, from circumstances, many of them singular, to present a body of evidence of unusual weight, derived from documents written, acts done, and declarations made, all bearing with a strength almost irresistible against the marriage. To countervail this evidence, the biased, inconsistent, improbable, and inaccurate evidence of the alleged ceremony, is, as I think, altogether inadequate, and the interlocutors affirming the marriage ought, in my opinion, to be reversed, and the appellant assoilzied, with expenses in the Court of Session.

Lord Hatherley concurred.

Lord O'Hagan.—My Lords, the lucid and elaborate judgment of my noble and learned friend on the woolsack has made further discussion almost superfluous; but the case is one of importance, and as my view is adverse to that of learned Judges for whom I have very sincere respect, I think it becoming that I should state, with as little detail as possible, the general grounds on which I have felt myself coerced to differ from them.

I was struck by an observation of Mr Scott as to the difficulty affecting comparative strangers to the peculiar circumstances and feelings of the Scottish people when they are required to consider acts performed under the influence of those circumstances and feelings, and according to the customs which have grown out of them, upon a question of fact, and the question here is altogether so. I should defer greatly to the opinion of those possessing local knowledge of which we cannot boast, but in this case it seems to me that undisputed statements and admitted documents give us special means of supplying the want of it. The remark would have extreme force if our attention were called only to the circumstances of the alleged marriage of the 13th February 1866, but it fails to

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touch in the same manner the accumulated records, letters, and accounts which cast light upon those doubtful circumstances, and appear to me decisive in favour of the appellant. Had we, however, to deal merely with the proof afforded of the events of the 13th February, I should be inclined gravely to doubt, with the minority of the learned Judges who have discussed the case with such elaborate fulness and conscientious care, whether it should be held to establish that "free, deliberate, full, and solemn consent,"—to use the words employed in Jolly v. Macgregor, 3 W. and S., 195—with the intention of constituting a marriage between the pursuer and Major Steuart, such as the law of Scotland requires for that purpose.

The burthen of proof is on the pursuer, and she comes to undertake it after the lapse of years, when some material witnesses have passed away, the memories of others have been weakened, and effectual inquiry as to important facts has become impossible. Assuming that something like the scene described by George Wilson did take place, we must remember that its value for the pursuer's object depends entirely on the precise words that were employed by the Major on that occasion; and for their ascertainment we are left to the evidence of two witnesses, George Wilson and Kellet (I do not rely on Agnes Forbes, for the reasons which have been already given by the Lord Chancellor), who are to be regarded with caution,—the one as the brother of the pursuer, and the other as her friend, speaking of occurrences in the absence of any person unconnected with her. The father and the mother are dead, and at least the father's after conduct seems to me, for reasons I shall suggest, flatly inconsistent with the notion that on that evening he was witness to anything which he then deemed a valid and real marriage.

Then it is plain that the words alleged by Wilson and Kellet are mere fragments of a lengthened conversation, and we are left without any means of judging how far they were modified or affected in their meaning by those which preceded and came after them. And yet, before we pronounce that a binding contract, uniting the parties for all time, we must have sufficient reason to be satisfied that we know, if not the *ipsissima verba*, at least the precise effect of the communication that passed between them. Is it not very difficult to affirm that we have such knowledge from the report of a few sentences or portions of sentences, especially when the reporters vary from each other, and from the statement of the pursuer herself? In her original condescendence she makes the Major ask, will she be his wife, but neither of the witnesses speak of such a query. Wilson alleges his words to have been—"I am poor now, and I cannot marry, but I will marry you in the Scotch fashion;" whilst Kellet says that on her coming in he said, "He could not do what he would wish to do at the present time; but, he added, I will shew you, Wilson, what I will do, or what I can do." These words are different, as are others, also deponed to by the witnesses, and it is natural that they should not exactly agree, even if they be honest, after such a lapse of time; but their differences are material when the question is whether a marriage was then and there solemnly effected between the pursuer and a man who declared, if we believe them, that he could not marry or do what he wished at "the present time," and when the supply of an omitted sentence might make indisputable the view presented in the Court below, that no present marriage was contemplated, whatever might have been the hope of the future on the one side, or the willingness to encourage it on the other.

The questionable incident of the ring, and the somewhat equivocal declaration

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that the pursuer was his wife "before Heaven," involving a possible repudiation for the time of the force of earthly law, which by-and-bye might be invoked to sustain the Heavenly sanction, have been fairly assailed as rather weakening the pursuer's case. And certainly it does appear to me that it would be a serious thing, on evidence of words so meagre, so uncertain, so capable of being shifted to another sense by a misconceived phrase or a forgotten syllable, to establish the most sacred and momentous relation which can unite human beings in this world.

The difficulty of giving such grave effect to such proof, so offered, at such a distance of time, and with such circumstances of impeachment, is much increased when we remember the evidence as to the conduct and demeanour of the pursuer and her sisters, one of whom, Mary, still living, capable of speaking to very material facts, and challenged by personal allusions to appear, has not been produced; the utterly unrestrained intercourse between the Major and the pursuer in their frequent drives together, with her father's sanction—the introduction of a man so abandoned in his habits to such a dwelling, occupied by young girls, and with such domestic arrangements as have been detailed in proof—the condition of the Major on the evening in question, as described in the testimony "coming off drink,"—the absence of all independent witnesses, and the manifest want of any previous preparations for a marriage, of which the Major is said to have spoken only when violently threatened with expulsion from the house;—all these things, I say, and others, for reasons I do not pause to detail, seem to increase the difficulty of reaching any assurance that the words deponed to by Wilson and Kellet were deliberately intended to constitute a present and concluded marriage.

It does seem somewhat startling to give such an effect to such doubtful words, spoken, if at all, at a nocturnal carouse by a habitual drunkard, even then emerging from a fit of intoxication, weak in mind and body, and weeping maudlin tears, and without a friend to counsel or a witness to protect him. But, as I have said, if the case had stopped there I should have had much greater difficulty in acting on any impression of my own as against the judgment of the Court below.

I should have hesitated to differ from eminent Judges fully conversant, not only with the law, but also with the manners of Scotland, and though certainly with doubt and misgiving, I should have possibly declined to concur in a reversal. But the case does not so rest; and, looking to the subsequent conduct and acts of the parties, I find myself obliged to hold the appeal sustained. In all inquiries of this sort I apprehend the true rule is not to regard singly and apart the one transaction on which reliance is placed as constituting the marriage. It is necessary to exercise a "large discourse of reason looking before and after," and, from all the antecedents and all the consequents to ascertain the true mind and purpose of the parties whose intention determines the character of their act. And it seems to me eminently proper to apply this rule to the issue before us. No one, I think, can say that the direct proof of the alleged marriage is very strong or very clear; and this being so, we are bound to gather from all the information within our reach such aid as may enlighten obscurity and clear away doubt. Having striven to do this as carefully as possible, I am forced to conclude that the testimony furnished by the mass of letters, records, and proceedings which have been so laboriously presented before us is decisive against the pursuer. The parole proof is often conflicting and unsatisfactory.

The documentary evidence points only to one result, and, taken altogether, seems to me demonstrative. I do not, as I have said, dream of again detailing it, but I touch on some salient points which have most affected my own judgment.

Old Mr Wilson is dead, but his acts make him a persuasive witness from the grave. He, if any one, knew all about the asserted marriage; and what did he think of it? I pass for the present his letter to the Major as to the birth of the child, which is, in my view, a powerful piece of evidence, inasmuch as it is affected by the suggestion of a compact for secrecy, to which I shall allude in a few minutes. But when the Major was dead, and no reason existed for further falsehood or concealment by reason of such a compact, or anything else, when, on the contrary, there was every motive of duty and interest alike for speaking the truth, Mr Wilson ignores the marriage in his accounts to the Major's executors, and when Mr Jameson writes to inform him of the Major's death, he replies simply by inquiring about his borrowed money. His description of the pursuer as Margaret Wilson in his deed of settlement, in which the name of another daughter was altered by reason of her marriage, is inexplicable if he then believed her to be the wife of Major Steuart.—[584] The document was framed for family purposes, and not to be blazoned to the world, and it is hard to imagine that he should have consciously put on record a false description dishonouring his daughter if he knew her to be married, and putting on record permanent evidence against the rightful claims of her and of his grandson.

Then, as to the pursuer herself, her whole correspondence with her alleged husband, so far as we have it—fifteen letters out of fifty written by him having been produced—in its address and its diction, and in its spirit, is inconsistent with the supposition that they wrote to each other as man and wife. "It is not too much to say," observes the Lord Ordinary, "that no such letters ever passed between a husband, said to be an attached husband, and his wife." After the supposed marriage her dealing with tradesmen were all in her own maiden name. So was her complaint in the Police Court eight months after it, on the hearing of which we have the evidence of four witnesses, including the agent by whom she was cross-examined, to prove that she swore she was not a married woman.—[561-4] Then we have the statutory registration of her child's birth, vouched by her own signature, and describing it as illegitimate. We find her sued and decreed, without objection, by Sir W. Steuart, in her maiden name. In her maiden name she corresponded with her supposed husband's agent during his lifetime, giving receipts for payments for her boy, which were manifestly made as for an illegitimate child. After her husband's death she distinctly stated to Mr Steuart, a cousin of the Major, that she was not married to him. She wrote as Margaret Wilson to Sir William Steuart, Mr Jameson, and others. She petitioned the magistrates of Edinburgh in that name. She sued Sir W. Steuart in that name successfully for the aliment of her son as an illegitimate child. In that name she accepted payment, and gave receipts on account of it; and finally, in that name she married her present husband.

Your Lordships have heard very ingenious explanations of these striking circumstances. The imagined compact of secrecy, to which I shall immediately advert, could only have had operation during the Major's life; and on the theory of the respondent that she was a pure woman, bound to her husband by an

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honourable marriage, and having the rights of her legitimate son to protect, it is difficult to credit that she could have been induced to compromise these rights, deny that marriage, and voluntarily submit to the degradation of virtually describing herself as a concubine, for any motive, even whilst the Major lived. I have heard no reason for the continuance of such a course of conduct after his death. She had nothing to hope from Sir W. Steuart. He put her at arm's length, and was utterly hostile to her. It has been said that she was poor, and could not assert herself. But her poverty did not require the voluntary sacrifice of her own good name and the fortunes of her child; and it is inconceivable, if she had a real consciousness of her position as a married woman, that without necessity or advantage she should, by gratuitous and aimless falsehood, have persisted in compromising it. I do not discuss in detail the various suggestions which were made at the bar to account for her conduct. They were ingenious, but notwithstanding them the undoubted facts that I have summarised press on my mind with overwhelming force.

Then as to Major Steuart, we have admittedly strong *prima facie* evidence in his letters to prove that he did not regard as his wife the woman to whom he addressed them. They are clearly not such letters as any husband ever addressed to any wife, acting upon the ordinary feelings of her nature, or in the ordinary course of things. They are false on the face of them if Margaret Wilson was a wife, for they are all addressed to her in her maiden name, and they are utterly without any single indication of the confidence and affection which characterise the relationship of marriage, especially when the hope of offspring makes it doubly close and dear. The force of the argument from these letters has pressed hard on the pursuer, and it is encountered only by the theories, first, that the parties had an interest and an understanding binding them to keep the marriage secret; and next, that the letters were deliberately framed by the Major so as to avoid the furnishing of any proof of it.

The answer seems to be, as to the first, that between the husband and the wife there was no necessity for pretending to keep a secret, whatever might be their view as to the outer world—that the suggestion seems at right angles with a great portion of the pursuer's case, which rests on the further proclamation of her marriage by the Major on the morning after its occurrence to Mortimer, a butcher, who did not believe his statement, and afterwards at Birnam, and elsewhere to a multitude of other people; and, finally, that the publicity so given is incompatible with the notion that he was anxious to conceal it from his father, for whom he cared nothing, from whom he feared nothing, who authorised and encouraged him to marry the pursuer, and to whom he took the most direct means of communicating the fact that he had married her—if she be right in alleging that she was openly acknowledged as his wife amongst his father's servants and at his father's gate. No doubt the Major's statements on this point were various and contradictory. To the butcher and others he announced his marriage, whilst to the Rev. Mr Rigg and to the doctors, Dunsmure, Simson, and Culbard—persons for whom he had more respect, and to whom he seems to have spoken more seriously—he persistently denied it. His vacillating conduct and contradictory allegations give no safe ground to rest upon either way, but his letters, written deliberately in private, without any need of concealment or dissimulation, appear to me to be persuasive in the last degree.

Then as to the suggestion made by some of the Judges, and repeated here,

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that those letters were coolly and deliberately framed, so as to give no colour to any claim which might be made by the pursuer, I can only say that it appears to me to be inconsistent with her own case and her own evidence in material particulars. He is represented as having interchanged a mutual affection with her, and entered with full deliberation into a solemn contract to make her his wife; and if this was really so, why should the affection have been concealed and the contract carefully ignored in letters the most intimate and confidential? And, again, he is said to have been, notwithstanding his loose habits, a truth-speaking and honourable man until the close of his life. Is such a character consistent with a foul design, if persistently carried out, to deprive his wife of any acknowledgment of their real relation, and with a contemplation in cold blood of the chance of having her declared a concubine, and her son a bastard, by reason of writings cunningly devised to assure every reader of them that no such relation had existence?

Surely such theories seem as unreasonable as they are degrading to the memory of the man to whom they attribute base motives and unworthy acts for the purpose of justifying a forced and unnatural construction of letters which in their plain and ordinary meaning so powerfully negative the notion of a marriage.

I do not go into arguments which have been fairly urged as to the mode of living of the parties,—when the Major was in prison—at St Patrick Square and at Birnam, after the alleged marriage, the coarse words employed with reference to the pursuer to the Rev. Mr Rigg and to Mr Gold, and as to other matters,—in order to shew that he did not act towards her as a man might be expected to speak of and act towards his wife.

But I must add one word as to the evidence of Captain Cooper, which has been so much relied on in the very able and lucid judgment of the Lord Justice-Clerk, and which, we were told, mainly determined the majority of the Judges in favour of the marriage. With great deference to their Lordships I am unable to attach such high value to it. No doubt such statements as that which is attributed to the dying Major by Captain Cooper are worthy of great consideration, and under certain circumstances would be of capital importance. The English law rightly regards as equivalent to an oath a declaration of a man who, retaining clear memory and full intelligence, feels his spirit solemnized under the shadow of death, and stands consciously on the brink of eternity, in the expectation of a speedy accounting with his God. Such declarations are admitted on the most momentous issues, and have founded many verdicts affecting the lives of men. But this was not the case of the unhappy Major Steuart. When Captain Cooper came to Hythe on the evening of the 16th of October Major Steuart was fast approaching his end, and on the night of that day he had a fit of *delirium tremens*—that fearful avenger of intemperance, which shatters equally the body and the mind. He could not talk like a rational being. His memory had failed. He asked Captain Cooper if he had a wife, although he had before known fully of her existence, and had recently received a letter about her. He mistook his old comrade for another person. On the night of the 18th he died, and on the 19th his friend and agent Mr Jameson, who had arrived on the day after Captain Cooper, thus described his condition—"With the exception of an occasional look or word of intelligence he was not in a state to make any settlement of his affairs."

It seems to me impossible to rely on the broken words of a person in such a condition as giving any faithworthy assurance of any fact, and especially of a

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fact so often solemnly denied by himself—implicitly in his letters, and expressly by his conversation on many serious occasions when he was perfectly collected and in full possession of his mental faculties.

And this view is sustained by the letters of Mr Jameson of the 29th October and the 2d November 1868, in which he treats the statement of Major Steuart as of no account, dealing with the child as illegitimate, and expressly saying that "the girl, Miss Wilson, the mother of the boy, has no legal claim." Mr Jameson's close relations with the Major, and thorough knowledge of him, gave peculiar significance to the expression of such an opinion at such a time, and he appears to have had no unfriendly feeling towards the pursuer, which might have led him, consciously or unconsciously, to misrepresent the truth.

Consider it as we may, this very singular and painful case is not free from many difficulties, which have not unnaturally produced diversity of judgment upon it, and which can never in this world be satisfactorily removed. But your Lordships must decide as best you can, on the balance of testimony and argument; and on the whole I am of opinion that that balance strongly inclines in favour of the appellant, and that, accordingly, the appeal should be allowed.

LORD SELBORNE.—My Lords, when the evidence of the only two witnesses (the pursuer's brother George and Mrs Kellet) who speak directly to the constitution of a marriage *per verba de præsenti* is examined, its effect is found to depend upon (1) certain words spoken, of which they profess to give the substance or effect, and which, as reported by them, are in themselves far from unequivocal; (2) certain accompaniments of fact, principally the wedding ring and the bedding, of which the former is difficult to reconcile with the rest of the story, and the latter rests upon the testimony of one witness (Mrs Kellet) only; and (3) the interpretation put by these witnesses on what they saw and heard, as that it was "solemn and serious," and so forth. A third witness, Agnes Forbes, adds what is material by way of corroboration, though she does not profess to have been present at the critical moment, but upon her testimony serious doubt is thrown, unless several other witnesses are to be entirely disbelieved. The rest of the pursuer's evidence relates to what happened either before or after the time when the actual marriage is said to have taken place, namely, the evening of the 13th February 1866—as does also the whole evidence of the appellant.

In a case of this kind, the Scotch law being what it is, a certain amount of colour and exaggeration, and the addition, subtraction, or alteration of a few particulars in a narrative not wholly without foundation in fact, may bridge over the whole difference between what is, in law, marriage, and what is not. Before your Lordships can draw the conclusion in support of which this evidence is adduced you must be satisfied that what took place on the 13th February 1866 was intended and understood by Major Steuart and the pursuer as then and henceforth constituting between them the relation of husband and wife. If, on the other hand, you have the evidence of these witnesses, with such confirmation (be it more or less) as they receive from the subsequent talk about a marriage, which is deponed to by members of the Wilson family and others, and, on the other hand, convincing proof, documentary as well as oral, that Major Steuart and the pursuer did *not* really suppose or understand themselves to have been married to each other on the 13th February 1866 (a point on which, since it depended on the true meaning and intention of their own words and

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acts, they at all events could not be mistaken), and further, that George Wilson, the father (who must have understood what then passed, at least as well as his son George, or Mrs Kellet, or Agnes Forbes) did not after the 13th February really regard his daughter as the lawful wife of Major Steuart—I for one cannot hesitate for a moment which to believe. I believe the evidence of the subsequent lives, writings, acts, and declarations on serious occasions of Major Steuart, the pursuer, and George Wilson, the father, rather than the statements, for the purposes of this suit, of George Wilson the son, Mrs Kellet, and Agnes Forbes, made in 1872.

Your Lordships have already gone so fully into the particulars and the effect of the evidence that I think it sufficient, without further repetition, to say that I concur generally in the remarks on the details of that evidence which have been already made. The weight of the acts and declarations, inconsistent with belief in the alleged marriage, of the pursuer herself and her father, is so much the stronger because it is clear that the Wilsons desired, if they could, to bring about a marriage between Major Steuart and the pursuer, and did whatever they could (in the way of conversation with relatives and others) to give a colour of marriage to the connection between them. The theory that Major Steuart was willing to marry the pursuer on the condition that the marriage was to be clandestine and kept secret, in order to withhold the knowledge of it from his father, is conclusively disproved in a variety of ways,—first, by its absolute inconsistency with the large mass of evidence which is produced (whether entirely credible or not) to shew that Major Steuart himself, and all the Wilsons, habitually, unreservedly, and to all sorts of people, talked from the 13th of February 1866 downwards about this alleged marriage; secondly, by the behaviour of Major Steuart to his father, and by his not merely parading this connection with the pursuer very publicly at Dunkeld and elsewhere in the immediate neighbourhood of his father's residence, but even intruding with her on two occasions into his father's house; and lastly, by the evidence of Joseph Gold [544] (confirmed by George Wilson, the brother), of Sir William Steuart's conversation with him in December 1865, and by that of Dr Culbard [580], Mr Rigg [577], and Mr Jameson, as to Sir William Steuart's wishes and offers at a later date, and the communication of those wishes and offers to the Major—the result of which is that Sir William was then prepared not only to acquiesce in, but even to encourage, the marriage of his son with the pursuer, and to make a suitable provision for him in that event. I cannot, with the knowledge of all these facts, attribute any real importance to what was said by the Major to his friend Captain Cooper on his death-bed, whatever may have been the degree of the Major's capacity to speak rationally and collectedly on important matters of business. Even if he were supposed to have been willing at that moment to make the pursuer his widow by acknowledging her as his wife, he was of course unable to do so unless she already stood to him in that relation; and whether she did or not is a question which must be determined, not by this conversation, but by other evidence in the case.

It was strongly urged by the counsel for the pursuer that the difficulty of believing that the pursuer's father and mother (persons apparently in a respectable condition of life in Edinburgh) could have been capable of assenting to the cohabitation of their daughter with Major Steuart in their own house, and surrounded by their other children, on any other footing than that of marriage, was so great as to preponderate over all the difficulties on the other side. I cannot

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agree with that. It is indisputable, if the evidence of the pursuer's witnesses is at all to be believed, that Mr and Mrs Wilson were ambitious of having Major Steuart, the heir of Murthly, for their son-in-law; and that long before February 1866 they permitted and encouraged between him and their daughter a kind and degree of familiarity and intimacy (with opportunities of being together alone and unobserved for hours at a time) which could not have been reconciled with the most ordinary prudence or delicacy, considering more particularly the difference of birth and station, even if Major Steuart had been a man of exemplary reputation for moral propriety. He was, however, by no means a man of that reputation. He was an officer in the army, fond (in some respects at all events) of low life, of irregular habits, coarse and indelicate in his language. No parent could have a right to suppose that if such opportunities were permitted to such a person advantage would not be taken of them. The infection of his coarseness and indelicacy had extended to the conduct of both the pursuer and her father when that extraordinary nocturnal excursion to Birnam took place in December 1865, and there is also sufficient evidence that she herself learnt to imitate, apparently without restraint or rebuke, in the house of her parents, his peculiar manners and language.

It is part of the pursuer's case that scandal had arisen before the 13th February 1866, and was felt by the Wilsons to be certain to continue from the circumstances under which the Major then was and had been for some time living in their house; and that it had become necessary for them to choose whether he should go elsewhere or remain in that house on the avowed footing of conjugal or quasi-conjugal cohabitation. Whatever actually took place on the 13th February 1866, this previous state of things was confessedly the cause of it. If the Major had then left the house, the expectation of a future marriage must in all probability have been abandoned, and all the evils of the past scandal, with the consequences, whatever they might be, of the intimacy which had already existed, must have been endured without any hope of remedy. On the other hand, the connection, if permitted to continue, and justified as far as possible to the family and their friends and acquaintances by such reputation of marriage as they might be able to create, might grow into an actual marriage afterwards, either by habit and repute, or by regular or irregular solemnization, under the operation of those influences which that state of things would naturally produce or strengthen.

Under the law of irregular marriage in Scotland it is not, I am sorry to say, by any means incredible that persons, generally reputed to be respectable, but not fastidious in morals or manners, may sometimes reconcile their moral sense to the notion of an inchoate marriage, to be matured and perfected by the progress of future events, of which they hope and expect a favourable issue. Such a notion is indeed foreign to our law, which recognises no middle state between marriage and concubinage; but it is, nevertheless, both possible and probable that in the peculiar circumstances in which the Wilsons were placed, and considering what were the alternatives open to them if the Major was not then willing to bind himself by an actual marriage, they might offer this excuse to their own consciences, and justify by it the language which they held to their family and their friends.

If even Mr Melville Jameson, a gentleman and a man of business, could be in so ambiguous a mental attitude as that described in a remarkable passage of his evidence, it is not difficult to imagine a still greater indistinctness of ideas

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on this subject on the part of such people as the Wilsons. The passage to which I refer is this :—"(Q.) Did you think when he introduced her to you that he was introducing his mistress to you? (A.) I cannot say; I don't think it is likely that he would. (Q.) I suppose you would not have cared that he should? (A.) No, I should not, certainly. (Q.) Did you take offence at the introduction? (A.) I did not. (Q.) Therefore you could not have thought her to be his mistress? (A.) No, I did not think her to be so. (Q.) Then, I suppose, you thought her to be his wife? (A.) It was a very peculiar alliance, I thought. I don't know that it was a recognised alliance of husband and wife, but I did not think he would introduce me to a woman who was his kept mistress. I cannot go the length of saying that I understood her to be his wife. (Q.) But you certainly did not take her to be his kept mistress? (A.) Certainly not. (Q.) Then, I suppose, there are just two relations? (A.) There are just two relations. (Q.) If you negative the one, don't you affirm the other? (A.) I cannot say that I actually thought at the time that she was his wife."

The whole circumstances of this case (including the facts that after Major Steuart's death the advice of counsel was obtained by Mr George Wilson, the father, on the question whether there was sufficient evidence of a marriage, and the assertion that documentary evidence of a marriage did exist, contained in the pursuer's letter to Sir W. Steuart, of the 1st November 1869) appear to me to illustrate in a very striking manner what is said at pages 20 and 21 of the Report of the Royal Commission on the Laws of Marriage in 1868, namely,—"We are led to conclude that there may be and that there is a considerable difference between this strictly logical view of the value of evidence of matrimonial reputation in the Scottish law and the popular view of the same subject, and that the popular view may perhaps indicate more truly than the theoretical doctrine the practical working of the law of habit and repute in Scotland. Evidently there is a wide practical difference between the effect of cohabitation with reputation of marriage in a country the law of which requires some definite and solemn acts or act for the constitution of the contract and its effect (though still considered merely as evidence) where no such solemnity is required, but where the relation may be constituted at any time by the private consent of the parties. In the former case the inquiry is, whether a certain external fact, independent of intention, did or did not happen; in the latter it is really an inquiry into the intention with which a series of acts were done. The most express declarations, oral or in writing, by both parties, that they are husband and wife, will not make them so unless the Judge is satisfied that the inward intention of their minds was in accordance with those outward words or acts. This has been held, not only as to declarations concerning the past, which are mere elements in the proof of cohabitation with repute of marriage, but even as to *verba de præsenti*, which, if sincerely spoken, would have themselves constituted marriage. In the case of Jolly v. M'Gregor (3 W. and S. 85), a marriage irregularly celebrated before a clergyman of the Established Church was set aside as a nullity because the Court was satisfied that the parties had no real matrimonial intention, and never regarded the ceremony as binding. Lord Glenlee (in the Balbougie case) said, and the House of Lords in the same case affirmed his doctrine :—'The cohabitation under the married character must be uniform and consistent, for a few instances in which a man behaves to a woman as his mistress will do away a thousand in which he addresses her as his wife. A man without the least thought of marriage may behave to his mistress as if

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she was his wife, may not choose to contradict her before strangers who call her such, nor to expose at all times the nature of the connection.'"

Then the Commissioners proceed—"It is impossible not to perceive the copious elements of doubt and uncertainty which the application of the doctrine of habit and repute may introduce in a variety of circumstances under such a state of the law. An opinion, however, is entertained by some, whose views are entitled to much consideration, that instead of producing upon the whole any evil effect, the practical tendency of this state of the law is to discourage concubinage, and to promote regular marriage. It appears to be thought that the law would sometimes imply marriage in such doubtful cases although the parties themselves may not really have made up their minds to be married, and would, if they were required to say positively and conclusively whether they were married or not, decline to give an affimative answer to that question, and that the risk of such a construction of an equivocal course of life may tend to diminish the frequency of illicit connections. It was suggested to a witness of great authority, during his examination before us, that nobody could be the husband of a wife by habit and repute except by his own will; that it was his own conduct which induced the reputation; that if he wished not to be married he would not so act as by habit and repute to be a husband; that as it depended on his own will whether he would be married or not, there seemed to be no reason to suppose that having the will to marry he would not do whatever the law might require for that purpose. The reply of the witness, Lord Moncreiff, was—'I understand that in the metaphysical view; but as applied here it is reasoning in a circle. You may say that if the presumption raised by habit and repute be a true one, the parties will prove the fact by avowing it. But it seems to me clear that if that reasoning be logically carried out the presumption of law is useless. It is only useful where the fact is doubtful;' adding that, as according to his view of the practical effect of the presumption, connections continued in concubinage (that is, under the pretence or reputation of marriage) necessarily would become marriage unless there were a clear intention to the contrary; the parties would have no interest to continue in that state and not to be married in the face of the Church."

Whether the continuance of such a state of the law as this is, on the whole, for the benefit of society or not, it is for the Legislature, and not for this House, in its judicial capacity, to consider. But that under such a state of the law some things may be thought by some persons reconcileable with morality and respectability which otherwise would not be so, I do not doubt; and this appears to me to be the true and adequate solution of whatever moral difficulty there is in the present case.

I concur in the judgment proposed by the rest of your Lordships.

INTERLOCUTORS appealed from reversed, and the appellant (defender) assoilzied from the conclusions of the summons, with expenses of the Court below.

CONNELL & HOPE—TODS, MURRAY, & JAMIESON, W.S.—PADDISON & SON—M'CAUL & ARMSTRONG, S.S.C.

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THE MAGISTRATES AND TOWN-COUNCIL OF PEEBLES, Appellants (Respondents).—*Cotton, Q.C.—C. J. Pearson.*

THE REV. JOHN BELL LORRAINE AND OTHERS (the Minister and Kirk-Session of Peebles), Respondents (Suspenders).—*Pearson, Q.C.—W. E. Gloag.*

June 7, 1875. Magistrates of Peebles v. Kirk-Session of Peebles.

Church—Burgh—Parish Bells—Interdict.—On the rebuilding, in 1779, of the parish church of a parish partly burghal partly landward, it was agreed between the heritors of the parish and the magistrates of the burgh that a steeple should "be carried up on the east end of the church," at the sole cost of the burgh, "which steeple, when finished, with the bells, &c., therein, is to be the sole property of the burgh for ever, the bells, however, to be employed for and parish as well as the town." The steeple was completed in 1784, and the burgh bells were thereafter hung in it.

Held (in *aff.* judgment of the First Division) (1) that having regard to the circumstances of the contracting parties at the date of the agreement, and specially to the fact that the heritors were bound to provide a bell for the parish church, the agreement was to be construed as conferring on the parish the exclusive right to use the bells for ecclesiastical purposes; and therefore (2) that the town-council were not entitled to order the bells to be rung on Sundays or national and parochial Fast-days for the purpose of intimating worship elsewhere than in the parish church at such hours as might be fixed by the kirk-session.

(IN the Court of Session, July 10, 1874, *ante*, vol. i. p. 1139.)

Ld. Chancellor (Cairns). Ld. Chelmsford. Ld. Selborne.

This was an action of suspension and interdict at the instance of the minister and kirk-session of the parish of Peebles against the magistrates and town-council of Peebles. The complainers sought to interdict the respondents "from causing the bells in the steeple of the parish church of Peebles, or any of them, to be rung, and from granting any warrant or order to ring the same on Sundays, or national or parochial Fast-days, except for the purpose of calling the public to worship in the parish church, or in the case of funerals or of fires, unless with the consent of the complainers, or at least from causing the said bells to be rung, or granting any warrant or order to ring the same for the purpose of summoning meetings of Voluntary church associations, or similar associations, without the complainers' consent."

About the year 1777 the parish church of the parish of Peebles, which was a parish partly landward and partly burghal, having fallen into a ruinous state, the question of rebuilding it was brought under the consideration of the heritors, amongst whom were the magistrates as representing the burgh. At the same time, the magistrates being desirous to erect a tower or steeple for the accommodation of the town clock and bells, and also thinking it for the benefit of the town's people that any new church to be built should be situate within the burgh, negotiations were opened between them and the heritors which resulted in an agreement which was set forth in an act of the town-council of 28th December 1778 and a minute of the heritors of 16th February 1779.

The terms of the agreement were, that the burgh undertook to build the new church after an agreed on plan, on receiving a contribution of £300 sterling from the heritors, and at its own expense to carry up a steeple on the east end of the church, and therein to hang the burgh bells, "which steeple, when finished, with the bells, &c., therein, is to be the sole property of the burgh for ever, the bells, however, to be employed for the parish as well as the town."

In terms of this agreement the church was built and opened for public worship in 1784, and has since been maintained as the parish church

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of the burgh and parish of Peebles. The steeple was also erected at the same time, and the town clock and two bells belonging to the town were placed in it. One of these bells was never used, except when rung by order of the magistrates at certain funerals, and on the occurrence of fires. The other was always rung on Sundays and national and parochial Fast-days, at the times fixed for public worship in the parish church. It, as well as the other bells in the steeple, was under the charge of the burgh officer, but was rung at whatever times were appointed by the minister and kirk-session, for the purposes above mentioned. In 1843 or 1844 a third bell was placed in the steeple, which was afterwards in use to be rung at stated times on week-days, for the convenience of the inhabitants of the burgh.

The present action arose out of a resolution of the magistrates and town-council of Peebles of 12th October 1873, whereby it was resolved that the bells in the steeple of the parish church should be rung at certain hours on Sundays, at which the various Dissenting congregations in the burgh, and especially the Free Church, were in use to meet, whether there was to be service in the parish church at these particular times or not.

The minister and kirk-session accordingly brought this note of suspension and interdict, and pleaded;—(1) The use of the bells in the steeple of the church on Sundays and national and parochial Fast-days, except in connection with the parish church and public worship therein, being illegal and unwarrantable, the complainers are entitled to interdict as craved. (2) The use of the bells complained of being contrary to law, and to immemorial custom, ought to be prohibited.

Pleaded for the respondents;—(1) The bells in question being, along with the steeple, the property of the respondents, they are entitled to regulate their use, and the complainers have no title to insist in the present proceedings.

The Lord Ordinary (Shand) pronounced this interlocutor:—"Finds, *inter alia*, that the respondents, while maintaining their right to use the said bells on Sundays and Fast-days, on occasions or at times when there is no service in the parish church, do not dispute their obligation to continue to ring the bell which has hitherto been rung for the parish church at all times when the same is required for the services of the church: Therefore refuses the note of suspension and interdict, and decerns: Finds the complainers liable in expenses," &c.

The minister and kirk-session reclaimed.

The First Division, on 10th July 1874, pronounced this interlocutor:—"Recall the said interlocutor: Sustain the reasons of suspension: Suspend the proceedings complained of, and interdict, prohibit, and discharge the respondents, the magistrates and council of the burgh of Peebles, from causing or ordering the bells in the steeple of the parish church of Peebles to be rung on Sundays or national and parochial Fast-days, except for the purpose of calling the public to worship in the said parish church at such hours as may be fixed by the minister and kirk-session, and except on occasion of funerals or fires, and decern: Find the complainers entitled to expenses," &c.

The magistrates and town-council appealed.

LORD CHANCELLOR.—In disposing of this case your Lordships will not, as it seems to me, be called upon to decide some questions of common law of some nicety which are referred to in the cases and proceedings; much less will your Lordships be called upon to entertain the question of any peculiar right which the Established Kirk of Scotland may be supposed to have as to the possession

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or use of bells in their kirks in contradistinction to those who are termed Dissenters. The case appears to me to rest upon grounds altogether apart from considerations of that description, and upon grounds which are extremely simple in themselves. What, as it seems to me, your Lordships will really have to consider is the proper construction to be placed upon a contract, contained in a very few sentences, entered into in the year 1779, between the parish of Peebles, and those who represented it, on the one hand, and, on the other hand, the town, represented by the municipal authorities. That contract appears to constitute what in this country would be termed a trust for public or charitable uses. And in this country possibly the case might have assumed the form of a proceeding for the administration of that trust. But in the form in which the case comes before your Lordships the same end will have to be arrived at through the construction of the contract to which I have referred.

Now, in order to place that construction upon the contract, your Lordships, as it seems to me, will have to look, in the first instance, at the position in which the parties to the contract stood at the time when it was entered into.

Let us take, upon the one hand, the town of Peebles. The town, at the time in question, had an old building or belfry in which were two bells, which clearly belonged to the town, and were used for the purposes of the town. That belfry had fallen into disrepair, and apparently the time had arrived at which the belfry must either be reconstructed or some other provision made for the housing and use of the bells. On the other hand, the parish and the heritors of the parish (and among the heritors the town itself was included) were in this position:—The church was in a ruinous condition—it was an old church, and had to be rebuilt. It does not appear very clearly whether there were any bells or what bells there were in the old church, or whether they were in a condition which would have made them available for the use of the new church. It was desired to erect a new church. The obligation to erect a new church would fall by the law of Scotland upon the heritors, including the burgh, so far as it was itself a heritor. The same law would have thrown upon the heritors the obligation of providing or furnishing the new church with a proper bell; but the law would cast no obligation upon the heritors to provide a steeple for the reception of the bell, or to ornament the church in any way with a steeple as part of its architecture. Under these circumstances it appears to have been considered desirable by the town to secure a habitation for their bells, which, obviously, would be a not unnatural one, and which, architecturally, might probably be made the best habitation which could be procured for them; and, in order to do this, it appears they were not unwilling to provide for the expense of constructing the steeple to the new church, which could not have been thrown upon the heritors against their will.

The arrangement which was proposed by the town for this purpose is evidenced in the first instance by a minute of the 12th May 1778—"Then the council appointed the provost and bailies of the burgh to meet with the heritors of the parish on Thursday first, in name of the council and community of the burgh of Peebles, and to agree with said heritors either to repair the old or to build a new church, and to pay their proportion of the building thereof or reparation, as shall be agreed on, according to what part of the same they shall possess, and in case of a new church to be built on the Castlehill, they allow the said provost and bailies, or any of them that shall attend the meeting, in their name to become bound to pay their said proportion of the building, pro-

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viding that the steeple for their clock and bells shall be carried up with the building of the church, and the town shall be obliged in that case to pay any additional expenses that said steeple shall occasion." This minute, which obviously is in the nature of an offer, is perfectly clear in its construction. It amounts to this—there is a site, which is, from its nature, the most desirable site for the erection of a church and for the housing of these bells. If you, the heritors, will abandon the scheme of repairing your own church, and will build a new church, and not only build a new church, but build it on the Castlehill, we, the town, will contribute our share of the expense; and, more than that, if that is made a place where our bells shall be received, we will provide the steeple and carry up the steeple to the proper height as a part, architecturally, of the church, providing the funds to meet the expense of doing that. It is therefore an offer in which the town asked, as it were, as the consideration which was to move them, a right to erect upon this situation, as part of the church, a steeple to receive the bells. That is a little more fully elaborated in the minute of the 29th of December 1778. That minute was made on the eve of the meeting which was to be held with the heritors. It will not be necessary for me to read the whole of it, but about the middle of the minute it runs to this effect—That the heritors are to have their third set off on either end of the kirk they please, to be divided among them as they shall judge proper; that, besides the said £300 to be paid by the heritors, the town are to have the benefit of the old kirk and seats thereof, and to have power to take down the same to within six feet of the bottom, to enable them to rear up the new one; that the town shall be obliged to keep up in sufficient repair the said new kirk after it is finished for a certain number of years at their own expense, and from that period the repairs of the kirk shall fall upon the heritors and the town in proportion to their several possessions as above. That the steeple is to be carried up on the east end of the kirk, and make part of the gable thereof so far as the kirk wall goes,—that is to say, the gable kirk wall was to be the foundation of the steeple—the steeple was to rest upon that—and when the whole is finished the steeple, bells, and everything therein, are to be the sole property of the town for ever; that the council agrees to give as much of their ground betwixt the bowling green and the street as will be necessary for building said kirk and steeple upon.

On 16th February 1779 the meeting, in view of which this last minute had been made, took place between the heritors and those who represented the town. "Provost Reid laid before the meeting an act of the town-council of date the 28th (that is obviously a mistake for the 29th) December 1778, mentioning their opinion that a new church ought to be built, and the burgh should contract with the heritors for building it, in case the heritors should give £300 sterling as their proportion for building and finishing said church, and flooring and breasting the galleries" and so on, and that a steeple was "to be carried up on the east end of the church, which steeple, when finished, with the bells, &c., therein, is to be the sole property of the burgh for ever;" and then comes this next stipulation, which appears to have been inserted in the proposal of the town on the part of the parish—"the bells, however, to be employed for the parish as well as the town."

Now, it is the construction of those last words which I have read that is in question; and upon that construction the controversy in this case appears to me really to turn. What was the meaning, under the circumstances I have detailed, of this stipulation—"the bells to be employed for the parish as well

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as the town?" I apprehend that the meaning clearly was this,—We, the town, have bells, which are now in our own separate belfry, and we use them for town purposes—they are there for that end and object. We have no desire to use them for any other purposes, but we consider that a most desirable site to obtain possession of for these bells would be in a steeple which architecturally will become part of the parish church. We offer to the parish church to build that steeple, to incorporate it with the parish church, and to do this at our own expense, provided they will receive the steeple and allow it so to be incorporated. In that steeple we shall have our own bells, we tell the parish that we shall use them, as we have done hitherto, for town purposes, and we make a right on our part so to use the bells part of the bargain. Says the parish, on the other hand,—We are about to erect a new kirk. We are willing that the steeple which the town requires shall be incorporated in the new kirk. We should be entitled to assess the parish for the purpose of providing a bell for parish purposes, and providing for its suitable accommodation in some way in the kirk, but we are willing to take this offer of the town-council, provided the town-council will put us in as good a position as we should have been in if we had had a bell provided by ourselves and at our own expense,—that is to say, we shall have the use of these bells put by the town into the steeple for parish purposes, as we should have had the use of our own bell if we had provided it, and put it up in the kirk.

My Lords, that appears to me to be both the natural meaning of the words which I have read, and also exactly the natural arrangement which would have been made under those circumstances between two such bodies as the town and the parish. The agreement was acted upon accordingly. The kirk was built, and the steeple was built, and in the steeple were placed the bells of the town. Everything appears to have gone on harmoniously until a very recent date; and what is claimed now by the town, and what was sought to be controlled by the action upon which this appeal arises, was this—the parish kirk had divine service on Sundays at a quarter past eleven (as I understand it), and at two. The bell was rung for these services at eleven and a quarter before two. On that there is no dispute. In the parish kirk there is no service in the evening, but there is service in the evening in some other places of worship in the town, and notably, as I understand, in the Free Kirk, at six o'clock. And the town-council have come to a resolution that the bells in the steeple of the Established Kirk shall be rung at a quarter before six, with reference to the worship which is to take place in the Free Kirk at six o'clock. It was this claim on the part of the town-council which led to the institution of the action in this case, for the purpose of restraining that ringing of the bells.

My Lords, it appears to me that there are two points of view in which that claim of the town-council of the right to ring the bells is to be looked at. In the first place, if I am right in saying that the contract was that the town should have the right of ringing these bells for town purposes, and only for town purposes, is this purpose to be called a town purpose? Is it to be called a town purpose that the town-council should say—We will look to the interests of one denomination or of more denominations than one. We will observe the time at which they have public worship on Sundays, and we will insist upon our right of ringing the bells in the steeple of the Established Kirk for the purpose of summoning those members of the public who wish to attend the worship of those denominations to that worship. I asked the learned

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counsel who appeared for the burgh, whether they contended that that was a town purpose. I think the learned counsel felt some embarrassment in answering the question, and I rather think I am right in saying that the counsel for the appellants preferred to rest their claim upon the absolute right of the town-council to control the ringing of these bells, provided they rang them for the worship of the Established Kirk, rather than upon the argument that ringing them for the worship of another denomination was to be called a town purpose. But, if I am right as to the construction of the contract, the question to be solved is—Is the ringing for the worship of a particular denomination other than that of the kirk of the parish a purpose of the town? It appears to me that it cannot be considered to be a municipal purpose. It appears to me that it is impossible to say that it is part of the duty of the municipality to provide a bell for the purpose of summoning to the worship of a particular denomination those who are anxious to attend that worship.

Another consideration arises—Is it consistent with the stipulation made on behalf of the parish that the parish should have the bells for parish purposes, that they should be rung on Sunday with reference to the worship of other denominations? Now, as I said before, it appears to me that the result of the agreement with regard to the parish was this,—that the parish should be in as good a position *quoad* these bells for the parish purposes as if they had a bell or bells of their own, and provided at their own expense, in the kirk. Now, what is the purpose, with regard to public worship, of parish bells? The purpose obviously is this—that they are to sound forth upon the day or days appropriated to public worship, in a way which shall indicate to those who hear them that as soon as the bell or bells cease ringing the worship in the church over which the bells are ringing is to commence. And if in the church over which the bells are placed the bells are rung at a time which has no reference to the worship in that church, but has reference to something which is taking place elsewhere, you not merely are not satisfying the purpose of the parish, but you are defeating the object of the parish, and the object with which the bell is placed above the parish church. So far as the ringing of the bells at eleven and a quarter to two is concerned no question arises. Those hours happen to synchronise with the hours of worship of other denominations in the town, and the bell which rings for the parish church at those hours may well answer the purpose of informing the public that the hour is approaching when there will be service in the other places of worship. But observe the consequence with regard to the ringing of a bell at a quarter to six o'clock. Any person who hears that bell ought to be under the impression, and probably would be under the impression, that that is an announcement made from the parish church that, at the end of the tolling of the bell, worship will commence there. He goes to the parish church, he finds it shut up. If he can procure any information of what the state of things really is, he is told there that the bell is ringing, not for the worship at the parish church, but for the worship to take place in some different building in some other part of the town. Therefore, not only is the ringing of the bell not serving a parish purpose, but it is defeating a parish purpose, for it is misleading the parishioners into the belief that there is going to be worship at the parish church, where there is not going to be any such worship.

Therefore, both upon the ground that the town is claiming to use the bells for a purpose which is not a town purpose, and also upon the ground that it is

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using the bells for a purpose which defeats the object of the bells as parish bells —upon both of these grounds it appears to me that the use claimed to be made of these bells by the town-council is not a use warranted by the contract of 1779. That really exhausts all that I will trouble your Lordships with upon the merits of the case. The interlocutor of the Court of Session appears to me in substance to be correct. I am inclined, however, to submit to your Lordships, that the interlocutor has not assumed the most happy form, and that it has unnecessarily concerned itself with the question of funerals and of fires, upon which really no evidence has been adduced which is material, and by the introduction of which words it appears to me that some confusion and difficulty might hereafter arise. If your Lordships concur with me upon the main question in the case, I shall submit to your Lordships that the interlocutor of the 10th of July 1874 should be varied thus,—That it shall restrain the town-council from ordering the bells to be rung on Sundays or national and parochial Fast-days for the purpose of intimating worship or calling the public to worship elsewhere than in the said parish church, at such hours as may be fixed by the minister and kirk-session, and decern, &c., following the words of the interlocutor thenceforward.

My Lords, I have only one other observation to make, which is this—Some distinction was attempted to be drawn between the two bells which were placed in the steeple at the time it was built, and a third bell, which has since then, and in more modern times, been added to the original two bells. As to this third bell, it was contended that it clearly belonged to the burgh, and that it did not come within the contract or trust which was created by the minutes of the year 1779. My Lords, as to that, it appears to me that the appellants must choose between one of two things. Either this third bell must be taken to be an accretion to the cumulus of bells which are spoken of in the contract of 1779, and to have become subject to the trusts and obligations of that contract; or, if it is to be held free from that contract, the only result will be that the town-council must remove the bell from the steeple. I give no opinion as to their right to do that. But whether they have the right to remove it, or whether it is allowed to remain there, it appears to me clear that it cannot be used except as one of the bells which are to be rung in the steeple, and subject to the same rules which must govern the original two bells.

My Lords, I shall move your Lordships that the interlocutors complained of be not reversed, but that the interlocutor of the 10th of July 1874 be varied in the way I have mentioned. And inasmuch as the alteration deals with that which was not the real subject of the appeal, and as the appellants appear to me to have been in the wrong in their appeal, I shall submit to your Lordships, and move your Lordships, that the interlocutors be affirmed in other respects, with costs.

Lord Chelmsford.—The question of the town-council's claim of right to control and regulate the ringing of the bells in the steeple attached to the parish church depends entirely upon the terms of the agreement between the heritors and the town-council of the 16th February 1779. The church was built at the joint expense of the burgh and of the heritors, the heritors agreeing to contribute £300, and they were to possess one-third part of the church, and the burgh the other two-thirds, and the parties stipulated that a steeple should be carried up on the east end of the church, which steeple when finished with the bells, &c. therein, was to be the sole property of the burgh for ever, the bells

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however, to be employed for the parish as well as the town. The steeple in which the bells are placed is structurally part of the parish church. If the burgh had not placed any bell in the steeple the heritors would have been bound by law to have provided a bell for the purpose of summoning the congregation to public worship in the parish church. The burgh having placed their own bells in the steeple, and stipulated that they were to be their sole property, the heritors would not have been discharged from their legal obligation unless the town-council had appropriated the bells to the same purpose as a bell placed in the church by the heritors must have been applied to. They therefore agreed that the bells should be employed for the parish as well as for the town, which can have no other meaning than this, that the bells were to be used for the same purpose as if they had been put up by the heritors, which of course, would be for the use of the parish church only. The parochial use of the bells is distinct, and is distinguished from the town use. To say that the ringing of the bells on Sunday at hours to suit the different congregations of various denominations is for the benefit of the town generally, and therefore a town purpose, is to confound the two uses for which the bells may be employed, the parish use, which is necessarily ecclesiastical, and the town use, which is necessarily secular. Although the exclusive use of the bells in connection with the worship in the parish church for nearly one hundred years cannot control the words of the agreement, nor perhaps interpret its meaning, yet it is impossible not to feel fortified in the construction which I have put upon the agreement by the fact that it has been adopted and acted upon for so long a period by both the contending parties without doubt or question. I agree with my noble and learned friend that the interlocutors ought to be affirmed, with the variation in one of them which he has proposed.

Lord Selborne.—The only material facts (beyond the agreement of 1779 itself) appear to me to be these—first, that the bells in question have been lawfully placed in a steeple, which, though vested in point of property in the magistrates, is still an inseparable part of the structure of the church, and is accessible only through other parts of that structure; and secondly, that by the arrangement for providing in this steeple bells to be "employed for the parish," the heritors were in a lawful manner fulfilling an obligation incumbent upon them by law to provide at least one bell for the purposes of the parish church. Under these circumstances it appears to me impossible to doubt that when the agreement says the bells are "to be employed for the parish as well as the town," it means that they are to be used for such purposes as are properly and truly parish purposes and properly and truly town purposes, and for no other purpose whatsoever; and that the regulation of the use of the bells for those purposes respectively was to belong, as to each kind of purpose, to the proper legal authority, *i.e.*, as to the parish purposes, to the kirk-session; and as to the town purposes, to the magistrates; and that, as (on the one hand) the powers of the magistrates as to town purposes ought not to be usurped or encroached upon by the kirk-session, so (on the other hand) the powers of the kirk-session ought not to be usurped or encroached upon by the magistrates. This being so, I think it is reasonably plain that by assuming to regulate the hours of ringing these bells on Sundays for purposes of public worship the magistrates have in two respects trespassed upon the proper province of the kirk-session, and have violated the substance of the contract as to the employment of the bells "for

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the parish,"—first, by fixing the particular hours at which the bells shall be rung for such purposes, whereas the right to fix those hours belongs properly to the kirk-session; and secondly, by doing this with a view to other worship than that of the parish church, for which it would be wrong and unlawful both on principle and according to the decision in the Paisley case[1] to ring any bell or bells which had been lawfully provided by the heritors in discharge of their legal obligation for the purposes of the parish. It further appears to me that there is no legal ground on the construction of this agreement for making any distinction for these purposes between one bell and another, so long as it is lawfully placed and remains in this steeple, and that there is no usage in this case by which the rights of parties, according to the legal construction and effect of the original agreement of 1779 have been in any way restricted or altered. While, however, I agree with the majority of the Judges in the Inner-House on the merits of this case, I think it will be proper that the interlocutor should be varied, without prejudice to the costs of the appeal, in the manner proposed by the Lord Chancellor.

THIS judgment was pronounced:—"It is ordered and adjudged by the Lords Spiritual and Temporal, in Parliament assembled, that the said interlocutor of the Lords of Session in Scotland of the First Division, of the 10th of July 1874, complained of in the said appeal, be varied, by leaving out after the words 'parochial Fast-days' the word 'except,' and by inserting after the words 'purpose of' the following words, 'intimating worship or,' and by inserting after the word 'worship' the words 'elsewhere than,' and by leaving out after the words 'kirk-session' the following words, 'and except on occasion of funerals or fires:' And it is further ordered and adjudged, that, with this variation of the said interlocutor of the 10th of July 1874, that interlocutor" (and the interlocutor approving of the Auditor's report) . . . . . "be, and the same are hereby affirmed, with costs:" . . . "And it is further ordered, that the cause be, and the same is hereby remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this variation and this judgment."

GRAHAMES & WARDLAW, Westminster—GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—CONNELL & HOPE, Westminster—GILLESPIE & PATERSON, W.S.

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M'Donald v. M'Donald's Trustees.

COLONEL ALASTAIR M'IAIN M'DONALD, Appellant (Defender and Claimant).—*Cotton, Q.C.—Marten, Q.C.—J. M. Collyer.*

WILLIAM M'INROY AND OTHERS (Sir John and Lady M'Donald's Trustees), Respondents (Pursuers and Real Raisers).

ALEXANDER WEIR ROBERTSON (John Allan M'Donald's Trustee) AND OTHERS, Respondents (Claimants).

JOHN ALLAN M'DONALD, Respondent (Defender).—*J. Pearson, Q.C.—Kay, Q.C.*

ELIZABETH MOORE MENZIES M'DONALD, Respondent (Defender and Claimant).—*J. Pearson, Q.C.—Kay, Q.C.*

Marriage-Contract—Provision to Children—Power of Apportionment, Exercise of—Condition adjected.—By an antenuptial contract of marriage the wife's fortune was conveyed to trustees, with directions, on the death of the survivor of the spouses, to "pay over or assign" the whole trust-funds to the child or child-

[1] M'Naughtan v. Magistrates of Paisley, Feb. 7, 1835, 13 S. 432, 7 Scot. Jur. 214.

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ren of the marriage, "in such proportions, and at such time, and under such conditions as" the spouses should by joint deed appoint, and failing such apportionment, then in certain specified proportions. A portion of the wife's funds, amounting to £25,000, was advanced by the marriage-contract trustees on heritable bond over two estates purchased by the husband for £28,000 during the subsistence of the marriage. The parents, on the narrative that it was their wish to entail these estates, as well as the patrimonial estate of the husband, on the children of the marriage, and their heirs before the children of any subsequent marriage of the husband or other substitutes, and that the husband had for that purpose agreed to alter the destination of his patrimonial estate, and to execute an entail of the whole estates, and had executed the same, proceeded, in the exercise of their power of division, to provide that the above mentioned sum of £25,000 secured over the husband's estates should be "settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate," the said sum being the share of the trust-fund, "which we do hereby allot and apportion as the share of our eldest son, or, failing him, of the heir of entail succeeding to the said entailed estate, it being our desire and appointment, that the said trustees under our marriage-contract before narrated, or the survivors of them, should immediately on the death of the survivor of us renounce and discharge the said heritable bond, and disburden the said lands and estates" of the same.

Held (*rev.* judgment of the Court of Session) that this was a valid exercise by the parents of the power of appointment contained in the marriage-contract in favour of the eldest son to the extent of £25,000 in fee, the addition of the words "and other members of our family in succession, being heirs in possession of the entailed estate," importing no effectual limitation of his right, and the direction to the trustees to discharge the bond for £25,000 over the entailed estate being one which could only be carried out with his consent.

Ld. Chancellor (Cairns). Ld. Hatherley. Ld. Selborne.

(IN the Court of Session, March 10, 1874, *ante*, vol. i. p. 794.)

By antenuptial contract of marriage, dated 8th September 1826, John M'Donald of Dalchosnie (afterwards Sir John M'Donald), settled his estate of Dalchosnie upon himself and his wife, Miss Adriana M'Inroy (afterwards Lady M'Donald), in conjunct fee and liferent, but for her liferent use allenarly, and upon the heirs-male of the marriage, and certain other heirs in fee, with power to himself to execute an entail, which he subsequently did, calling first to the succession these heirs in the order of the destination contained in the marriage-contract.

On the other hand, Miss M'Inroy conveyed her whole interest under her father's will, amounting to more than £50,000, to trustees, for the following purposes:—That they should pay the whole annual produce to herself and John M'Donald during the subsistence of the marriage, and to herself, should she survive him, during the remainder of her life; that they should pay to John M'Donald, should he survive her, an annuity of £750 a-year from her death during the remainder of his life; and that after the death of the survivor of herself and John M'Donald they should "pay over or assign the whole of the sums and property to be liferented in manner aforesaid to the child or children to be procreated of the said intended marriage, and that in such proportions and at such time and under such conditions as the said John M'Donald and Adriana M'Inroy shall by any joint deed, or as the said Adriana M'Inroy, in case she shall be the survivor, shall, by any deed or writing signed by her, direct and appoint, and, failing any such direction or appointment," then in certain specified proportions.

Soon after his marriage Sir John M'Donald purchased the two estates of Lochgarry and Kinloch-Rannoch, adjoining to Dalchosnie, for the price of £28,000. There was paid towards the purchase of these estates, out of the funds in the hands of Lady M'Donald's trustees, the sum of £25,000, for which a heritable bond over the estates was granted to them by Sir

John. This bond remained a burden on the estates during the life of Sir John and Lady M'Donald.

On 18th July 1837 Sir John and Lady M'Donald executed a joint deed of settlement and provision.

This deed proceeded on the narrative of their contract of marriage, and of the subsequent purchase of the estates of Lochgarry and Kinloch-Rannoch, and of the advance on the security of the estates of the sum of £25,000 of Lady M'Donald's funds, and on the further narrative of it being "our desire to settle definitively, onerously, irrevocably, and mutually the whole of the said estates of Dalchosnie, Lochgarry, and Kinloch-Rannoch belonging to me, the said John M'Donald, and also to divide, apportion, and settle the whole property, heritable and moveable, including the said sum of £25,000 secured over the said lands of Lochgarry and Kinloch-Rannoch belonging to me, the said Adriana M'Donald, on ourselves and our family, and failing our heirs-male, so far to alter the destination in the marriage-contract with regard to Dalchosnie as to settle it with the other lands on heirs-female of the present marriage, giving them a preference and priority to heirs-male of any subsequent marriage: And (considering) that in order to effect that object I, the said John M'Donald, have of this date executed a deed of entail of the said lands of Dalchosnie and Lochgarry and Kinloch-Rannoch in favour of my said wife and myself, and the survivor of us in liferent, and to the heirs therein mentioned in fee,* and which deed of entail was granted by me in consideration of the declarations and apportionment hereinafter made in regard to the property of the said Adriana M'Donald, my wife:" and then provided as follows:—"Therefore we, the said John M'Donald and Adriana M'Donald, in consideration of the said deed of entail and of the powers possessed by us under the said contract of marriage, do by these presents, with joint consent and assent, declare and appoint as follows:—First, It is our will that in the event of the said John M'Donald surviving me, the said Adriana M'Donald, he shall have and enjoy the liferent use of my whole property during all the days of his life, just as I myself would have enjoyed it if I had survived him; second, that it is our will that the said sum of £25,000, secured over the said estates of Lochgarry and Kinloch-Rannoch, shall be settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate, the sum of £25,000 being the share of my (the said Adriana M'Donald's) property, which we, the said John M'Donald and Adriana M'Inroy or M'Donald, have allotted and apportioned, and do hereby allot and apportion, as the share of our eldest son, or failing him, of the heir of entail succeeding to the said entailed estate, it being our desire and appointment that the said trustees under our marriage-contract before narrated, or the survivors of them, should immediately on the death of the survivor of us, renounce and discharge the said heritable bond, and disburden the said lands and estates of Lochgarry and Kinloch-Rannoch of the same; and, third, as to the remainder of the property belonging

* The destination in this entail was to the eldest son of the marriage and the heirs-male of his body; whom failing, to each son of the marriage successively, and the heirs-male of his body; whom failing, to each daughter of the marriage successively, and the heirs-male of her body; whom failing, to the heirs-female of the body of each son *seriatim*; whom failing, to the heirs-female of the body of each daughter *seriatim*; whom failing, to the sons and daughters of any subsequent marriage of the entailer and the heirs-male of their bodies; whom failing, to the entailer's two brothers and the heirs-male of the body of each successively; whom failing, to the entailer's heirs whomsoever. The entailer's two brothers predeceased Lady M'Donald without issue.

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to me, the said Adriana M'Donald, it is our will that after the death of the said John M'Donald, in case he survives me, the whole funds beyond the said sum of £25,000 settled as above shall be equally divided among our younger children, exclusive of the heir; it being provided that in case such funds shall exceed £10,000 to each younger child, the whole excess above £10,000 shall all fall to the eldest son or heir of entail as above mentioned, with the view of its being laid out in the purchase of lands and entailed with the other estates upon him and the heirs called in the foresaid deed of entail through the whole course of succession." . . . .

Sir John M'Donald died on 24th June 1866 survived by his widow and by three sons and three daughters.

Lady M'Donald died on 7th November 1872.

On Lady M'Donald's death, the trustees under her contract of marriage brought a multiplepoinding of the funds in their hands. In that action a question was raised as to the validity of the exercise by the mutual deed of 18th July 1837 of the powers of apportionment reserved in the marriage-contract of 8th September 1826.

It was pleaded for Colonel Alastair M'Iain M'Donald, the eldest son of Sir John and Lady M'Donald, and as such heir of entail in possession of the lands of Dalchosnie;—Under the settlement and deed of division executed by Sir John and Lady M'Donald the claimant is entitled to payment of the sum of £25,000, without the limitations and conditions attached to the appointment thereof, in respect that the said limitations and conditions are ineffectual, not being authorised by the power of appointment in the marriage-contract.

It was pleaded for the younger children;—(2) The deed of Sir John and Lady M'Donald of 18th July 1837 is ineffectual as an apportionment, in respect that it gives a large portion of the fund to persons not objects of the power. (3) No valid deed of division or apportionment having been executed either by Sir John and Lady M'Donald jointly, or by Lady M'Donald as the survivor, the marriage-contract funds fall to be divided among the children of the marriage who survived Lady M'Donald in the proportions specified in the marriage-contract.

The Lord Ordinary (Gifford) pronounced this interlocutor:—"Finds that there was no valid or effectual exercise of the power of direction and appointment reserved to the late Sir John M'Donald and Lady Adriana M'Inroy or M'Donald, his spouse, or to the said Lady M'Donald, if survivor, in the contract of marriage between them, dated 8th September 1826; and finds that the estate of the said Lady M'Donald, settled by the said marriage-contract, being all and whole Lady M'Donald's whole share and interest of every kind in the estate of or under the will of the deceased James M'Inroy, her father, falls now to be paid, divided, and assigned to and among the surviving children of the marriage, in the same manner as if no division or appointment had been made or attempted under the said power," &c.

Against this interlocutor Colonel Alastair M'Iain M'Donald reclaimed.

The Second Division, after an argument before themselves and three Judges of the First Division, in conformity with the opinion of the majority of the seven Judges (dissenting Lord Justice-Clerk and Lord Ardmillan), adhered to the Lord Ordinary's interlocutor.

Colonel M'Donald appealed.

LORD CHANCELLOR.—The only question of difficulty in this appeal is as to the proper construction of a joint deed of division executed by Sir John and Lady M'Donald in the year 1837.

At the outset I may say that I certainly do not give any weight to an argu-

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ment which, somewhat late in the progress of the case, was addressed to your Lordships in favour or the respondents—that because the joint deed of division purported to give to Sir John M'Donald, in the event of his surviving his wife, a life interest in the whole of the trust-property, therefore all that was done by way of appointment subsequently to the giving of that life interest was invalid. There was an attempt to give the whole of the income to Sir John during his life, in the event of his surviving Lady M'Donald. In point of fact he did not survive Lady M'Donald. Under these circumstances it appears to me it would be entirely contrary to reason, and, as far as I know, quite without authority, to hold that an attempted disposition, not in any way interfering with that which was legitimately within the object of the power of distribution of the property, and only to take effect in an event which never has happened, should in any way militate against the validity of the subsequent appointment.

Passing by that, I come to what was done with regard to the children of the marriage. Lady M'Donald had a very considerable property of her own, amounting to over £50,000. Shortly after the marriage Sir John and Lady M'Donald thought it would be desirable to purchase two properties neighbouring to that which belonged to Sir John M'Donald at Dalchosnie—namely, the properties of Lochgarry and Kinloch-Rannoch, and Sir John purchased these properties for a sum of £28,000. He borrowed, in order to pay for these properties, £25,000 of the trust-money, which represented the property of Lady M'Donald, and he gave to her trustees a heritable bond over the properties which he had purchased—namely, Lochgarry and Kinloch-Rannoch. When the spouses came to consider the appointment they should jointly make of Lady M'Donald's property they took notice of the state of the landed property. A new entail was made of the Dalchosnie family property, and at the same time an entail was made of the Lochgarry and Kinloch-Rannoch properties. They entailed the whole three upon their eldest son, and their other sons in course of entail, and then upon other persons.

Now, there is not the least doubt upon the view which must be taken, on the whole, of the joint deed of division, coupled with the deed entailing these properties, that the spouses intended and desired that the estates of Lochgarry and Kinloch-Rannoch, which had been mainly acquired by the £25,000 of trust-property, should go in the course of the entail under which they were limited, and should go without the encumbrance on them of the heritable bond securing the £25,000, to the trustees of the trust-funds. And there is not the slightest doubt, at least not in my mind, that if Sir John and Lady M'Donald had been asked, is that what you desire? do you desire to execute an instrument which shall say that Lochgarry and Kinloch-Rannoch shall go in the course of the entail under which they have been settled, discharged of the £25,000?—they would have said, By all means, that is exactly what we want; let that be done in whatever way it can be done. But, my Lords, although there is no doubt that that was the general intention of Sir John and Lady M'Donald, the question for your Lordships to consider is this—How have they given effect to that general intention, and have they given effect to that general intention in a way which is open to objection upon the ground of its complete invalidity? My Lords, it was perfectly well known—any one reading the deed of 1837 would see it—that those who were advising Sir John and Lady M'Donald saw that this general intention of the spouses could not be given effect to, except through the medium of an appointment of the trust-fund representing Lady M'Donald's property, and the

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question again comes to be, have they, in making that appointment of the trust-funds, exceeded the conditions of the power of appointment.

Now, what they did, in order to accomplish the intention which they had in view was this—Under the second head of the deed they provided in these words, "That it is our will that the said sum of £25,000 secured over the said estates of Lochgarry and Kinloch-Rannoch shall be settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate." That was the first part of the clause. The second is this—"The sum of £25,000, being the share of my (the said Adriana M'Donald's) property which we, the said John M'Donald and Adriana M'Inroy or M'Donald, have allotted and apportioned, and do hereby allot and apportion as the share of our eldest son, or, failing him, of the heir of entail succeeding to the said entailed estate." That is the second. The third is this—"It being our desire and appointment that the said trustees under our marriage-contract before narrated, or the survivors of them, should immediately, on the death of the survivor of us, renounce and discharge the said heritable bond, and disburden the said lands and estates of Lochgarry and Kinloch-Rannoch of the same."

Now, as regards the first clause of this second head of the deed, "it is our will that the said sum of £25,000 secured over the said estates of Lochgarry and Kinloch-Rannoch shall be settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate," if that stood alone, if the deed contained nothing more than that, it would, as it seems to me, be open to this observation,—There is a direction to take £25,000 of the trust-funds, and to settle it on the eldest son—to make it belong to the eldest son,—a person then in existence, a person spoken of, a *persona designata* by the title which he then filled. And if you add the words, "and other members of our family in succession, being heirs in possession of the entailed estate," the most favourable view for the respondents that could be taken of that clause would be this—that while the eldest son was to take, in the first place, the other persons who were heirs in the course of the entail were to take afterwards in the same way in which they were to take the estates themselves afterwards—that is to say, the eldest son was to take that which was money in the way in which he was to take the land as heir of entail, or what we should term the tenant in tail, and that he should take it therefore as the fiar, with a simple destination to those who afterwards might become fiars in succession. Your Lordships will readily see that if that were to be the construction it would make the eldest son the absolute owner of the money, because, of course, the money could not be subject to fetters which would keep it from his absolute *dominium*.

But, my Lords, we have further information in the second clause, which is this—"The sum of £25,000, being the share of my (the said Adriana M'Donald's) property, which we, the said John M'Donald and Adriana M'Inroy or M'Donald, have allotted and apportioned, and do hereby allot and apportion as the share of our eldest son, or, failing him, of the heir of entail succeeding to the said entailed estate." I again say, if this clause stood alone, it would appear to me to be the clearest possible apportionment and appointment of the £25,000 as the share of the eldest son, and under the words "or failing him" if he were not there at the time when the succession opened at the death of the survivor of the spouses, there would be an indication that the heir of entail succeeding to the

entailed estate was to come in his place as substitute for him. Then, again, if that were to be the construction of the second clause, the eldest son, being there, would be entitled, as the object of the appointment, to take the money, and the circumstance that there was an alternative limitation, which never came into existence, to a person who might not have been an object of the power, could not in any way defeat or invalidate the appointment to the eldest son, who was an object of the power.

I have pointed out what appears to me to be the only two constructions which these two clauses admit of. There is either an appointment to the eldest son with an appointment by way of succession to the next owners in tail, making both of them fiars,—the one a fiar in the first instance, with a simple destination to the others afterwards, or there is an appointment to the eldest son if he is alive at the death of the survivor of the spouses, with a conditional institution of the next heir of entail if the eldest son should not then be alive. In either case the eldest son would be entitled to the *dominium*, the possession of the money.

Then the third clause is this :—" It being our desire and appointment that the said trustees under our marriage-contract before narrated, or the survivors of them, should immediately, on the death of the survivor of us, renounce and discharge the said heritable bond, and disburden the said lands and estates of Lochgarry and Kinloch-Rannoch of the same." That is the expression of what I began by saying was without doubt the general intention of the spouses, that by means of the land being disburdened of the heritable bond it should be left to go in succession to the heirs of entail without the obligation of paying the sum of £25,000. It is simply an expression of a desire which could only be carried into effect with the consent of the person who by the previous clauses was made, according to my opinion, the absolute owner of the £25,000. If he consented the trustees might disburden the estate. If he did not consent the estate had to remain burdened with this bond, and this expression of desire would not be held in any way of itself to take away from that ownership which was created by the former clause. My Lords, it appears to me that the clause with regard to the £10,000 for portions for the younger children entirely corroborates this view of the construction. That clause runs thus :—" It being provided that in case such funds shall exceed £10,000 to each younger child the whole excess above £10,000 shall all fall to the eldest son or heir of entail as above mentioned (that is to say, to the eldest son if he is there, and to the heir of entail if he is not there), " with a view to its being laid out " (it says not by whom) "in the purchase of lands, and entailed with the other estates upon him and the heirs called in the foresaid deed of entail through the whole course of succession,"—that is, it shall fall to the eldest son, and it shall fall to him with a view to its being laid out in the manner described. Whether it would be so laid out or not would depend upon whether the heir or the eldest son taking it held himself to be bound by or was willing to comply with this expression of a wish as to the way in which the money should be used.

That is the construction which, as it appears to me, ought to be put upon the deed, and, if so, the rule of law which is applicable to the subject is beyond all doubt. It was not in any way disputed at your Lordships' bar. It is a rule to be be derived from the authority of Carver v. Bowles, Jan. 19, 1831, 2 R. and M., 301, and the numerous class of cases of the same kind, and also from those cases (of which Lassence v. Tierney, Dec. 11, 1849, 1 Mac. and Gor., 551, may be taken

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as an example) which, though not relating to powers, but to gifts and legacies, raise questions almost identical with those which are raised in the cases of which Carver v. Bowles is an example. From all those cases the plain rule is to be derived, that if you cannot disconnect that which is imposed by way of condition or mode of enjoyment from a gift, the gift itself may be found to be involved in conditions so much beyond the power that it becomes void. But where that is not so, where you have a gift to an object of the power, and where you have nothing alleged to invalidate that gift but conditions which are attempted to be imposed as to the mode in which that object of the power is to enjoy what is given to him, then the gift may be valid and take effect without reference to those conditions.

Here it appears to me that there is a clear gift, in the events which have happened, to the eldest son. There is nothing whatever attempted to be added by way of checking his enjoyment of the property but the injunction to the trustees (that is, to other parties) to destroy the security by means of which the money appointed to the eldest son was secured.

The trustees, of course, could not do that without the consent of the person to whom the money was given. It appears to me that there was no authority whatever which would warrant your Lordships in holding that a direction of that kind could invalidate an absolute gift.

That being so, the deed of division appears to me to be entirely efficacious for the purpose of vesting in the eldest son the right to receive the £25,000, and I shall therefore take leave to submit to your Lordships the motion that the interlocutors which are appealed from should be reversed, and that a declaration should be made that the appellant under the settlement and deed of division executed by Sir John and Lady M'Donald is entitled as from the death of Lady M'Donald to the gift of £25,000, secured by heritable bond over the estates of Lochgarry and Kinloch-Rannoch, and that with this declaration the case should be remitted to the Court of Session.

Lord Hatherley.—I am of the same opinion. When the case comes to be analysed it is clearly within the authorities that have been cited — so clearly within them, that it appears to me that the counsel for the respondents have wholly failed in establishing a distinction in principle between it and the authorities which have long guided the Courts in cases of this description. In the present case there is a power to the spouses to dispose amongst their children of a very large property of the wife, Lady M'Donald, and by the instrument which is now in question they undoubtedly intended to dispose of the wife's property, over which this power existed. The mode in which they attempted to dispose of it, and the collateral views and intentions which may have existed in their minds, have not prevented, I think, the operation of the clauses by which the actual disposition is clearly made.

I cannot doubt, my Lords, that there was a desire on the part of the husband and the wife that those estates, which had been bought mainly with the property of the wife, and which were to be the subject of disposition, should be added on to the original family estates, and that inasmuch as £25,000, part of the wife's fortune, had been employed in buying those estates, both the eldest son should be entitled, in the first instance, under the deed by which those estates had been settled to the enjoyment of the property, and, if it could be lawfully done, his successors in the entailed estates should have the advantage

of enjoying the estates so purchased with the £25,000 discharged from that sum. That appears clearly and undoubtedly from one provision in this deed.

But they had, paramount to that, and as their primary intention in the execution of the deed, the desire to settle definitely, onerously, irrevocably, and mutually, the whole of the said estates of Dalchosnie, Lochgarry, and Kinloch-Rannoch, belonging to the husband, and it was also their clear intent "to divide, apportion, and settle the whole property, heritable and moveable, including the said sum of £25,000 secured over the said lands of Lochgarry and Kinloch-Rannoch," belonging to the wife, "on ourselves and our family, and, failing our heirs-male, so far to alter the destination in the marriage-contract with regard to Dalchosnie as to settle it with the other lands on heirs-female of the present marriage, giving them a preference and priority to heirs-male of any subsequent marriage." They appear to have thought in making the apportionment some arrangement might be made with reference to the disposition of the property passing on to the heir in the same manner as the original property of the husband was settled, yet the intent to dispose of the whole property over which they had power was undoubtedly and clearly the leading intent of these two persons.

And when they come to dispose of it they do so in this way:—First, they begin, as was noticed by one of the learned Judges in the Court below, by attempting to exceed their power by giving a life interest in the whole property to the husband, who by the original deed had only a life interest in £750 a-year. But it appears to me that, in the events which have happened, that can make no difference whatever in the result of this case. This is simply, as a learned Judge in the Court below says, an indication that they had not the full limits of their power steadily before their eyes.

The real difficulty of the case has been this,—What is to be done with reference to the disposition that is made of the £25,000? The spouses say that it is their will that the £25,000 that is secured over these estates "shall be settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate." That would have been their desire if they could have effected it as regards the sum of personalty—at least what we should call personalty—the sum of £25,000. But in doing that, if they had settled it upon the eldest son, and settled it with the same limitations as were expressed with reference to the landed property, the result would have been that it would have gone to him absolutely. And if they had stopped there, he, being alive at the death of the survivor of the two spouses, would have taken the sum absolutely, and would have had it free from any possible claim on the part of those who might come after him, inasmuch as it was not subject to the fetters and limitations imposed by the Act of 1685. But they do not stop there. The words of the deed make it still more plain as they proceed,—"The sum of £25,000, being the share of my" (the wife's) "property which we" (the spouses) "have allotted and apportioned, and do hereby allot and apportion as the share of our eldest son." I cannot conceive any words of appointment more clear than these. I cannot conceive any words (to follow Lord Cottenham's dictum in Lassence v. Tierney) that would more completely and clearly and neatly sever one share from the rest of the fund, whether that fund be a testator's general residue, as in the case of a will, or, as in this case, a fund of which an appointment is made existing in the hands of trustees in one large mass. The fund amounts in the present case to £50,000, and out of it the sum of £25,000 is plainly severed.

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That distinguishes this case and the case of Lassence v. Tierney from a case like Rucker v. Scholefield, Nov. 14, 1862, 1 Hem. and Mil. 36, and from all the cases in which you find the gift only in a continuance of limitations expressed in the instrument without any complete severance of the share at once, for here we have a share taken out of the general-trust fund, and it is allotted to the eldest son, or, failing him, to the heir in possession of the entailed estate. He did not fail. At the death of the survivor of the spouses there he was found, and there was his share found for him,—it was allotted and apportioned for him,—it was taken out of the estate. The case therefore appears to fall as clearly within the case of Carver v. Bowles as any case that can be conceived.

No doubt, my Lords, the spouses proceed to say after that that they wish the trustees to "renounce and discharge the said heritable bond, and disburden the said lands and estate of Lochgarry and Kinloch-Rannoch of the same." That is a condition superadded to the clear and plain allotment of the share which had been made to the eldest son, and, being a condition by which he is not fettered or bound, the condition itself becomes simply a void condition as against him, and he takes the property as he would have taken it under the former limitation, if it had been a limitation to him by way of settlement, in the same manner as the estates were settled, it not being subject to fetters, for the reasons I have already assigned.

Then comes a passage which has been much commented upon. It expresses the same view as the passage preceding with regard to the desire of the spouses that the estates should go in the manner they described. In the subsequent passage, with regard to a surplus after giving £10,000 to each of the younger children, nothing is said that could, I think, afford a ground for the respondents' construction of the previous gift of the eldest son's share. Indeed it was only pressed into the argument in order to shew the general intent upon the whole deed (which I do not dispute) that if it could be so the estates of Lochgarry and Kinloch-Rannoch should pass on with Dalchosnie to the eldest son and his successors in possession of the entailed estate without the encumbrance of the £25,000.

Concurrently with that there was undoubtedly also a desire that a full and complete disposition should be made of the funds over which they had the power of appointing. In the exercise of that power I think they have made a sufficient disposition, in the events which have happened, to the eldest son, and I think the subsequent direction in which they attempt to impose a condition upon the trustees, a condition which the trustees could not with any propriety have fulfilled, to release the estates from the bond, fails to take effect. This is in accordance with the authority of cases which have been decided over and over again in the English Courts, the principle of which is co-incident with that which is supported by the learned Judges in the Court below, although they have differed in their view as to the conditions. I think, therefore, my Lords, that the conclusion which ought to be come to is that the appointment took effect *simpliciter*.

Lord Selborne.—I read this deed exactly as if the words had stood thus—"We do hereby allot and apportion the sum of £25,000 secured over the estates of Lochgarry and Kinloch-Rannoch as the share of and in my, Adriana M'Donald's, property, of our eldest son, or, failing him, of the heir of entail

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succeeding to the said entailed estate, and it is our will and desire that the said sum of £25,000 shall be settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the said entailed estates; and also that the trustees under our marriage-contract, or the survivors of them, shall, immediately on the death of the survivor of us, renounce and discharge the heritable bond for the same sum of £25,000, and disburden the said lands and estates of Lochgarry and Kinloch-Rannoch of the same."

So reading the deed, there is, first, an appointment (in the events which have happened) to the eldest son, as fiar, of the whole £25,000. All that follows is but a superadded wish, desire, or condition, having in view the settlement or the release to the owners of the entailed estates of the sum so appointed, which ulterior purpose might be accomplished, and could only be accomplished, through the medium of the estate and interest vested in the eldest son by virtue of this appointment. That wish, desire, or condition, not being authorised by the power, must necessarily fail unless the appointee (whether bound to elect or not, by reason of other benefits given to him independently of the power), should elect to give effect thereto; but the appointment itself is not therefore vitiated. The authorities, of which Carver v. Bowles is an example, have determined (on principles which if sound in England must be equally so in Scotland), that an ulterior purpose of this kind, which is *ultra vires* only, and not also a fraud on the power, though it may have operated as a motive to the appointment in the mind of the appointor will, nevertheless, not prevent an object of the power from taking for his own benefit the estate appointed to him, if the words used according to their proper construction, which must itself be independent of any peculiar doctrines of law applicable to powers, are sufficient to execute the power, and to vest the property in the appointee.

The context of this deed satisfies me not only that, on sound principles of construction this was its real effect, but that the appointors intended to do the very thing which in law they did, and that they well understood that it was necessary that the deed should so operate in order to make it possible that their ulterior wishes should be capable of accomplishment. The declaration and appointment which they made was expressed to be "in consideration of the said deed of entail," (*i.e.* the entail of the Lochgarry and Kinloch-Rannoch estates), as well as "of the powers possessed by us under the said contract of marriage;" and after disposing of the £25,000 in the way which has raised this controversy they proceeded to appoint the rest of Lady M'Donald's settled property equally among their "younger children exclusive of the heir" to the extent of £10,000 each, directing that if there were any excess above that amount such excess should all fall to the "eldest son or heir of entail as above mentioned." Here also they superadded the expression of an ulterior wish, to be effectuated through that appointment by the words which followed, "with a view to its being laid out in the purchase of lands and entailed with the other estates upon him and the heirs called in the aforesaid deed of entail through the whole course of succession." And afterwards in two places they referred to the £25,000 as being by this deed "settled on the heir of entail," words which are nearly in those places applicable to the eldest son, as well as to any other heir of entail who (in different events from those which happened) might have succeeded on the deaths of the appointors to the entailed estates. A comparison of all the passages in which the appointee of the £25,000 is thus spoken of in the singular number seems to me to make it quite clear that one individual person

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(to be ascertained with reference to the state of the title to and possession of the entailed estate immediately after the death of the survivor of the appointors), and one person only, was intended to take the £25,000 by way of appointment.

That being so, I agree with your Lordships that the opinion of the minority of the learned Judges in the Court of Session was correct, and that this appeal ought to be allowed.

THIS judgment was pronounced:—"That the said interlocutors complained of in the appeal be, and the same are hereby reversed; and it is declared that the appellant under the settlement and deed of division executed by Sir John and Lady M'Donald (in the proceedings mentioned) is entitled as from the death of Lady M'Donald to the £25,000 secured by heritable bond over the estates of Lochgarry and Kinloch-Rannoch: And it is further ordered that the cause be, and the same is hereby remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and judgment."

LOCH & MACLAURIN, Westminster—A. P. PURVES, W.S.—GRAHAMES & WARDLAW, Westminster—DEWAR & DEAS, W.S.—WEBSTER & WILL, S.S.C.

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ALEXANDER BREMNER, Inspector of Poor of Rathven (Defender), Appellant.—*Cotton, Q.C.—W. A. Brown.*
JAMES ELDER, Inspector of Poor of Elgin (Defender), Respondent.—*Pearson, Q.C.—Lancaster.*
DISTRICT BOARD OF LUNACY FOR ELGIN (Pursuers).

Arbitration.—A dispute between two parishes as to the settlement of a pauper was referred by them to the decision of a society of inspectors of poor, which was in the practice of deciding such questions by vote at their general meetings, at which it was uncertain what members would be present. *Held* that the reference and the award following thereon were valid.

Ld. O'Hagan.
Ld. Selborne.

(IN the Court of Session, July 10, 1875, *ante*, vol. i. p. 1155.)
This was an appeal from a judgment of the Second Division. The circumstances of the case and the nature of the action are fully given in the opinion of the Lord Chancellor.

LORD CHANCELLOR.—My Lords, subject to an observation in regard to the form of the interlocutor of the Second Division of the Court of Session, I cannot entertain any doubt as to the matter that is presented by this appeal to your Lordships.

It has not been suggested that when, between two parochial boards in Scotland, a dispute arises as to the chargeability of a pauper, that dispute may not be referred to arbitration.

In this case a dispute arose in regard to the chargeability of a pauper named Charlotte Grant, and the dispute, in the first instance, was of a tri-lateral character. The parishes concerned were Rathven, Elgin, and Urquhart. In order to avoid the expense of litigation it was suggested between the parochial authorities that this dispute should be referred to arbitration. The Parochial Board of Rathven had a committee of management, consisting of eight persons; and, in the first instance, on the 1st February 1859, at the general quarterly meeting of the Parochial Board of Rathven, the meeting remitted the case of Charlotte Grant "to the committee, to dispose thereof as may seem best for the interest of

this parish." The general power thus committed to the committee of management appears never to have been in any way recalled by the parochial board. Further, on the 3d of May 1859, the Parochial Board of Rathven "directed the inspector to intimate to the parishes of Elgin and Urquhart that the board is willing to submit this case" (that is, the case of Charlotte Grant) "to arbitration, the arbiter to be mutually chosen by all parties;" and eight months having elapsed, on the 3d of January the following year, at an adjourned meeting of the parochial board, there is a minute headed "Charlotte Grant, Elgin.—The inspector laid this case again before the meeting, when the inspector" (that is, the present appellant, Mr Bremner), "was directed to refer the case to any competent arbiter that may be agreed upon between all the parties, but they object to the arbitration of the Secretary to the Board of Supervision, in respect that the case has been prejudged by him in the opinion sent to the inspector of poor of Elgin, in which the inspector of Rathven was not heard as a party."

Therefore, your Lordships have got this at the commencement—the clearest possible intention on the part of the Parochial Board of Rathven to refer the case to arbitration, a direction to the inspector to refer the case to any competent arbiter that the parties might agree upon (by which I understand that he, in conjunction with the two other parties, Elgin and Urquhart, might agree upon), and then overriding the whole, the continuing authority of the managing committee to deal with the case of Charlotte Grant as might seem best for the interest of the parish.

That being the state in which the case was left on the 3d of January 1860, some steps were taken by Mr Bremner, on behalf of the Parochial Board of Rathven, and by Mr Stiven, the inspector of Elgin, to agree upon an arbiter; and on the 13th of April 1860 Mr Stiven, the inspector of Elgin, writes to Mr Bremner, the inspector of Rathven—"I should like to be able to say whether, in the event of Urquhart and Elgin being willing to refer the case to the Society of Inspectors at Glasgow, your board agree to that proposal, as I much fear they will not agree to the parties named by Rathven." Then, passing over the intervening letters, on the 22d of February 1861 Mr Stiven again writes to Mr Bremner with regard to the choice of arbiters:—"What do you think of the Society of Inspectors for Scotland?" And to that, on the 23d of February 1861, Mr Bremner replies:—"On the 1st of July 1859 I see I offered to refer to the society you now propose to refer to." Therefore, your Lordships have it that, at all events, as regards Mr Stiven, the inspector of Elgin, and as regards Mr Bremner, acting on behalf of Rathven, there was a proposal and an agreement to take as arbiter the Society of Inspectors at Glasgow. I will afterwards consider the constitution of that society.

Up to this point there was no agreement on the part of Urquhart, and as the case went on, and as proceedings were taken to settle a statement to be laid before the Society of Inspectors, we find that, on the 4th of April 1861, Mr Stiven writes thus to Mr Bremner:—"I have now got the decision of the board of Urquhart in the above case, which is, 'they decline any reference, and are to defend it.' I laid their letter before our board yesterday, and am directed to see whether your board would be willing to go into the reference along with Elgin alone." Now, of course, the arbitration originally contemplated, having been *intended to* be between all the parties, it was a matter of importance to *find whether it* would go on between Elgin and Rathven if Urquhart did not agree. *Then*, on the 1st of May 1861, three weeks afterwards, the inspector

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of Elgin "laid before the board a letter from the inspector of Rathven, agreeing to join in a reference of this case to the Society of Inspectors of Poor for Scotland without the parish of Urquhart, and the inspector was instructed to prepare a joint minute along with the inspector of Rathven."

Now, stopping here, I proceed to ask, what was known by the committee of management as to what was being done? Your Lordships have this statement in the evidence of Mr Bremner on his examination by the Court. He is asked —"Were these eight members of the board" (that is, the committee of management) "aware individually that you were about to refer this case to the Society of Inspectors? (A.) I think that, individually, they were aware of it? (Q.) Every one of them? (A.) I think so, but I am not positive as to that; but it was not brought before them officially. (Q.) But your opinion is that every one of them knew of it individually? (A.) I suppose they did." My Lords, I apprehend that it would be impossible in this state of things to arrive at any other conclusion than that, before the reference to the Society of Inspectors took place, the board of management, who had complete power to give authority in the case, were aware that the arbiter selected by the inspector, in pursuance of the direction given to him, was the Society of Inspectors of Scotland. With regard to the non-concurrence of Urquhart, no question having been asked of Mr Bremner as to whether the committee of management were aware or were not aware of that non-concurrence, and Mr Bremner having taken upon himself to state to Mr Stiven, the inspector for Elgin, that his board were willing to go on with the arbitration without the concurrence of Urquhart, I think that no conclusion can be drawn but that the committee of management were perfectly well aware that the arbitration which they were directing, and in which they had approved, of the arbiters, was to be persevered in, even although Urquhart was not willing to concur in it.

I now turn to the arbiters who were thus chosen. Who were they, and was there any incapacity on their part to undertake an arbitration of this kind? They are described in the evidence of Mr Lemon as a society consisting of inspectors of poor and assistants in Scotland. He says that—"Questions connected with the poor-law administration frequently came before the society, and the society give their consideration to them and pronounce their opinions upon them. The society keep minute-books of their proceedings and also a letter-book." They therefore were a body as to whom it is not too much to say that there was no objection in point of law to choosing them as arbiters. They were eminently qualified to undertake the task, and, as a consultative and deliberative body, to pronounce an opinion upon the subject referred to them, as to which they, of all persons in Scotland, were competent to speak.

Now, was there any objection in point of law to a body of that kind as arbiters when the parties agreed to select such a body? Your Lordships have heard an elaborate argument to shew that in Scotland there must, as regards the choice of arbiters, be a *delectus personæ;* and you were referred to authorities which shew that, where there is a contract beforehand to refer to the arbitration of individuals not named, or of individuals filling an official position, or of individuals composing a fluctuating body, and where, therefore, at the time the contract is made to refer to arbitration future disputes which may not arise for years, there can be no *delectus personæ*, there a contract of that kind cannot be urged and founded on to oust the regular jurisdiction of the Courts of law.

I should be sorry to express any opinion adverse to those decisions, or tending

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to throw any doubt upon the propriety of those decisions, but they appear to me to have no application whatever to the present case. The question is this—Is it the law of Scotland that where there are two persons competent to refer to arbitration where a dispute has arisen, and where those persons may select the arbiter at their option, there is some invalidity in point of law in the selection as arbiter of a society consisting of a number of members? I have anxiously attended to the argument in order to find out whether there was any authority in the Scotch books upon that subject, and certainly none has been produced to shew that a reference of that kind would be invalid. I apprehend that in this country there is nothing whatever which would prevent persons who are minded to refer to arbitration from referring to the arbitration of an unincorporated society consisting of a number of members, or to the members of an incorporated society. How the arbitration so made should be worked out—by what numbers it should be decided—whether at a public meeting or in what way, is a different question which may be kept distinct from the question of whether such persons can be selected as arbiters. I therefore arrive at this stage of the case, that I find those who were competent to bind the parish of Rathven willing to refer to the Society of Inspectors as arbiters, and that there is nothing in law that I have discovered which prevents a valid reference being made to a society of that description.

Then arises the question, how was the reference conducted, and was there any irregularity in the proceedings under that reference; and if there was any irregularity, has it been condoned or waived by those who might have objected to it.

What was done was this: The inspector for Rathven and the inspector for Elgin could not agree upon a joint statement of facts. Of course if they could have agreed upon a joint statement that would have been much the most satisfactory mode of taking the opinion of the Society of Inspectors. Elgin and Rathven were at a distance from the *situs* of this society, for the society met at Glasgow. The inspectors appear to have agreed to adopt the course of sending each his own statement of the case. Accordingly they sent separate statements—statements which have been read to your Lordships, and which are of a very argumentative description, and contain some not very precise references to facts.

I apprehend that when persons refer to arbitration, if, in place of appearing before the arbiter, or of asking the arbiter to examine witnesses, they agree amongst themselves either upon a joint statement of the case, or that they will each send their own statement to the arbiter for him to form his opinion upon, that is a competent course; and if that course is taken, and the award made upon that basis, neither party can resile from that award. And when I say "neither party," I do not lose sight of this, that the persons who managed the mode and form in which the proceedings were conducted were the inspectors and not the parochial boards. A parochial board, in a matter of this kind, must of necessity act by their officer or agent, and that their inspectors were. The parochial boards could not in person have attended to the detail of an arbitration of this kind. Where they had agreed upon an arbitration, and agreed upon the arbiters, and placed in the hands of their officers the authority to take all the steps of procedure which might be thought necessary, they cannot object to an irregularity assented to by their own officers.

These two statements having gone before the arbiters, the arbiters appear to have considered that they, being a consultative body, it would be convenient to request two of their members to make a single statement collected from the state-

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ments which were before the Society of Inspectors, together, apparently, with such further information as they might think it necessary to ask for. They thought it necessary to ask on one point for further information, and a letter in duplicate was sent to the two contending parties, the inspector for Rathven and the inspector for Elgin, asking for that further information. On these materials, not in any way withdrawing the two statements which had been made by the inspectors of the parishes and laid before the Society of Inspectors, but adding this further single statement collected from the two, made by the two members of their body, on those materials the society pronounced its decision. And no other materials having been afforded or tendered to the society, and the parochial officers being satisfied that the decision should proceed upon those materials, it appears to me that it would be the grossest injustice to hold that either of those parochial authorities, or either of the parishes which they represented, should afterwards be allowed to turn round, when the award was given against them, and object to it upon the ground that other materials might have been presented to the Society of Inspectors, and that the facts might have been put before them in a different way, and in a more elaborate or an altered form.

The Society of Inspectors having come to their determination, a determination unfavourable to Rathven, it is quite clear that that determination was announced immediately to both parishes. In point of form your Lordships have not got the submission to arbitration of the inspectors on behalf of the parishes. It has, however, been most justly conceded at your Lordships' bar, that it must be taken that there was in some form a submission of the kind, although it is lost. In point of form also your Lordships have not got the mode in which the decision of the Society of Inspectors was communicated, but their decision or their award was entered upon their own minutes, and it appears from the letters of the inspectors that it was made known to them immediately afterwards. In point of fact, Mr Bremner, the present appellant, having got the decision, wrote to the Society of Inspectors (and this certainly was an irregularity on his part) demurring to the decision at which the society had arrived, and suggesting to them that they had overlooked some important fact, and he received from them an answer saying that his letter had been brought before them, and that they considered, notwithstanding his letter, that the decision they had arrived at was the proper decision.

My Lords, I am bound to say that up to this point I find that which appears to me to be a valid reference to arbitration. I find arbiters selected who could not be objected to. I find proceedings before those arbiters, which, if not of the most usual and ordinary kind, and perhaps, I might add, not of the most convenient kind for the purpose of deciding the question referred, were yet proceedings which were adopted without being in any way objected to by those who had alone the right to object to the way in which the proceedings were conducted,—I mean the parochial officers acting on behalf of the parishes.

When that decision was thus made known there were payments which required to be made under and in consequence of the decision. Accordingly the parish of Rathven repaid to the parish of Elgin the sums which the Elgin parish had paid to the Lunacy Board in respect of this pauper, and the parish of Rathven paid to the Lunacy Board for a period during the year 1863, and up to December 1864 the payments which required to be made for her maintenance in a lunatic asylum. It was not until November 1864 that any attempt was made to resile from what had been done, when Mr Bremner wrote this letter to

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Mr Stiven on behalf of the parish of Rathven,—"I hereby intimate that we do hereby withdraw our admission of liability for the support of Charlotte Grant, and repudiate the finding of the Association of Inspectors for Scotland in so far as the same is against the parish of Rathven, which finding is contrary to the decision of the Supreme Courts in the case of Margaret Whyte (Huntly v. Bellie and Urquhart)." [1]

It is always important in these cases to find upon what ground, when first the controversy arises, the right to repudiate is placed. Now, I find here no allegation of want of authority or of invalidity in respect of the arbiters chosen, or of irregularity in the proceedings, but I find Mr Bremner professing to write on behalf of his parochial board (although it is suggested now that the letter was written without the authority of the parochial board), and intimating that they "repudiate the finding of the association of inspectors," not in consequence of its invalidity or its irregularity, but because there had been a recent decision of the Supreme Court in opposition to the law as found by that award. And on the 8th of December 1864, after the matter had been brought before the board, and when a minute had been passed in these terms:—"Charlotte Grant, Elgin Asylum.—The meeting withdrew the admission of liability made by the inspector in this case, and directed the inspector to intimate such to Elgin." Mr Bremner again wrote to Mr Stiven thus:—"In terms of minute above written, I have to intimate to you, as inspector of poor for Rathven, that this board have withdrawn their admission of liability in this case from and after the date of my last letter to you on the subject."

It appears to me that while, of course, the parish of Rathven are entitled to any legal right which may be theirs, and if the award is invalid, they are entitled to say they are not bound by it, yet, as regards the morality of this proceeding, I am bound also to say that I have never seen a clearer case in which there is an attempt made by way of afterthought to discover irregularities and to find objections to an award which no person ever thought was irregular, or should be impeached for irregularity at the time it was made, which the parish of Rathven did not desire to examine into at the time it was made, as to which they were perfectly satisfied to leave the whole of the conduct of the arbitration to their officer, and as to which they never thought of devising any mode of escape from it until that very officer himself suggested that course to his board in consequence of a decision which occurred in the Court of Session.

In my opinion, I can find nothing which would entitle your Lordships to say that there was here otherwise than a valid submission to arbitration, and an award by the arbiters, with regard to which, if the proceedings had been in any respect irregular, the irregularity was joined in and condoned by the person who had the conduct of the proceedings on behalf of the parish of Rathven. And I find that the parish when the award was made known to them (for it is not pretended that they made the payments without knowing that the award had been made), were content to take the award as it stood, and not to examine into the mode in which the authority given by them to their inspector had been acted upon.

This would decide the case upon its merits, and would be fatal to the contention of the appellants. Expressions appear to have fallen from the learned

[1] Taylor v. Strachan and Brown, Nov. 8, 1864, 3 Macph. 34, 37 Scot. Jur. 16.

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Judges who composed the majority of the Court of Session, which seem to shew a desire on their part to place the case, not upon the footing of a reference to arbitration and an award, but upon the footing of some species of agreement which does not amount to a reference to arbitration, but is yet, in their opinion, binding upon the parties. And I find that the form which the interlocutor appealed from has taken, is this,—The Lords recall the interlocutor of the Lord Ordinary, and "find that the Parochial Board of Rathven agreed with the Parochial Board of Elgin to abide by the opinion of the Society of Inspectors referred to in the record as to the settlement and support of the pauper lunatic in question: Find that an opinion of the said society on that matter having been expressed and intimated to the parties, the board of Rathven acquiesced in that opinion, and proceeded to implement their agreement by admitting their liability to pay and by paying to the board of Elgin the amount of bygone board which had been paid by the said Parochial Board of Elgin to the pursuers, amounting to £85, 16s. 2d., and further paid to the pursuers the board of the said pauper from March 1863 to December 1864: Find that implement and payment were thus made by the Parochial Board of Rathven in the full knowledge of the material facts of the case, and find that in this way the board of Rathven took fully and finally upon themselves the support of the said pauper, and that they cannot now, in a question with the parish of Elgin, withdraw from the liability thus admitted and acted upon."

In the conclusions thus expressed I entirely agree, but the wording of the interlocutor appears to me rather to avoid adopting the pleas in law of the parish of Elgin, and to suggest that there may, as I have said, be something in the nature of an agreement between these parties which is not an arbitration and an award. Now, the 4th and 5th pleas of the parish of Elgin are these:—"4. The parish of Rathven having referred to arbitration the question of liability for the support of the pauper as between it and the parish of Elgin, is bound by the decision in the arbitration, and is not entitled to defend this action to the effect of throwing the said liability on the parish of Elgin:" "5. The parish of Rathven having acquiesced in the decision in the said arbitration, and acknowledged their liability under it by making payments to the pursuers in respect of the pauper, are not now entitled to repudiate the same to the effect of attaching liability to the parish of Elgin."

I think it would have been more consistent with the form of the case, and with the facts proved before the Court, and with those considerations of law to which I have adverted, that the Court should at once have accepted the 4th and 5th pleas in law of the parish of Elgin, and have based their decision upon those pleas. I shall therefore move your Lordships that in this respect the interlocutor of the 10th July 1874 should be altered, namely, by omitting the special findings which I have read, and by simply, after recalling the interlocutor of the Lord Ordinary complained of, allowing the 4th and 5th pleas in law of the parish of Elgin, and then remitting to the Lord Ordinary to proceed with the cause.

My Lords, this, which is an alteration in form and not in substance, ought not, I think, to make any difference as regards the costs of the appeal. Therefore, my Lords, I move that the appellant pay the cost of the appeal.

Lord Hatherley.—My Lords, concurring, as I do, entirely in the conclusions which have been arrived at by my noble and learned friend who has preceded

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me, I shall very briefly state the grounds on which I arrive at these conclusions, more especially with reference to the objections taken by one at least of the learned Judges in the Court below to the constitution of the tribunal which the parishes selected to determine the point in dispute between them.

The parties to the dispute being the parishes of Rathven, Elgin, and Urquhart, we find that, in the first instance, the parish of Rathven called a meeting of its parochial board, and by that parochial board entrusted the management of the dispute, if I may so term it, to a committee formed of that board, and consisting of eight members. We then find that committee agreeing that Mr Bremner, their inspector and agent, shall have authority to submit the dispute to any competent arbiter, so far as all the parties should agree—that is to say, Rathven, Elgin, and Urquhart. We afterwards find Urquhart withdrawing from this mode of settling the dispute. There is plain evidence on the face of the proceeding of the concurrence of the board of Rathven in the proceedings taken by Mr Bremner in continuing the arbitration, notwithstanding that Urquhart had not consented to take any part in it.

We were told that, by the law of Scotland no reference could be made without a clear and distinct *delectus personæ*, and that a reference to a fluctuating body of the character of the Society of Inspectors was a reference in itself so utterly valueless, and any decision come to by that body so utterly void, that it was impossible, as one learned Judge held in the Court below, for any sort of homologation to take place which would give validity to an award or decision of such arbiters. I should be extremely sorry if it were necessary for your Lordships to come to any such conclusion in this or in any other similar case with respect to an award decided by a body like this Society of Inspectors. This society seems to have been composed of men eminently qualified to express a judgment upon a point of the character which had arisen in the dispute between these parishes. It seems to have been one of the principal duties of their lives to attend to matters of this description, both individually and as associated. And according to the evidence before us, upon which alone, of course, I can speak, they had apparently so far acquired the confidence of persons who might be brought into litigation for very small amounts of money, for which economical and expeditious justice would naturally be desired by all parties, that such disputes were frequently referred to them. I say I should be extremely sorry that a body so competent as this in respect of knowledge and acquirements should not be held to be in law competent to undertake the duty of arbiters. It appears from the evidence that they are applied to from time to time for their opinions, which, I suppose, means that, when a parish is in doubt, it desires to be guided by their advice, and that they are applied to also for their decisions, which, I apprehend, must mean when a dispute has arisen which the parties are content to terminate by their intervention.

Had it not been for an observation which was made by Lord Benholme in the Court of Session I should not have thought it necessary to say a word more upon the constitution of this tribunal. But that learned Judge seems to have thought that there was an inherent incapacity in a tribunal of this sort, by reason of its consisting of members fluctuating from time to time, by the addition of new members and the recession of some of those who might previously have constituted the body, and by reason of the fact that all the members might or might not be present at a meeting when any particular matter was brought before them for discussion and decision. Now, an example has occurred to me,

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which I may mention as a patent one, and one that will be well understood by everybody, and that is the case of the Benchers of the Inns of Court, who decide matters of the gravest importance to individuals, affecting their character, status, and their fortunes as involved in that status. And so satisfactorily do they decide those questions that it is very rarely that their decisions are interfered with or reversed by the Court of Appeal which exists, namely, the Judges of the land, who may review their decisions. And yet they are not a corporation, they are a fluctuating body, and it is not always, indeed but seldom, that you can know who are or who are not to be the particular persons who will sit in judgment upon a particular matter. But why that should disqualify or incapacitate them from being selected as arbiters to determine a case in dispute, on the strength of an abstract or an *a priori* reasoning, it appears to me very difficult to comprehend.

That the Society of Inspectors of Scotland take great pains in arriving at their decisions is, I think, manifest from the evidence before us. On the particular occasion on which this controversy was decided there appear to have been present about twenty-one members. But, before meeting to arrive at a final conclusion, they appear to have done all that ordinary persons forming a Court, and seeking to be informed as a Court of what was taking place, would do. They applied, in the first place, for a statement from the parties, and each party sent their statement. The inspector of Elgin and the inspector of Rathven, who managed the controversy for their respective parishes, seem evidently from the tone of their letters to have had communication with each other upon the subject, and not being able to agree upon the exact form of a common case to be stated jointly, they afterwards sent in separate cases, which, when carefully examined in detail, appear to present no very material variations in fact.

Then, my Lords, the society do what has been greatly complained of in the course of the argument,—they refer to two of their body to draw up a statement from these different documents which had been submitted to the society. Most Courts have some machinery or other by which the different facts put in evidence by the parties, when it is not *viva voce* evidence, can be collected together and laid before the Court, whether it is, as in the Court of Chancery, in the shape of a report by a Master of Chancery, or, as in the case of some foreign Courts, by a reporter selected by the Judges.

Accordingly, that having been done, the Society of Inspectors met together, and having before them not only the statement compiled by two of their body, but all the facts from which that statement was collected—having that statement to assist them by its brevity and by directing their attention to those facts, they came to this conclusion. And I do not see the slightest ground for supposing that this society has shewn itself in the slightest degree incompetent for this work, by taking as their basis on which to enter upon the discussion the abstract or abridgement of the facts of the case which had been prepared by two of their body. I thought it due, in justice to those gentlemen who founded this body, and who seem to have acquired the confidence of the public, to say that I can see no reason whatever (except for the great respect I have for the learned Judge who made some observations on the subject in the Court below) for holding them to be incompetent to perform those functions.

It seems to be made out that by the law of Scotland an agreement *ab ante* to refer contingent and possible disputes to a person not named but to be named by some one afterwards is not such an agreement which the parties can be held

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to, when a dispute has actually arisen and the one party wishes to avail himself of it against the will of the other. Either party is at liberty to resile from such an engagement. Perhaps some of the cases seem to point to something further, namely, the question whether, when the dispute which was contemplated as possible has arisen, you can enforce an engagement to refer it to a person who is to be named by a third person who is not expressly and accurately ascertained. There seems to have been the same or a similar observation (I think the authority only goes to the case of future disputes in that case), as to the force of a contract to refer disputes to a body like a Chamber of Commerce, which in some respects might be said to bear a resemblance to this body, the Society of Inspectors. But I listened in vain to find the authority of any decision of the Courts in Scotland cited which would authorise this House in saying that when a dispute has arisen, and when a reference has been made to an ascertained body of men, and when the body to whom the reference was made has arrived at its decision or made its award, that award is not binding upon the parties who had so submitted their case to the tribunal they had chosen, merely because it is composed of a number of individuals instead of being composed of a single individual, and because some of the persons composing that body may from time to time be changed.

No authority of that kind has been produced, and I apprehend, my Lords, that in this respect the decision of the body to whom the reference was made in this case was the decision of a body perfectly competent to decide the question between the parties. I think they have decided the question between the parties, and I think that decision not being quarrelled with for any irregularity other than the simple fact of its being given by such a body as I have described, must now be held to be a binding decision upon all the parties. The only objection that was raised to the mode of conducting the proceedings was with regard to the reference to these two gentlemen, instead of the whole matter being taken in hand by the body who were to deliberate and act upon it. I have already dealt with that part of the case.

With reference to what the parish did after the decision was arrived at, I think there can be no doubt whatever that they were fully informed of the award having been made. Being informed of it, they made a series of payments, commencing with what is a considerable sum to be levied upon a parish—a payment of £85—and they knowingly made those payments as in discharge of the debt which had been found due from them by the arbiters.

Therefore, my Lords, I think that your Lordships cannot have the slightest doubt about deciding this case against the appellants.

LORD O'HAGAN.—My Lords, I am of the same opinion with my noble friends. The first question is this, had the appellant, the inspector of the poor of Rathven, power to make the reference the result of which has been the subject of this tardy litigation? I think it plain that he had, not only from the terms of the resolutions of the 3d of May 1859 and the 3d of January 1860, but from the proceedings of the board of Rathven which affirmed and carried into effect the award of the Society of Inspectors. I think that equally by antecedent authority and subsequent ratification, the Rathven board are precluded from denying that Bremner acted for them at their instance, and so as to bind them effectually.

With regard to the reference itself, but for those subsequent proceedings, I should, perhaps, under other circumstances, have desired some opportunity of considering the peculiar views of the law of Scotland which have been presented

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at the bar as to the distinction between a reference and a "contract to abide," and which appeared somewhat to conflict with those ordinarily adopted and habitually acted on in England and Ireland. But believing, from the letter addressed by the superintendent of the Elgin asylum to the chairman of the Rathven board on the 23d of January 1874, the accounts with which the members of the board of Rathven must have been familiar, their payment of the arrears and their continuous maintenance of the lunatic for such a period of time and from the clear, although, I think, a little reluctant evidence of the appellant himself, that they perfectly understood their position, were fully informed as to the nature and result of the reference, and sanctioned it by a long course of deliberate action, I think that their conduct in any aspect of the law removes all difficulty in the case, and makes the decision of the Society of Inspectors which they so invoked, and to which they so submitted, conclusive upon them.

LORD SELBORNE.—My Lords, I do not think it necessary to add anything to what your Lordships have said as to the merits of this case, agreeing, as I do, with what has been said.

But with respect to the form of the order, I will just say a few words as to the terms of it, as it is very important that the judgments in these cases should be consistent with the manner in which the cases are pleaded by the parties on the record. I find that the pleading of the respondents—the parish of Elgin, is this: They adopt in substance the earlier articles of the condescendence of the Lunacy Board, including particularly the 5th article, in which it is expressly stated that the "parishes agreed to refer the question of liability to the decision of the Society of Inspectors of Poor for Scotland as arbiters in the matter," and that they decided it accordingly; and in their pleas in law they expressly say in No. 4, "The parish of Rathven having referred to arbitration the question of liability" "is bound by the decision in the arbitration;" and the 5th plea in law is to the same effect. Now, my Lords, if I were obliged to say that the facts as they appear, having regard to the pleadings, do not support these averments and pleas in law, I confess I should feel some considerable difficulty in falling back upon any *tertium quid* such as seems to be suggested by the peculiar phraseology of the interlocutor; but I do not feel any difficulty, having regard to the actual proceedings in the case, and the issues which the parties came into Court to try, in holding that we are in a position to found ourselves upon those pleas in law, and to treat them as well established.

I have referred to the manner in which the facts are pleaded on behalf of Elgin; on the other hand I find that in the condescendence on the part of Rathven, these points only are taken by way of defence:—Firstly, that they never agreed to refer to any arbiter at all; secondly, that there never was any joint submission or formal minute of reference ever entered into; and thirdly that the society is not a competent arbiter either in the terms of the authority which was given by the Rathven board, or in point of law. Beyond that there is no objection that I can discover, nor is there any statement that there was not a proper award or deliverance or finding, and that if these objections fail they have others. And their pleas in law are entirely to the same effect. They do take the objection, *inter alia*, that there was no proper submission to the Society of Inspectors, but they do not anywhere suggest that there was any objection on the ground of informality in the deliverance or award, if the other objections fail. With regard to the submission, there was a signed minute, and it appears to me a very

reasonable inference to draw, that that signed minute, if produced, would be found to be a proper minute of reference. With regard to the authority of Bremner to refer, the point appears to be taken notice of by the Lord Justice-Clerk. Perhaps that may have been partly the ground for the peculiar phraseology of the interlocutor. But, my Lords, having regard to the facts to which my noble and learned friends have referred, seeing that the decision of the arbiters was accepted and acted upon and is not challenged on the record, I think your Lordships can have no difficulty in sustaining the pleas in law in the manner which has been proposed.

"IT is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, that the said interlocutor of the Lords of Session in Scotland, of the Second Division, of the 10th of July 1874, complained of in the said appeal, be, and the same is hereby varied, by omitting the special findings following, namely:—'Find that the Parochial Board of Rathven agreed with the Parochial Board of Elgin to abide by the opinion of the Society of Inspectors referred to in the record, as to the settlement and support of the pauper lunatic in question: Find, that an opinion of the said society on that matter having been expressed and intimated to the parties, the board of Rathven acquiesced in that opinion, and proceeded to implement their agreement by admitting their liability to pay, and by paying to the board of Elgin the amount of bygone board, which had been paid by the said Parochial Board of Elgin to the pursuers, amounting to £85, 16s. 2d., and further paid to the pursuers the board of the said pauper from March 1863 to December 1864: Find that implement and payment were thus made by the Parochial Board of Rathven in the full knowledge of the material facts of the cause, and find that in this way the board of Rathven took fully and finally upon themselves the support of the said pauper, and that they cannot now, in a question with the parish of Elgin, withdraw from the liability thus admitted and acted upon:' And it is further ordered, that the 4th and 5th pleas in law of the parish of Elgin be, and the same are, hereby allowed: And it is further ordered and adjudged, that, with this variation of the said interlocutor of the 10th of July 1874, that interlocutor, and the other interlocutors complained of in the said appeal, be, and the same are hereby affirmed: And it is further ordered, that the appellant do pay, or cause to be paid to the said respondents, the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk of the Parliaments: And it is further ordered, that the cause be, and the same is hereby remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this variation and this judgment: And it is also further ordered, that unless the costs, certified as aforesaid, shall be paid to the parties entitled to the same within one calendar month from the date of the certificate thereof, the Court of Session in Scotland, or the Lord Ordinary officiating on the Bills during the vacation, shall issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary."

HOLMES, ANTON, GREIG, & WHITE—A. MORISON, S.S.C.—MARTIN & LESLIE—H. & A. INGLIS, W.S.

No. 14.

May 4, 1875.
Muir v. Crawford.

GEORGE WALKER MUIR, Appellant (Defender).—*Meadows White—E. Silvester.*
ROBERT CRAWFORD, Respondent (Pursuer).—*Nevay.*

Bill—Discharge—Indorser—Cautioner—Pactum de non petendo.—The holder of a bill, after it had been dishonoured and duly protested, while he retained possession of the bill, granted a discharge to the acceptors "of all claims and demands competent" to him against them, "reserving entire my claims against any obligants, other than" the acceptors "presently bound to me along with" the acceptors. He thereafter sued the latest of three indorsers of the bill for the amount in the bill. *Held* (*aff.* judgment of Second Division) that the discharge did not extinguish the debt, but was merely an agreement not to sue the acceptors, and that the indorser must pay, his recourse against the acceptors not being prejudiced.

Ld. Chancellor (Cairns).
Ld. Chelmsford.
Ld. Hatherley.

(IN the Court of Session, Oct. 29, 1873, *ante*, vol. i. p. 91.)

This was an appeal from a judgment of the Second Division of the Court of Session.

The facts of the case are sufficiently narrated in the opinion of the Lord Chancellor.

LORD CHANCELLOR.—My Lords, when this case came before the Inner-House of the Court of Session, the record, which had been closed before the Lord Ordinary, was, on the application of the present appellant, opened for the purpose of allowing a new defence to be alleged, and the nature of that defence was this: The pursuer in the Court of Session sued upon a bill of exchange, of which he was the holder, and which he had discounted. He sued the defender in the Court of Session as one of the indorsers of that bill, and the new defence that he set up in the Inner-House was that after the bill of exchange had become due, and while it still remained unpaid in the hands of the pursuer, the pursuer (according to the words of the statement) "without communication with the defender, freed and released the acceptors of the bill of his whole claims against the acceptors on the bill, by discharge dated 28th May 1872, of which No. 21 of process is a copy, whereby he renounced and discharged any claim which might otherwise have been competent to him against the defender." The plea added with regard to that statement was this,—"The pursuer having discharged the acceptors of the said bill, and thereby renounced any claim which might otherwise have been competent to him against the defender, the defender is entitled to absolvitor."

The document which is there called the discharge of the acceptors was in this form. It is dated the 28th of May 1872, and it is signed "R. Crawford," the pursuer in the action,—"Received from Mrs Janet Chirnside Hood or M'Cubbin, executrix of the deceased David M'Cubbin, accountant in Glasgow, who was one of the liquidators of the Scottish Granite Co., Limited" (the acceptors of the bill) "the sum of £20 sterling in full of all claims and demands competent to me against the said Scottish Granite Co. Limited, or liquidators thereof, or the said David M'Cubbin, or Mrs Janet Chirnside Hood or M'Cubbin, as his executrix, all which are hereby for ever renounced and discharged, reserving entire my claims against any obligants other than the said Granite Co. presently bound to me along with said Granite Co."

That defence having been admitted to be pleaded by the Court of Session the main point, and, as it appears to me, the only point, which was urged before the Court of Session was the validity of that defence. The Court of Session de-

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cided that the defence was not a sufficient one to absolve the defender, and there is no doubt that one of the main points, if not the main point of the appeal before your Lordships, was whether the Court of Session were right in coming to that conclusion.

Upon that part of the case I have never entertained any doubt. The law upon the subject is perfectly clear. There is no doubt that by proper and apt instrument it is competent for the holder of a security of this kind to agree with the principal debtor not to enforce his remedies against the principal debtor; and, if he does that in an instrument, which at the same time reserves his rights against those who are liable in the second degree, there will be no discharge of those persons so liable. The test which has been applied to all these cases is this: Has that which has been done towards the principal debtor been a transaction of this character, that it will entitle the principal debtor, if he should be sued for contribution or indemnity by the surety, to come to the creditor and say,—"You have discharged me completely and entirely from the debt, but I am now sued by a person who was surety, and that is inconsistent with the discharge which I have received from you?" If, on looking at the discharge, you find that there is nothing inconsistent in it with a proceeding by the surety afterwards against the principal debtor, then the surety is not in any way discharged.

Now, my Lords, admitting fully that in the present case the acceptors of this bill of exchange were liable in the first degree, and that the indorser was liable only in the second degree and as surety, it appears to me quite clear that that which was done towards the acceptors was nothing more than this: it was a taking of £20 from the acceptors, not merely on account of the bill (in point of fact there is no notice whatever taken of the bill in the discharge), but on account of all claims and demands whatsoever against the Scottish Granite Company, the acceptors, or the liquidators of that company, or David M'Cubbin, or Mrs M'Cubbin, his executrix, and at the same time a reservation entirely of all claims against obligants other than the Granite Company bound to the pursuer along with the Granite Company. Therefore, if those persons who were co-obligants with the Granite Company should afterwards sue for indemnity, the production of this instrument would at once shew that there was nothing inconsistent in such proceedings with that which was done in this instrument, because the claims of the pursuer, Crawford, were reserved entire against the persons who were sureties. These principles have been decided not merely in the case of Owen v. Homan[1] in your Lordships' House, but in many cases which have followed subsequently, and it appears to me that the Court of Session were entirely right in the conclusion which they arrived at on this part of the case.

LORD CHELMSFORD concurred.

LORD HATHERLEY.—My Lords, I entirely agree with the opinion that has been delivered by my noble and learned friend on the woolsack.

I will make one single observation only upon the case which was cited at the bar as having been decided by myself formerly in the Court of Chancery.[2] Upon the question of the effect of a principal debtor being discharged upon the petition of a surety when the rights against the surety are reserved, I

[1] Owen v. Homan, 1853, 4 Clark's House of Lord's Cases, 997.
[2] Webb v. Hewitt, June 10, 1857, 3 Kay and Johnson, 438.

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never entertained any doubt. On looking at the report of that case I see exactly what occurred there. The discharge there was not in the form in which it is here,—that is to say, taking part-payment and discharging the rest; but there was a purchase by the creditor of all the property of the principal debtor, and that property so acquired by the creditor was taken in discharge of the debt that was due to him; and though he said that there ought to have been in the deed that which there was not, namely, a clause reserving his rights against the surety, and that such a clause had been omitted by mistake, I held that, had it been there, the rule would not have been applicable to a case of that description, where it is impossible to say how much the debtor's estate was worth, or to say that if it exceeded or that it fell short of the amount of the debt in question. The creditor had taken it for what it was worth, and had taken it in satisfaction. Therefore, the questions which have been argued here could not possibly arise in such a case as that.

With regard to the judgment in the present case, I entirely concur in what has been proposed by my noble and learned friend on the woolsack.

CASE remitted to the Court of Session with this declaration:—It being admitted that the sum of £70 mentioned in the fourth head of the statement of facts of the appellant was paid on account of the bill of exchange for £200 as therein mentioned, declare that the interlocutors appealed from ought to be varied so far as they or any of them decern payment of the sum of £70.

CROSSE & SANDS—DAVID MILNE, S.S.C.—JAMES LAMOND—RICHARDSON & JOHNSTONE, W.S.

CASES

DECIDED IN

THE COURT OF JUSTICIARY

1874-75.

WILLIAM MACKENZIE, Complainer.—*D.-F. Clark—Balfour.*
JOHN LANG AND P. G. CUNNINGHAM, Respondents.—*Sol.-Gen. Watson—Asher.*

No. 1.

Nov. 9, 1874.
Mackenzie v. Lang, &c.

Suspension—Competency—Statute 29 *and* 30 *Vict. c. cclxxiii.* (*The Glasgow Police Act*, 1866), *secs.* 131, 132.—*Held* that it was incompetent for the High Court of Justiciary to entertain a suspension of a sentence of the Police Court of Glasgow, sitting under the Glasgow Police Act, 1866, on grounds which amounted to defect of jurisdiction, and malice and oppression on the part of the Judge, in respect that in such cases the statute had provided an exclusive remedy by appeal to the Circuit Court.

Observed that if the proceedings had been beyond the statute the primary jurisdiction of the High Court would not have been excluded.

HIGH COURT.
Lord Justice-Clerk.
Lord Neaves.
Lord Young.
Justiciary Clerk.

THIS was a suspension of a sentence pronounced by one of the Magistrates of the city of Glasgow, sitting under the Act 29 and 30 Vict. c. 273 (The Glasgow Police Act, 1866), against William Mackenzie.

The complainer set forth that on 11th September 1873 he was in the employment of Messrs Miller and Bannerman, wrights in Glasgow, as a journeyman joiner; that on the morning of that day, while employed at a house the joiner work of which Messrs Miller and Bannerman were executing under contract, his attention was called to two old women who were removing bits of wood from the premises; that he ordered them away, but did not force them to relinquish three small and useless pieces of wood which they had gathered; that on the afternoon of the same day he was given in charge to a policeman by Messrs Miller and Bannerman's foreman, on a charge of theft of the three pieces of wood above mentioned; that the officer on duty having made inquiry refused to entertain the charge; that on the following day, being Saturday, 12th September, when he went to receive his pay at Messrs Miller and Bannerman's office, he was again, on the same charge, given into the custody of a policeman, who was in waiting in plain clothes; that he was detained in the Central Police-office till the following Monday; that while so under detention he was visited by a detective named Jeffrey, who strongly urged him to plead guilty to the charge, in the sure expectation that he would be dismissed with a mere admonition; that on Monday the 14th September he was brought up before the Central Police Court of Glasgow, in which Bailie Bannerman was sitting, and a charge of theft of the wood was preferred against him; that while intending to plead guilty to not

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having prevented the women above mentioned from taking away the wood, his plea, owing to an impediment in his speech, was interpreted as one of guilty of the theft; that in the confusion and excitement of the moment he signed the plea without well knowing what he did; that he was at once sentenced by Bailie Bannerman to thirty days' imprisonment; and that he was immediately thereafter imprisoned, but liberated on 22d September, at the solicitation of his fellow-workmen, after having suffered eight days' imprisonment.

In support of his suspension the complainer contended that the proceedings taken against him and the sentence pronounced were illegal and incompetent, as also malicious, oppressive, and corrupt, inasmuch as Bailie Bannerman, who tried the case, was for many years the sole partner of the firm of Miller and Bannerman, and at the date of the prosecution was a sleeping partner, and retained a large pecuniary interest in the firm, of which his son was then an active partner; and further, that Bailie Bannerman had directed and instigated the prosecution which was afterwards brought before himself.

An appeal from a sentence of the Glasgow Police Court lies within fourteen days from its date to the Court of Justiciary "at the next Circuit Court to be held at Glasgow, in the manner and under the rules, limitations, and conditions contained" in the Act 20 Geo II. c. 43. This Act provides by sec. 34 that such appeal shall be served on the respondent fifteen days at least before the sitting of the Court.*

The conviction against the complainer was obtained on 14th September. The days for appealing to the Circuit Court accordingly expired on the 28th September, and the next Circuit Court sat at Glasgow on 6th October. The complainer did not take an appeal to the Circuit Court, but instead of doing so brought this suspension before the High Court of Justiciary.

The respondents objected to the competency of bringing the case by suspension to the High Court, and contended that appeal to the Circuit Court of Justiciary was the only competent mode of review under the Glasgow Police Act, 1866, 29 and 30 Vict. c. cclxxiii., secs. 131 and 132.[1]

Argued for the complainer;—Fourteen days being allowed for appeal, and fifteen thereafter being required for service, there was no time in the present case to appeal to the Circuit Court, which sat only twenty-two

* 29 and 30 Vict. c. cclxxiii, provides, sec. 131,—"No warrant granted by the Magistrate, or citation made in pursuance of the provisions of this Act, and no charge or complaint, and no proceeding or trial before the Magistrate, and no order or sentence of the Magistrate thereon, or the extract thereof, shall be quashed or vacated for any misnomer or informality, or be subject to suspension, reduction, advocation, or appeal, or any other form of review or stay of execution, unless in manner and on some one or more of the grounds hereinafter mentioned." Sec. 132,—"Any person who feels aggrieved by any order or sentence of the Magistrate may, within fourteen days after its date, appeal to the Court of Justiciary at the next Circuit Court to be held at Glasgow in the manner and under the rules, limitations, and conditions contained in an Act passed in the 20th year of the reign of his Majesty King George the Second, chapter 43, 'for taking away and abolishing heritable jurisdictions in Scotland,' on the ground of corruption, malice, or oppression on the part of Magistrate, wilful deviations in point of form from the statutory enactments, incompetency, or defect of jurisdiction, but on no other ground."

The Act 20 Geo. II. c. 43 sec. 34, provides for taking and serving appeals to the Circuit Court of Justiciary, and that "such service shall be sufficient summons to oblige the respondents to attend and answer at the next Circuit Court which shall happen to be held fifteen days at least after such service." . . .

[1] Walker v. Lang, Nov. 25, 1867, 5 Irvine, 506, 40 Scot. Jur. 89; De Belmont v. Lang, June 28, 1871, 2 Couper, 95, 43 Scot. Jur. 522.

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days after the conviction. Even admitting that the statute provided the Circuit Court as the ordinary tribunal of appeal, in this particular case it was not possible to go there, and resort to the High Court was necessary, and therefore competent.

But apart from this, a distinction must be drawn between cases where review, properly so called, was required, and those in which it was sought to quash a sentence without reviewing it. Admitting that cases of the former kind must be taken exclusively before the Circuit Court, the High Court of Justiciary still retained a cumulative jurisdiction in all cases of the latter kind. The present being emphatically a case where a sentence was sought to be quashed *simpliciter* might therefore be competently brought before the High Court.[1]

LORD NEAVES.—This is a case of some importance, but when examined it is not attended with any great difficulty. The position of matters is this,—the nature of the review sought in this Court, and the grounds upon which it is sought, are such, *prima facie*, as would have been competent had the case been brought before the Circuit Court of Justiciary. But instead of going there the complainer has chosen to come here. Now, where the multiplicity of cases coming within the provisions of an Act, such as the Glasgow Police Act of 1866, is so endless, it is most desirable that the review open to parties who may feel themselves aggrieved should be simplified and reduced to a definite mode of proceeding, and this the Legislature has recognised in sections 131 and 132 of the statute, by providing a manner in which, and certain grounds upon which, such review shall be competent. And looking at these provisions I have great doubts whether it was intended to give a cumulative jurisdiction to this Court as well as to the Circuit Court of Justiciary. There is a jurisdiction created in the Circuit Court on various grounds, among which the grounds here pleaded are included. If there is no obstacle otherwise the Circuit Court is the natural and legitimate place of resort, and the inference is that it was not intended to give an alternative and optional method of review in this Court. There may be cases,—I do not say there are,—in which the Circuit Court could not interfere, and in which, therefore, recourse would have to be to this Court. But as a general rule, where a power of review is given under a statute to a particular Court, it is to be presumed that where that power can be competently exercised all other review is excluded.

The first ground stated for bringing the case to this Court is that the complainer having fourteen days allowed to him by statute within which to deliberate whether to seek review or not, and being required to give fifteen days' notice of his appeal to the opposite party after he had determined upon it, there was not that length of time, twenty-nine days in all, intervening between the date of the sentence (14th September) and the meeting of the next Glasgow Circuit Court (6th October). It is contended that the complainer was entitled to delay making up his mind whether or not he should appeal, even although that delay

[1] Duffy v. Lang, March 5, 1869, 1 Couper, 238; Graham v. Mackay, Feb. 25, 1845, 7 D. 515, 17 Scot. Jur. 240; M'Phail v. Campbell, March 18, 1861, 4 Irv. 18, 33 Scot. Jur. 383; Gray v. M'Gill, Feb. 27, 1858, 3 Irv. 29, 30 Scot. Jur. 511; Erak. 1, 2, 26; Sheill v. Mossman, Nov. 7, 1871, 10 Macph. 58, 44 Scot. Jur. 46; Manson v. Smith, Feb. 8, 1871, 9 Macph. 492, 43 Scot. Jur. 261; M'Beth v. Innes, Feb. 8, 1873, 11 Macph. 404, 45 Scot. Jur. 270.

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might render it impossible for him to comply with the other statutory requirements as to notice. But that is not a plea that comes very well from the mouth of the present complainer, who comes here alleging that he has met with such flagrant injustice and been misrepresented and ill-used at every step, and yet takes fourteen days to make up his mind to complain. He could have made up his mind, and he ought to have made up his mind in time to enable him to take the necessary steps to comply with the other requisites of the statute. I think, therefore, that we ought to disregard this first plea. But, further, when we come to look at the grounds upon which review by this Court is sought, we find that they are not such as would justify our interference. What might be the case where there never has been a process at all, where there is no complaint signed by a proper officer authorised by a proper prosecutor, and brought before a proper magistrate, or at least before a person having an apparent jurisdiction—where, in fact, a mere farce is enacted—I need not stop to inquire. That is not the case here. The prosecution is raised by the proper prosecutor, and brought before a Judge competent to entertain it—at least speaking generally—for there are some special objections to the jurisdiction, to which I shall immediately allude. The complainer, it seems, appeared, and, without stating any preliminary objections, deliberately pleaded guilty, in the expectation, as he says, of getting an advantage by that means. He says he meant to plead guilty to something else, but from an impediment in his speech was understood to plead guilty to the theft, and that that was a mistake. But the plea was written out upon the complaint and signed by him. He might have read it, for I presume he could read and write. At any rate he signed this plea of guilty, and must now be held to have done so deliberately.

But, further, it is said that the prosecution was "instigated" by the Judge. Instigation is a very vague word, and I cannot understand that it is instigation in an evil sense for one public official to suggest to another public official that a case of this kind requires to be looked into. That is not instigation. We are not to assume that the public prosecutor, a man of known character, weight, and integrity, was obliged to do everything which might be suggested to him, but that he brought the action in a deliberate and regular manner. Instigation as pleaded is mere vituperation, a thing that has no definite meaning at all. Then it is said that the suspender was wrongously apprehended. But I do not think that it is for him to state such an objection now. He is not a pupil requiring the protection of the Court, but a grown man in communication with a member of his own family—his wife—and he could have obtained advice if he had wanted it. But he did not apply for it, and then without any objection as to the mode in which he was brought before the Police Court he pleaded guilty. It is said that a police-officer volunteered a piece of advice, but that is no ground for interference. If the Judge could have been connected with the persuading of the man to plead guilty it might have been more serious, but it is not alleged that the magistrate who tried the case did this. The officer gave the prisoner a piece of advice, a thing which he had no right to do, but a policeman saying a thing of that kind will not vitiate a sentence.

Lastly, it is said that a man cannot be judge in his own cause, and that the judge here tried the suspender for the theft of his own wood. Now, it is quite certain that a man cannot be Judge in a civil suit involving pecuniary interests to himself. It is not, indeed, so clear that he cannot be a Judge if he happens to be connected with a company, joint-stock or otherwise, whose interests are

involved in the matter at issue. But I know of no authority for saying that a Judge cannot competently sit in a criminal case because the alleged crime is an offence in some way against his own rights. All that can be said is that it is most indecorous that he should do so, and I cannot therefore entertain this ground of suspension. On all these grounds, therefore,—the incompetency of coming to this Court, the nature of the objections stated, the absence of objection made at the trial, and the plea of guilty,—I think we are bound to refuse the suspension.

LORD YOUNG.—I am of the same opinion, and concur in every word which has fallen from your Lordship. But, at the same time, I would prefer to put the judgment of the Court on the preliminary question of jurisdiction.

The suspender complains of a sentence pronounced against him by a Police Magistrate of the city of Glasgow, sitting under the Act 29 and 30 Vict. c. cclxxiii. Now, it is quite clear that the instance was regular, for it was the instance of the Procurator-fiscal, who by section 115 of the statute has title and is bound to prosecute in all cases before the Court. It is further clear that the complaint was relevant, and subject to certain possible exceptions to be afterwards mentioned the jurisdiction of the Court is not questioned. The suspender pleaded guilty and signed his confession, and sentence was thereupon pronounced with all apparent regularity. What the defender now says is, that Bailie Bannerman, though a judge competent to sit in the Court, ought to have declined himself in this particular case, because, as alleged, he was a partner of the firm from whom the wood in question was charged to have been stolen; and farther, that he was disqualified from sitting in judgment in this particular case because he had directed the prosecution to be instituted.

I put it to the suspender's counsel within what category he brought his grounds of complaint. His reply was that they fell under these two,—1. Defect of jurisdiction; and 2. Malice and oppression on the part of the judge. These are, I think, the only categories under which the grounds of complaint above stated can come. But when I look at the Act of Parliament I find that it contemplates the possibility of parties being dissatisfied with the judgments of the Police Court on these very grounds, and that accordingly it provides a tribunal before which those so dissatisfied may obtain redress, and says in most distinct and emphatic terms that it shall be incompetent to resort to any other. Now, that tribunal is not the High Court, but the Circuit Court of Justiciary. But then it is argued that there is a distinction between reviewing a judgment and quashing it as *funditus* null and void. There may be cases in which such a distinction can be drawn. But I see no reason for drawing any such here, except it be that, review on the merits being excluded, every case of review must be in order to quash the judgment as *funditus* null. But in that sense of the term "review" the power of review is conferred exclusively upon the Circuit Court of Justiciary, and the question is why did the complainer not go there. He has given no satisfactory reason.

Being therefore of opinion that a proper tribunal of review is constituted by the statute, of which the complainer has failed to take advantage, and that the jurisdiction of this Court is excluded, I can have no doubt that this suspension must be refused.

But I would add that I am not of opinion that the authority of this Court to interpose in order to prevent in any case the immediate execution of an alleged

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oppressive sentence until the proper remedy can be taken is excluded. If, for instance, a complainer were to come here and say that he was suffering in the meantime in consequence of a sentence which was *ex facie* illegal and oppressive, and that he could not have it brought under the review of the proper Court until after the injury was inflicted, as in the case of a sentence of whipping or imprisonment, this Court might, if it saw fit in the circumstances, interpose and suspend the execution of the sentence upon such terms as it thought proper, but only to stay execution until it could be brought under review of the proper tribunal.

LORD JUSTICE-CLERK.—I concur substantially in the grounds which have been stated by your Lordships, and which I need not again go over. I shall only make one or two observations in order to prevent misapprehension.

Unquestionably the statute intended, upon the plainest possible grounds of public expediency, to exclude our jurisdiction in complaints against sentences pronounced under its provisions, where the complaint is founded on grounds on which an appeal is directed to be taken to the review of the Circuit Court. But before the excluding words of the 132d clause can apply there must be a magistrate and a prosecution and a sentence, to which the main part of the clause itself applies. If it appeared so clearly on the face of the proceedings that there could be no doubt about the fact that there was no magistrate, or no prosecution, or no sentence, then I think the case would be brought within a perfectly well known rule in our practice, which has been frequently the subject of judicial recognition, namely, that though it might have been perfectly competent to take the sentence to the review of the Circuit Court under the 132d section, and for the Circuit Court finding it was a mere nullity to suspend or quash it, yet that the primary jurisdiction of this Court to prevent such abuses was not excluded. I only make these observations in order to save the opinion I have on that matter. But I do not think that we have here alleged in any relevant form a case of that kind. The facts are simply these. There was an information, it is said, given by Bailie Bannerman, a magistrate, given quite competently and to a competent person, that a theft had been committed by the suspender. He was accordingly apprehended and duly prosecuted by the proper authority. He appeared before the informant, sitting in the exercise of his public functions as a magistrate, and he pleaded guilty and received sentence. All that not only appears on the face of the proceedings, but it is admitted on both sides. And now it is said that, because the magistrate had a certain interest,—which was the whole extent of the allegation,—in the trading company whose property was the subject of the theft, we are therefore to hold that there never was any prosecution or sentence at all, and that the whole proceedings are absolutely null. I cannot hold that. I think that the allegation falls entirely short of that category up to which the suspender endeavours to bring his case. Therefore I entirely concur in the result of your Lordships' decision.

THE COURT accordingly refused the suspension.

JOHN GALLETLY, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 2.
Nov. 9, 1874.
Lazenby v. M'Arthur.

JAMES LAZENBY, Complainer.—*D.-F. Clark—Orr Paterson.*
JAMES M'ARTHUR, Respondent.—*Rutherfurd.*

Suspension—Competency—Game Dealer's Certificate—Statutes 1 *and* 2 *Will. IV., c.* 32, *sec.* 27, *and* 23 *and* 24 *Vict., c.* 90, *secs.* 3 *and* 13, 19 *and* 20 *Vict., c.*

56, *sec.* 17.—*Held* that a prosecution for dealing in game without a licence was an Excise prosecution, and that suspension of a sentence pronounced under such prosecution was incompetent in the Court of Justiciary.

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Lazenby v. M'Arthur.
High Court. Lord Justice-Clerk. Lord Neaves. Lord Young. Justiciary Clerk.

JAMES LAZENBY was convicted before two Justices of Peace for the county of Elgin on an information at the instance of James M'Arthur, an officer of Excise, of dealing in game without a licence, in contravention of the statutes thereanent. The conviction was affirmed by the Court of Quarter Sessions. Lazenby brought a suspension of the conviction in the High Court of Justiciary.

The respondent objected to the competency of the suspension, on the ground that the prosecution was an Excise prosecution,[1] and that review, which was formerly by writ of *certiorari* from the Court of Exchequer,[2] was now exclusively by note of appeal to the Lord Ordinary in Exchequer causes.[3]

The complainer contended, that as the information laid against him was not for a breach of the revenue laws, but for failure to obtain a certificate from the Justices, and as the penalty was appropriated[4] to the relief of the poors-rates, the prosecution could not be held an Excise prosecution, or the penalty an Excise penalty, and, therefore, recourse had properly been had to the High Court of Justiciary.[5]

THE COURT refused the suspension as incompetent, on the ground that the prosecution was an Excise prosecution, and that therefore the proper mode of review was by note of appeal to the Lord Ordinary in Exchequer causes.

KEEGAN & WELSH, S.S.C.—THE SOLICITOR OF INLAND REVENUE.—Agents.

THOMAS AND WILLIAM SANDYS AND MANDATARY, Pursuers and Appellants. —*D.-F. Clark—Mair.*
LOWDEN AND ROWE, Defenders and Respondents.—*M'Kechnie.*

No. 3.
Nov. 26, 1874.
Sandys v. Lowden and Rowe.

Sheriff—Appeal—Competency—Debts Recovery (Scotland) Act, 1867, 30 *and* 31 *Vict. c.* 96.—An action was brought under the Debts Recovery Act for a sum under £25, which the Sheriff dismissed as incompetent, in respect that the debt sued for did not fall under the Act. *Held* (*dub.* Lord Young) that an appeal to the Court of Justiciary was competent.

Sheriff—Debts Recovery (Scotland) Act, 1867—"*Merchants Accounts*"—*Triennial Prescription.—Held* that the expression "merchants accounts" in the Debts Recovery Act was not limited to such accounts as would fall under the triennial prescription.

Question, whether an account for goods to the value of £23 supplied by a wholesale dealer in England to another wholesale dealer in Scotland fell under the triennial prescription.

ON 20th July 1874 T. and W. Sandys, trimming manufacturers, London, and their mandatary, raised an action under the Debts Recovery (Scotland) Act, 1867, in the Sheriff-court at Edinburgh, against Lowden and Rowe, wholesale small-ware dealers, Edinburgh, for payment of £22, 13s. being the amount, less 15s. of returns, of two accounts for buttons

High Court. Lord Justice-Clerk. Lord Neaves. Lord Young. Justiciary Clerk.

[1] 1 and 2 Will. IV., c. 32, sec. 27; 23 and 24 Vict., c. 90, secs. 3 and 13.
[2] Paley on Convictions, 3d ed., 277–8; Young v. Townshend, Nov. 24, 1856, 2 Irv. 525, 29 Scot. Jur. 31.
[3] 19 and 20 Vict., c. 56, sec. 17.
[4] 1 and 2 Will. IV., c. 32, sec. 37.
[5] Macdonald v. Gordon, Nov. 3, 1868, 1 Couper, 105, 41 Scot. Jur. 48.

No. 3. and other small wares furnished by the pursuers to the defenders in course of trade.

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The defenders entered appearance, and pleaded, *inter alia*, (1) that the action being one to recover an account for goods supplied by manufacturers in England to wholesale dealers in Scotland, it was not a merchant's account in the sense of the Debts Recovery Act, and that the action was incompetent under that Act, and fell to be dismissed.

The defence upon the merits was that certain of the buttons were disconform to order, and had been returned by the defenders, and that after deducting the price of these buttons the balance due by the defenders was reduced to £8, 10s. 9d. which they were willing to pay.

On 9th October 1874 the Sheriff (Davidson) pronounced the following interlocutor:—"Having heard parties' procurators on the competency of this action under the 30 and 31 Vict. c. 96, sustains the first plea of the defenders, and finds the action incompetent: Therefore dismisses the same: Finds the defenders entitled to expenses; fixes the same at £2, and decerns."*

The pursuers appealed to the High Court of Justiciary.

Argued for the appellants;—1. The appeal was competent. Refusal on the part of the Sheriff to exercise a jurisdiction which belonged to him was still a ground of appeal to the Circuit Court of Justiciary where there were circuits, and to the High Court where there were no circuits,

* "NOTE.—This is an action for the price of goods said to have been furnished by one firm of wholesale manufacturers in London and Birmingham to another firm of wholesale small-ware merchants and manufacturers in Edinburgh. The amount sued for is not great (only £23, 8s. with a deduction of 15s.), but the quantity of the same kinds of articles indicating the small individual value of each article is considerable. It is plainly a transaction or rather two transactions between two dealers in the way and for the purposes of their respective trades. It is apprehended that the mere amount of the debt claimed, or the value of the goods sold, and in that view the comparative smallness of the transactions, is not a matter of any importance. The point is, what is the character of the debt, and is it one of those which can be recovered under the second section of the Debts Recovery Act, 1867?

"If the question were whether the Triennial Prescription Act of 1579 were applicable to this debt, it is thought that it would be held to be inapplicable, and that this is not a merchant's compt,—a shopkeeper's account,—in the meaning of that Act. These were proper mercantile transactions,—the furnishing of certain goods by the manufacturers in England to other merchants in Scotland for the purposes of their business, and the result of the decision is that such mercantile transactions do not fall under the Act of 1579.

"If this be so, then the question is, Are the pursuers entitled to sue under the Act of 1867? The Sheriff does not doubt that the intention of the second section of this Act was to make competent under it such actions of debt (of the value prescribed) as are affected by the Act of 1579, and no other. It indeed leaves out the provision 'that are not founded upon written obligations.' But that is a difference which does not affect the matter at present under consideration. With the exception of this difference, the phraseology as to the subjects of the two Acts is identical, and is such phraseology as would not have been adopted in the year 1867, except for the purpose of indicating that the debts to be sued for were to be of the same kind. No doubt the word 'merchant' has now a different, or at least a more extended signification from what it had in 1579. But adopting other expressions which would not have been used in the modern Act, except for the purpose of identifying it with the old one, the Act of 1867 must be held as limiting merchants' accounts pursuable under its second section in the same way as under 1579. It is to be regretted that this Act did not expressly refer to the Act 1579."

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in causes not exceeding the value of £25, and that notwithstanding the exclusion of review contained in the Sheriff-court Act, 1853, and the Debts Recovery Act, 1867.[1]

2. (Upon the merits.) There were two questions in the present case,—first, whether the triennial prescription applied to this debt, and secondly whether the class of debts embraced in the Act of 1579 were the same as those embraced in the Act of 1867. If the second question was answered in the negative it was unnecessary to go into the first question. The object and character of the two Acts were widely different. The Act of 1579 was one limiting existing rights, and it had therefore received a strict construction. The Act of 1867 was an enabling Act, providing a more perfect remedy for the recovery of debts, and must therefore receive a liberal construction. The Act of 1579 applied to all debts, however large, that fell within its category. The Act of 1867 was limited to debts under £50, and it was not qualified by the expression "that are not founded on written obligations," which occurred in the Act of 1579. It was not conceivable that the Act of 1867 was not intended to apply to the case of one wholesale dealer selling articles to another wholesale dealer to an extent which relatively must be considered a small amount. It would entirely defeat the object of the Act if a preliminary inquiry was necessary in each case as to whether the person who sued was a shopkeeper or a merchant.

The respondents argued;—The appeal was incompetent. In a question not involving oppression or excess of jurisdiction the Sheriff's judgment was conclusive in causes not exceeding £25 in value. If the cause did not fall under the Debts Recovery Act there was no ground of appeal. If the cause did fall under that Act the Sheriff had committed an error in law, but the cause not exceeding the value of £25 his judgment was final.[2] If review was competent, suspension in this Court, and not appeal, was the proper form.

2. (Upon the merits.) The class of debts which could be sued for under the "Debts Recovery Act" were "house maills, men's ordinaries, servants' fees, merchants accounts, and other the like debts." The only purpose for which these old Scotch words could have been used by the Imperial Parliament in 1867 was to point out a certain class of debts to which a well known short prescription applied. It was reasonable that, as the Legislature had abridged the time within which such debts could be proved in the ordinary way, it should give exceptional facilities for their speedy recovery. It was well known that in the Scotch language of the sixteenth century the word "merchant" meant "shopkeeper," as it did still in popular language, and the triennial prescription introduced by the Act 1579 had been held not to apply to proper mercantile transactions between wholesale dealers, or between manufacturer and merchant.[3] It was true that the account in the present case was not large, but the character of an account did not depend on its pecuniary amount. It was a proper mercantile transaction between wholesale dealers, not falling under the triennial prescription, and therefore excluded from the operation of the Debts Recovery Act.

LORD NEAVES.—Upon the point of competency I have no doubt. Refusal on

[1] 54 Geo. III. c. 67, sec. 5, extending 20 Geo. II. c. 43, sec. 34; 16 and 17 Vict. c. 80, sec. 22; 30 and 31 Vict. c. 96, secs. 12 and 17; Dick v. Great North of Scotland Railway Company, Oct. 8, 1860, 33 Scot. Jur. 2, 3 Irv. 616; Steuart v. M'Gregor and Sons, Sept. 23, 1868, 40 Scot. Jur. 654, 2 Couper, 92.

[2] Debts Recovery (Scotland) Act, 1867, 30 and 31 Vict. c. 96, secs. 12 and 17.

[3] Laing and Irving v. Anderson, Nov. 10, 1871, 10 Macph. 74, 44 Scot. Jur. 53.

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the part of the Sheriff to apply an Act where it ought to be applied is a sufficient ground for the interference of this Court; and the respondents cannot found upon the exclusion of review contained in a statute which the Sheriff has refused to apply.

The question raised upon the merits of the appeal is not free from difficulty. I think it the safer construction of the Debts Recovery Act to read it without reference to the Act 1579, or at least to hold that the latter Act is not to be taxative of the former, or to control its meaning. The Debts Recovery Act is a statute of the Imperial Parliament, and its object is to provide means for the easy recovery of small debts. The Act begins by referring to two other Acts, the Small-debt Act, 1837, and the Sheriff-court Act, 1853, neither of which is limited by the Act of 1579. And it proceeds:—"Whereas it is expedient to make farther provision to facilitate the recovery of certain debts in the Sheriff-courts of Scotland." If it had been meant to refer to certain debts already defined by an old statute, it would have been natural to say so. No reference is made in the statute of 1867 to the old Act, and although the mere words used to describe the debts are substantially identical in both statutes, the Act of 1867 does not anywhere say that they are to be treated as the same.

Some of the language certainly appears to be provincial, or, as I should rather say, peculiar to Scotland. But the words "merchants accounts" are not. I think it is safer in construing an imperial Act, unless the contrary is expressed, to read words in their present and prevalent meaning, in so far as they have such a meaning. It is different with words unintelligible to English ears. But the words "merchants' accounts" are perfectly intelligible as English words, though in a wider sense than what is generally held to be their sense in the Scotch Act of 1579. Are we to go back upon words which are not technical, and to go into an antiquarian discussion as to their meaning three hundred years ago, when the words are still used in ordinary life?

Seeing that the object of the Act is favourable, viz., to secure despatch in the recovery of debts of small amount, we must construe it liberally. And seeing how inconvenient or impossible in such cases it would be to go through the preliminary inquiry that would be necessary to ascertain whether any particular transaction fell under the Act of 1579, I am of opinion that this account might competently be sued for under the Debts Recovery Act. The limitation to debts under £50 is a sufficient safeguard against any abuse of the facilities provided by that Act.

I do not say whether the Act 1579 would exclude this debt. It is not necessary to decide that question.

Lord Young.—I agree. I have no doubt about the case, except only the jurisdiction of this Court. The subject-matter is a civil action for the price of goods sold and delivered. There is no question as to the jurisdiction of the Sheriff-court. The only question is in regard to the form of procedure in that Court of undoubtedly competent jurisdiction. The action is brought before the Sheriff-court in the summary form allowed by the "Debts Recovery (Scotland) Act, 1867," in cases between £12 and £50 value; and the objection was not to the jurisdiction of the Sheriff-court, but rather of that character with which we used to be familiar in cases where it was objected that the case was not one for summary procedure, but ought to have been the subject of an ordinary action. I had a doubt whether the High Court of Justiciary was the proper Court to

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resort to in a case where the subject-matter was civil; and I confess that—although, assuming the jurisdiction, I was of opinion that the form of appeal is a very suitable and convenient one,—but for the concession which counsel for the respondent has made in answer to a question put to him by me, admitting that this is the proper tribunal, assuming that any remedy is competent, I should have had great doubt upon the point. It was conceded that if the Sheriff improperly refused to exercise his jurisdiction, there would be a remedy in this Court, although it was contended that suspension, and not appeal, was the proper form; and, after that concession, I did not desire to hear further argument upon that point. On the assumption that this is the proper Court, I am clearly of opinion that an error has been committed by the Sheriff, that the case is one altogether suitable for the summary form of procedure of the Act of 1867, which is, I think, applicable. Otherwise I should have had some doubt whether the Court of Justiciary was the proper Court for giving redress against the Sheriff in a civil cause for refusing to apply a certain procedure.

One cannot look to the action before the Sheriff without being compelled to withhold all sympathy from the respondents. It would be difficult to conceive a case more suitable for the exercise of the summary jurisdiction of the Sheriff, and I cannot understand how any party reasonably well advised could object to such a course being pursued. The respondents had, in the course of their trade, sent two orders for buttons and other such small wares to the appellants; the first, of the amount of £7, 15s. 9d.; and the second, of the amount of £15, 12s. 3d.—£23, 8s. in all. The respondents admitted receiving the articles, but alleged that some of them were disconform to order, and that these being returned, the account fell to be reduced in its amount to £8, 18s. 9d. The dispute is, therefore, about £14, and turns upon whether the respondents were entitled to reject so many buttons as more or less disconform to order. There was a long argument in the inferior Court as to whether certain restrictions which have generally been put upon the words of the Act of 1579 were also applicable to the same expressions used in the Act of 1867. The Sheriff has decided upon what appeared to him the true meaning of the statute, and we have the case now brought before the Court of Justiciary, all about these fancy buttons, on the question whether the Sheriff is to use one form of procedure or another in deciding the controversy regarding them.

I have no doubt that the Act of 1867 does apply to such a debt as this in its words, sense, and spirit. It is not necessary to determine whether or not the Act of 1579 would also apply, but I have no hesitation in saying that the case of Laing and Irvine v. Anderson is not in point. And being prepared to concur in the opinions of the Judges in that case, I express my opinion the more readily that the ratio of that judgment does not apply to accounts of this kind for small wares sold by a person who manufactures them to a dealer in the same articles. I am not doubtful that the Act of 1579 is applicable to such accounts, although it is not applicable to such transactions as formed the subject of litigation in the case of Laing and Irvine v. Anderson. It is certainly not true that the Act 1579 applies only to the accounts of merchants in the sense of people who keep retail shops. It is familiarly applied to the accounts of professional men—writers, engineers, and a variety of others whose debts are regarded as like those of merchants, although assuredly not so like as those of a button-maker, who supplies shopkeepers and all others who chose to buy from him. For these reasons I concur with Lord Neaves, and am of opinion that the appeal

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should be sustained, and the case sent back to be dealt with by the Sheriff in what I conceive to be the proper mode of dealing with it, viz., the summary mode provided by the Act of 1867.

LORD JUSTICE-CLERK.—On the question of the competency of the appeal I have no doubt. The contention that the Sheriff is conclusive as to the limits of his own jurisdiction is untenable. In regard to the form of review, appeal is an old and well-recognised mode of obtaining redress in this Court.

In regard to the question whether this account would fall under the triennial prescription I give no opinion, for it appears to me that the question whether the Debts Recovery Act is limited in its range to debts which would fall under the triennial prescription is preliminary to the other. If it is not so limited we need not go further.

The words of the Debts Recovery Act contain no limitation on the ordinary meaning of the term "merchants accounts." So far from importing that limited meaning which has been generally put upon the words, as they occur in the Act 1579, the Debts Recovery Act, while it recites two modern Acts in its preamble, does not refer to the Act 1579 at all. If it had been intended to put that limited meaning on the words, the Legislature could very easily have made that clear. Terms were chosen which had received construction in the Courts of Scotland in relation to that old statute, but I do not think that it was intended to use "merchants accounts" in any other than their ordinary meaning at the present day.

This is a very suitable case for the Sheriff's summary jurisdiction, and I see no reason why that jurisdiction should be excluded, unless it is expressly excluded by the statute. I am glad that we have come to this result, and that we are not called upon to determine the limits of the triennial prescription as applicable to dealings, whether of large or small pecuniary amount, between persons carrying on a wholesale business. This would open up a wide field. I am of opinion that the Debts Recovery Act is not limited in its terms to those debts which would fall under the triennial prescription, and that we should therefore sustain the appeal, and remit to the Sheriff to proceed with the cause.

THIS interlocutor was pronounced:—"Sustain the appeal: Recall the interlocutor appealed from, and remit to the Sheriff to proceed in the action as accords: Find the appellants entitled to the expenses of this appeal, which modify to five guineas, for which, and one guinea as the dues of extract, decern, reserving to the Sheriff to deal with the expenses in the Sheriff-court when he finally disposes of the case."

DANIEL TURNER, S.L.—GEORGE M. WOOD, S.L.—Agents.

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Dec. 11, 1874.
Muckersie v. M'Dougall.

HELEN MITCHELL or MUCKERSIE, Complainer.—*Omond.*
JOHN M'DOUGALL, Respondent.—*J. C. Smith.*

Public-Houses Acts, 9 *Geo. IV. c.* 58, *sec.* 25, *and* 25 *and* 26 *Vict. c.* 35, *sec.* 26—*Summary Procedure Act*, 1864, 27 *and* 28 *Vict. c.* 53—*Appeal to Quarter Sessions.*—An appeal on the merits is allowed to Quarter Sessions against convictions by the Justices in Petty Sessions under the Public-House Acts; but there is no provision in those Acts, or in the Summary Procedure Act, for recording the evidence led before the Justices in Petty Sessions, but only for recording the names of the witnesses examined. *Held* that the Justices in Quarter Sessions are bound to rehear the evidence led before the Court below.

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Observed (*per* Lord Young) that a conviction before the Justices in Petty Sessions must be assumed to be valid until the contrary is proved, and that it is the duty of an appellant to adduce before the Quarter Sessions the whole evidence previously led both for the prosecution and defence.

Suspension—Competency—Statute 25 *and* 26 *Vict. c.* 35 (*Public-House Acts Amendment Act*, 1862), *secs.* 33 *and* 34.—The Public-Houses Acts Amendment Act, 1862, secs. 33 and 34, allows an appeal from Quarter Sessions to the Circuit Court of Justiciary "on the ground of corruption or malice and oppression on the part" of the Justices, "or on such deviation in point of form from the statutory enactments as the Court shall think have prevented substantial justice from having been done," and excludes any other form and ground of review. Where the Quarter Sessions refused, in an appeal, to rehear the evidence led before the Justices in Petty Sessions, *held* that they had declined to exercise their jurisdiction, that the jurisdiction of the High Court of Justiciary was not excluded by the above section of the statute, and suspension *sustained*.

HIGH COURT.
Lord Justice-Clerk.
Lord Neaves.
Lord Young.
Justiciary Clerk.

MRS MUCKERSIE, hotel-keeper, Melrose, was, on 2d October 1874, tried before the Justices in Petty Sessions, at Melrose, at the instance of the Procurator-fiscal of the Justice of Peace Court of Roxburgh, on a complaint of breach of certificate under the Public-Houses Acts Amendment Act, 1862,[1] and the Acts therein recited. The Justices having heard the evidence, convicted the accused of the breach of certificate charged, and imposed a fine of £2.

The complainer appealed to the next meeting of the Quarter Sessions[2] held at Jedburgh on 27th October 1874. She then proposed to examine in support of the appeal the witnesses who had been examined before the Justices in Petty Sessions. It was objected for the respondent that "such a proceeding was incompetent, the proceedings having taken place under the provisions of the Summary Procedure Act, which provides that no record of the evidence shall be necessary, and the special Act containing no provision on that head."

The Court of Quarter Sessions sustained this objection, and refused to allow the examination of witnesses, and accordingly dismissed the appeal and sustained the judgment appealed against.

On 3d November 1874 the complainer intimated to the respondent an appeal against this judgment of the Quarter Sessions to the next Circuit Court of Justiciary.

Thereafter, without withdrawing the appeal, she raised this suspension in the High Court of Justiciary.

She pleaded;—(1) In the circumstances libelled it was incompetent for the Justices in Quarter Sessions to refuse to allow the examination of witnesses. The judgment ought therefore to be suspended. (2) The judgment now complained of is inept, null, and void, and ought to be suspended, in respect that it was *ultra vires* of the Justices in Quarter Sessions to refuse to hear the appeal by leading evidence *de novo*. (3) The complainer having been denied justice through the refusal of the said Justices to exercise their lawful jurisdiction it is competent for the High Court of Justiciary to remit to the said Justices to hear evidence and decide upon the merits of the case.

The respondent objected to the competency of the suspension, on the ground that a statutory mode of appeal had been provided to the Circuit Court of Justiciary,[3] and had been made the exclusive mode of

[1] 25 and 26 Vict. c. 35.

[2] 25 and 26 Vict. c. 35, sec. 26, and 9 Geo. IV. c. 58, sec. 25.

[3] 25 and 26 Vict. c. 35, Public-Houses Acts Amendment (Scotland) Act, 1862, enacts, sec. 33,—"It shall be competent to any person conceiving himself aggrieved by any warrant, sentence, &c. . . . . to bring the case by appeal

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appeal.[1] The respondent had rightly given notice of appeal to the next Circuit Court to be held at Jedburgh, and it was still open to her to go to that Court. To entertain a suspension in the meantime in the High Court of Justiciary was incompetent.[2]

Argued for the complainer;—It was not incompetent to suspend this sentence even though appeal had been intimated to the Circuit Court.[3] The reason of the complainer's coming to the High Court of Justiciary was that there were doubts of the competency of going to the Circuit Court.[4] The real objection to the judgment of the Justices in Quarter Sessions was that they refused to rehear the evidence proposed to be reled in order that they might be able to judge of the merits of the case. This was not therefore a complaint against a sentence on the ground of corruption, or malice, or oppression, or of deviation in point of form from the statutory enactments, which are the statutory grounds of appeal to the Circuit Court. It was a complaint that the Magistrates at Quarter Sessions had refused to exercise their jurisdiction, and where there was excess or defect of jurisdiction it was competent to come to the High Court of Justiciary for redress whatever statutory provision for appeal there might be.

On the merits of the suspension;—There was no provision in the statutes under which the prosecution proceeded for taking a note of the evidence.[5] The party intending to appeal was not bound to require that the evidence should be recorded. Farther the terms of the statutory enactments and the schedules annexed rendered it doubtful whether

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before the next Circuit Court of Justiciary, or, where there are no Circuit Courts, before the High Court of Justiciary at Edinburgh . . . . . Provided always that such appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the Sheriff, Justice, or Justices of the Peace, or Magistrate, as the case may be, or on such deviations in point of form from the statutory enactments as the Court shall think have prevented substantial justice from having been done," &c.

[1] The same statute enacts, sec. 34,—"No warrant, sentence, order, decree, judgment, or decision made or given by any Quarter Sessions, Sheriff, Justice, or Justices of the Peace, or Magistrate in any cause, prosecution, or complaint, or in any other matter under the authority of the said recited Acts or of this Act, shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of execution on any ground, or for any reason whatever, other than by this Act provided."

[2] M'Phail v. Campbell, March 18, 1861, 4 Irv. 18, 33 Scot. Jur. 383; Mackenzie v. Lang and Cuningham, Nov. 9, 1874, *supra*, Just., p. 1.

[3] De Belmont v. Lang, June 28, 1871, 2 Coup. 95, 43 Scot. Jur. 522.

[4] Rhodes v. Ross, Sept. 23, 1870, 1 Coup. 469, 43 Scot. Jur. 36; Clarkson v. Muir, July 19, 1871, 2 Coup. 125, 43 Scot. Jur. 589.

[5] 25 and 26 Vict. c. 35, Public-Houses Acts Amendment (Scotland) Act, 1862, sec. 26,—"Every offence committed against the recited Acts and this Act, or any of them, may, except where inconsistent with the provisions and conditions of this Act, be tried and determined in a summary manner, without any written pleadings on record or notes of evidence . . . . . but in any prosecution under the recited Acts and this Act, or any of them, the complaint, and procedure following thereupon, shall be in the form, or as nearly as may be in the form, provided by schedule (D) to this Act annexed," &c.

27 and 28 Vict. c. 53, Summary Procedure (Scotland) Act, 1864, sec. 16,—"It shall not be necessary in any proceeding under the authority of this Act to record or to preserve a note of the evidence adduced, but the record shall set forth in the form of the schedule (1) to this Act annexed the respondent's plea, if any, the names of the witnesses, if any, examined upon oath or affirmation, with a note of any documentary evidence that may be put in."

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it would be competent for the Justices at Petty Sessions to record the evidence.[1]

Argued for the respondent;—There was nothing in the statute to prevent the complainer requiring the Justices at Petty Sessions to take a note of the evidence. On no other supposition was appeal to the Quarter Sessions possible on the merits, because there was nothing to warn the prosecutor that he must be prepared to relead his evidence before the Justices at Quarter Sessions. Till the case is called at Quarter Sessions there is nothing to disclose to the respondent the nature of the ground of appeal, and if the contention of the complainer in this case was admitted, it would necessitate the respondent in every appeal before Quarter Sessions being prepared with his witnesses in case they should be required. This was contrary both to practice and to common sense.[2]

At advising,—

LORD JUSTICE-CLERK.—In this case we have a bill of suspension of a judgment of the Quarter Sessions of the county of Roxburgh, dismissing an appeal from the Petty Sessions, in a prosecution under the Public-Houses Acts. In such prosecutions there is provided by the statutes an appeal upon the merits from the Petty to the Quarter Sessions. But this particular appeal was dismissed on the ground that there was no record of the evidence adduced, though there was a record of the names of the witnesses examined, the proceedings having been taken under the Summary Procedure Act. The complainer proposed to lead the evidence over again, but the Quarter Sessions held that it was incompetent for them to rehear the evidence already taken, and they dismissed the appeal. The ground on which this suspension is brought is, that the Justices in Quarter Sessions in coming to this decision declined to exercise the jurisdiction conferred on them, and therefore refused to do justice to the complainer. It is objected by the respondent that the suspension is incompetent, because (1) review is excluded under the statute, except in certain specified cases, among which the present does not fall; and (2) where review is allowed, the Circuit Court is made the exclusive Court of review.

On the first point the case will not, I think, bear argument. It has been decided over and over again that if an inferior Court possessing jurisdiction under a statute either oversteps that jurisdiction or refuses to exercise it, however much review may be excluded or limited under the special statute, we, sitting in the High Court of Justiciary, have power to set matters right. I am also of opinion that the form of suspension is the proper and recognised form under which such questions should be raised. A great many cases in point are to be found in the books, but I think it sufficient to refer the parties to one of the most recent, that of Murray v. Jones,[3] which is very apposite to the present.

The second question relates to the alleged exclusion of our jurisdiction by the claim giving appeal to the Circuit Court. It is not necessary for us to decide whether appeal on the present ground is competent to the Circuit Court. That question can only arise on an appeal taken to the Circuit. At the same time it

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[1] Anderson and Holms v. Cooper, March 7, 1868, 1 Coup. 18, 40 Scot. Jur. 292.

[2] Gardner v. Dymock, Jan. 9, 1865, 5 Irv. 13, 37 Scot. Jur. 189; Halliday v. Bathgate, June 1, 1867, 5 Irv. 383, 39 Scot. Jur. 446; Wright v. Dewar, March 9, 1874, *ante*, vol. i. Just. p. 1.

[3] June 17, 1872, 2 Coup. 284, 44 Scot. Jur. 458.

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is worthy of remark that Lord Deas in his judgment in the case of Rhodes v. Ross, Stirling, Sept. 23, 1870, 1 Couper, p. 469, says that "where what is done in the inferior Court is outwith the statute or contrary to the statute, such clauses of limitation and exclusion do not exclude review by the Circuit Court." But I am satisfied, independently, that there is nothing in the clause in question, giving an appeal to the Circuit Court, which can be held to exclude the paramount jurisdiction of this Court.

There remain for consideration the merits of the suspension. An appeal upon the merits is given by the Public-House Acts from the Justices in Petty Sessions to the Justices in Quarter Sessions. When this appeal was taken the prosecutor objected that there was no note of the evidence. The complainer proposed to relead the evidence that had been previously led before the Court below. I am of opinion that she was quite entitled to do that, and that the Court of Quarter Sessions was not entitled to reject this proposal and the appeal. I believe it has been a common enough practice of late years for Quarter Sessions to rehear evidence in such cases, and I entirely concur in the opinion of Lord Cowan on the subject expressed in the case of Anderson and Holmes v. Cooper,[1] as follows:—"That Court (the Quarter Sessions) does not require any note of the evidence to be taken in order to review. The Quarter Sessions, when necessary for the explication of their appellate jurisdiction, hear the cases brought before them and lead the evidence, if the case requires it, *de novo*, and no hardship would therefore follow where no such note has been taken."

Being of opinion that the Court of Quarter Sessions were entitled and bound to follow that course, and as they declined to do so, it follows that this bill of suspension must be sustained, and their judgment set aside.

Lord Neaves concurred.

Lord Young.—I am of the same opinion. It is clear that the complainer was entitled to appeal on the merits of her case. She did not complain of the regularity of the conviction, but appealed expressly on the merits,—that is to say, on the ground that she was convicted when innocent. The appeal was quite warranted by the Act of Parliament and was well taken, and the appellant had undoubted right to have her appeal considered and disposed of on the merits by the Court of Quarter Sessions. There was no record of the evidence led before the Justices in Petty Sessions. The appeal could therefore only be disposed of by evidence taken before the Court of Quarter Sessions itself. The Court of Quarter Sessions refused to allow such evidence to be led. In this they committed an error of judgment, and I concur in thinking that the course they followed was in effect a declinature to exercise that appellate jurisdiction which the appellant was entitled to call upon them to exercise.

I should like to add a few words with reference to an objection taken at the bar proceeding on the assumption that where there is an appeal taken on the merits from the Petty Sessions to the Quarter Sessions, it is inconsistent with principle and impossible in practice to adduce the evidence over again. What I have to say is implied in your Lordship's opinion, but I think it as well it should be distinctly stated and understood. An appeal on the merits is not of the nature of a new trial. The conviction complained of is assumed good till the

[1] March 7, 1868, 1 Coup. 18, 40 Scot. Jur. 292.

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appellant proves the contrary. For that purpose it is incumbent on the appellant to lead evidence, and the Court of Quarter Sessions will be very slow to reverse a judgment unless the appellant produces to them the whole of the evidence led in the Court below. It is the appellant's duty to adduce the evidence to set aside the conviction, and for that purpose to have all the witnesses in attendance who were examined either for the prosecution or for the defence before the Justices. It would be a strong thing for the Court of Quarter Sessions to reverse a judgment of the Justices below in ignorance of the evidence on which they proceeded.

With these observations, I entirely concur in what your Lordship has said, and in the result of the judgment, viz., that this case ought to be remitted to the Quarter Sessions in order that they may proceed in the exercise of their jurisdiction to hear the evidence of new upon which the judgment complained of proceeded.

THIS interlocutor was pronounced :—"Remit to the Quarter Sessions to recall the interlocutor complained of, and to hear and determine the appeal according to the statute: Find the respondent liable in expenses," &c.

GILLESPIE & PATERSON, W.S.—PARTY.—Agents.

No. 5.

Dec. 11, 1874.
Rae v. Linton.

JOHN RUTHERFORD RAE, Complainer.—*Macdonald.*
THOMAS LINTON, Respondent.—*M'Laren.*

Suspension—Competency—Edinburgh Provisional Order Act, 1867, *sec.* 187.—*Held* that notwithstanding the terms of sec. 187 of the Edinburgh Provisional Order Act, 1867, a suspension of a conviction in the Burgh Police Court, on the ground of the irrelevancy of the libel, was competent even after the lapse of fourteen days from its date.

Libel—Relevancy.—In support of a charge of falsehood, fraud, and wilful imposition, the libel set forth that the accused had wickedly and feloniously, and falsely and fraudulently, caused a cheque drawn by him upon the branch of the Bank of Scotland at Annan to be presented and cashed at the head office of the bank in Edinburgh, he well knowing that he had no money in the bank at Annan. *Held* that the libel was not relevant, in respect that the facts averred did not necessarily infer the crime charged.

HIGH COURT. Lord Justice-Clerk. Lord Neaves. Lord Young. Justiciary Clerk.

THE complainer, John Rutherford Rae, a law clerk, Annan, was tried in the Edinburgh Burgh Police Court on 14th August 1874 before Bailie Muirhead, at the instance of Thomas Linton, superintendent of police and burgh procurator-fiscal, on an indictment setting forth "that John Rutherford Rae, at present in custody, has been guilty of the crime of falsehood, fraud, and wilful imposition, actor, or art and part, in so far as upon the twenty-third day of July eighteen hundred and seventy-four years, or about that time, in the Bank of Scotland, situated in Bank Street, in or near Edinburgh, the said accused did wickedly and feloniously, falsely and fraudulently, cause to be presented for payment to Robert Thomas Scott, a teller in said Bank of Scotland, a cheque or order for money, conceived in the following or similar terms :—'No. —— Annan, 23d July 1874. To the agents of the Bank of Scotland, Annan. Pay to or bearer the sum of ten pounds stg.' (Signed) 'J. RUTHERFORD RAE'—he well knowing that he then had no money in said Bank of Scotland, Annan; and having in this manner imposed upon

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and deceived the said Robert Thomas Scott, he did then and there cause to be delivered to the said accused the sum of nine pounds nineteen shillings and sixpence sterling, being the amount of said cheque or order, less sixpence for commission, the property, or in the lawful possession of the directors of the Bank of Scotland aforesaid, which the said accused did carry away and appropriate to his own uses and purposes, by all which he did wilfully impose upon and defraud the said Robert Thomas Scott, and did obtain the property above mentioned fraudulently, and on false pretences; the said property not exceeding in value ten pounds sterling. It is therefore craved," &c. The complainer was convicted, and sentenced to twenty days' imprisonment.

It was admitted that the complainer had an account with the Bank of Scotland at their Annan branch, although at the date libelled in the indictment there were no funds at his credit with the bank there.

On 8th December following he presented to the High Court of Justiciary a suspension of the above conviction.

He pleaded;—(2) The complainer not having been charged with or convicted of any crime known to the law of Scotland, the said conviction should be set aside.

It was objected for the respondent;—(1) The High Court of Justiciary had no jurisdiction to entertain the suspension. The proceedings of the Edinburgh Burgh Police Court were conducted under the Edinburgh Provisional Order Act, 1867. Review was regulated by section 187 of that Act,* and was limited to certain special grounds, amongst which the present did not fall,—and to fourteen days from the date of conviction. (2) Even if review on a question of relevancy were competent, as the conviction took place on 14th August, and the suspension was not brought till 8th December, it was excluded by the statutory limitation of time.

Replied for the complainer;—(1) The suspension was competent. The Provisional Order Act set forth certain things which should be competent grounds of review. But the present suspension was founded on a ground which the High Court of Justiciary was always prepared to sustain, apart from all statutory regulation or limitation of review. The respondent was outwith the statute altogether, and could claim no benefit from its provisions. The magistrate had entertained an irrelevant complaint, and had therefore exceeded his statutory jurisdiction, and accordingly his sentence could receive no protection from the statute. (2) The libel was not relevant. The act complained of was one perfectly consistent with innocence. It was sought by the use of the words "wickedly and feloniously, falsely and fraudulently," to convert that into a crime which, in itself, was an innocent act. The mere heaping up of epithets was not sufficient. Where the act libelled was not inconsistent in itself with

* The Edinburgh Provisional Order Act, 1867, sec. 187, enacts:—"No order, judgment, record of conviction, or other proceeding whatsoever, concerning any prosecution instituted before the Judge of Police shall be quashed or vacated for any misnomer or informality; and all judgments and sentences pronounced by the Judge of Police shall be final and conclusive, and not subject to suspension, or advocation, or appeal, or any other form of review, or stay of execution, unless on the grounds of corruption, malice, or oppression on the part of such Judge, or of such deviations in point of form from the statutory enactments as the Court of review shall think took place wilfully, or of incompetency, including defect of jurisdiction; and such suspension, or advocation, or appeal, or review, or stay of execution, must be presented to the High Court of Justiciary within fourteen days after the date of the sentence complained of."

innocence, it was necessary to specify wherein it assumed its criminal character. No. 5.

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LORD NEAVES.—I cannot but think that this indictment in point of laxity goes beyond the limits that can be allowed even in a Burgh Police Court. I do not say that there are not cases where the use of such words as "falsely and fraudulently" is sufficient without any specific statement that the thing done amounted to a criminal act, by reason of the state of matters existing when it was done. Some acts are in themselves inconsistent with innocence, and where that is the case there is no necessity for farther explanation in the libel of the way in which they assume their criminal character.

Now, in the present case the complainer is charged with having drawn a cheque upon his account with a bank in Annan, and with having caused it to be presented to a bank in Edinburgh, and it is sought to be inferred that he was thereby guilty of a crime because he had then no money at his credit with the bank at Annan. That is not a fair libel. You must specify in what respect the act of drawing and presenting the cheque was fraudulent. There is nothing stated in the libel which is not consistent with perfect innocence on the part of the complainer of all fraudulent design. The having money at his credit with a bank is not the only ground on which a man may draw a cheque. He may be directly authorised by the bank to draw on credit, either by reason of having granted a cash credit bond or by reason merely of his undoubted solvency, or being obliged to overdraw his account in a temporary emergency he may be as morally certain that the bank will honour his draft as he would be if he knew that he had money at his credit, or he may even be in ignorance that he is overdrawing his account at all. Yet in this indictment there is nothing but the use of the words "falsely and fraudulently" to convert that into a criminal act which is perfectly consistent with innocence. Suppose that it is proved that he drew and presented the cheque when there was nothing at his credit with the bank at Annan: is that a crime? If so, I am afraid many very respectable persons are in danger daily of having a criminal charge laid against them. The simple use of the words "falsely and fraudulently" are not enough to convert this innocent act into a crime. Some additional statement is necessary, to the effect that he had neither money nor credit, nor any right to believe that his cheque would be honoured, or that he knew that it would not be honoured.

On the question of the competency of the present suspension, which perhaps I should have disposed of first, I shall only say that the objection to the conviction does not fall under any category mentioned in the 187th section of the Edinburgh Provisional Order Act. The objection is to the relevancy. It was endeavoured to include irrelevancy under incompetency. But relevancy is not competency. A panel pleads to relevancy quite apart from competency. This complaint does not therefore fall under the clause of the statute introducing a limitation of review. It is brought before us in the exercise of our jurisdiction, which requires us amongst other things to see that nothing is made a crime in a Police Court which is not a crime in itself. The clause of limitation does not apply, and there is no such great delay otherwise as to entitle us to refuse to entertain the suspension.

LORD YOUNG concurred.

LORD JUSTICE-CLERK.—I have only a remark on one point to add. It has

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been decided in several cases that where an act set forth in a criminal libel is not of itself criminal, but innocent or indifferent, the libel will not be rendered relevant merely by the addition of epithets or adjectives, but that the prosecutor must set out in his libel the specific facts which give the act a criminal character.

THIS interlocutor was pronounced:—"In respect the libel contains no relevant charge of falsehood, fraud, and wilful imposition, pass the bill, suspend the conviction and sentence complained of *simpliciter:* Find the suspender entitled to expenses," &c.

W. S. STEUART, S.S.C.—RICHARDSON & JOHNSTON, W.S.—Agents.

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Mar. 12, 1875.
Paterson v. Rose.

JAMES PATERSON, Complainer.—*Brand.*
ARCHIBALD YOUNG ROSE, Respondent.—*Sol.-Gen. Watson—R. V. Campbell.*

Suspension—Jurisdiction—Police Magistrate—Competency—Statutes 1 *and* 2 *Geo. IV., c. lx., and* 12 *and* 13 *Vict. c. lxxxix.* (*Airdrie Police Acts,* 1821 *and* 1849).—The Airdrie Police Act, 1821, declared certain acts to be offences, and provided that the provost and magistrates, or a certain number of them, which was specified in reference to each particular offence, should be the tribunal for trying such offences. An amending Act, passed in 1849, created a new magistracy, and conferred upon them the jurisdiction in offences under the original Act. The interpretation clause bore that "the word 'magistrate' or 'magistrates' shall include the provost and bailies, or any one or more of them."

Held that one magistrate sitting under the amending Act could exercise the jurisdiction conferred upon the magistrates or any two of them in relation to an offence under the original Act.

HIGH COURT.
Lord Justice-Clerk.
Lord Neaves.
Lord Young.
Justiciary Clerk.

THE complainer, James Paterson, surgeon in Airdrie, was, on 5th February 1875, convicted before Graham Stevenson, one of the magistrates of the burgh of Airdrie, on a complaint under the Summary Procedure Act, 1864, at the instance of the respondent, Archibald Young Rose, burgh procurator-fiscal, of having contravened the 22d section of the Act 1 and 2 Geo. IV. c. lx. (the Airdrie Police Act, 1821),* and was sentenced to pay a fine of five shillings, or, in default thereof, to suffer imprisonment for five days.

The Act 1 and 2 Geo. IV. c. lx., created certain police offences, and provided that the provost and magistrates, or a certain number of them, which was specified in reference to each particular offence, should be the tribunal for trying such offences.

The complainer, on 24th February 1875, presented this suspension of the conviction, on the ground, *inter alia,* that Mr Graham, the magistrate who tried the case, had sat alone, whereas the 22d section of the Act constituted the "provost and magistrates, or any two of them," the proper Court for trying offences under its provisions; that the conviction was therefore pronounced by a Court having no jurisdiction; and that the whole proceedings were accordingly null and void, and ought to be quashed.

* The Act 1 and 2 Geo. IV. c. lx., section 22, provides for the cleaning of private closes, back-courts, &c., by the proprietors, and enacts,—"And in case such closes, lanes, and thoroughfares, and back-courts shall not be so swept and cleaned, such proprietors shall severally forfeit and pay such sum not exceeding 5s. stirling as the said provost and magistrates, or any two of them, shall award, for each offence, to be levied and applied in manner hereinafter directed."

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The respondent stated the preliminary objection that the trial of all police offences, though they might be created under the 1 and 2 Act Geo. IV. c. lx., was now provided for under the amending Act 12 and 13 Vict. c. lxxxix.; that that Act, section 49, required suspensions to be presented "within fourteen days after the date of the sentence complained of;" that the conviction in the present case was dated 5th February, while the suspension was not presented till 24th February 1875; and that, therefore, the suspension was incompetent.*

Argued for the complainer;—The question was, whether the offence was properly tried before one magistrate.[1] The complaint proceeded entirely on the Act 1 and 2 Geo. IV. c. lx., and made no reference to the amending Act 12 and 13 Vict. c. lxxxix. The sections of the Act of Geo. IV. creating statutory offences all created a special statutory tribunal for the trial of each of them. The Act 12 and 13 Vict. repealed none of these sections of the previous Act, but left them standing as the foundation of the statutory offences which they created, and of the tribunals which were to try them. It could not be contended that the interpretation clause of the Act 12 and 13 Vict. was meant by a few chance words to sweep away all the distinctions so anxiously introduced between the tribunals for the trial of different offences under the Act 1 and 2 Geo. IV. This conviction, therefore, was not pronounced by a competent Court; and if there was no Court exercising competent jurisdiction under the statutes the case was outwith the statutes altogether, and the respondent could take no benefit from any limitation of review.

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* The Act 12 and 13 Vict. c. lxxxix. (the Airdrie Police and Municipal Act, 1849), enacted section 1, ... "That from and after the passing of this Act the said recited Act of the 1 and 2 Geo. IV. cap. lx., shall be, and the same is hereby repealed, ... so far as the same may deviate from or be inconsistent with the provisions of this Act."

Section 2.—"Provided . . . . . that in so far as not repealed by this Act . . . . . the powers and provisions of the said Act 1 and 2 Geo. IV. c. lx. shall continue to subsist and extend over the limits of the burgh of Airdrie, ... and it shall be competent to bring complaint, and sue for and recover fines and penalties, and punish misdemeanours which may be incurred under the said Act of the 1 and 2 Geo. IV. c. lx., in terms of the powers and provisions contained in this Act."

Section 8.—"And be it enacted that the magistrates shall have and possess police jurisdiction in and over the whole limits of the burgh of Airdrie, as fixed by this Act, with power to take cognisance of all crimes, offences, misdemeanours, and breaches of the police provisions contained in the before recited Act of the 1 and 2 Geo. IV. c. lx., or herein contained," &c.

Section 49.—"And be it enacted that no order, judgment, record of conviction, or other proceeding whatsoever concerning any prosecution instituted in the said Police Court by virtue of this Act shall be quashed or vacated for any misnomer or informality; and all judgments or sentences pronounced by the Judge shall be final and conclusive, and not subject to suspension or advocation or appeal, or any other form of review or stay of execution, unless on the ground of corruption, malice, or oppression on the part of the Judge, or of such deviations in point of form from the statutory enactments as the Court of review shall think took place wilfully, or of incompetency, including defect of jurisdiction of the Judge; and which suspension, or advocation, or appeal, or review, or stay of execution, must be presented to the High Court of Justiciary within fourteen days after the date of the sentence complained of."

Section 105 (interpretation clause).— . . . . . "The word 'magistrate' or 'magistrates' shall include the provost and bailies, or any one or more of them."

[1] Maitland v. Douglas, Dec. 13, 1861, 24 D. 193, 34 Scot. Jur. 77.

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Argued for the respondent;—Though the offence of which the complainer had been convicted was created under the statute of Geo. IV., upon which the complaint properly founded, the tribunal which tried it was no longer the one fixed by that Act. The amending Act of Victoria, section 8, transferred to the magistrates appointed under it jurisdiction to take cognisance of all offences created by the former Act; and farther, by section 105, provided that any one magistrate might exercise the powers of the whole. The offence created by 1 and 2 Geo. IV. c. lx., section 22, was therefore competently tried under 12 and 13 Vict. c. lxxxix. by one magistrate. But even if that was not the case, review was excluded. The ground of review fell clearly within the expression "incompetency, including defect of jurisdiction," contained in 12 and 13 Vict. c. lxxxix., section 49. If that expression did not include a case like the present, it was impossible to give a meaning to the words.

LORD NEAVES.—It is true the terms of the amending Act of 12 and 13 Victoria are not very precise, but I cannot doubt that in police cases jurisdiction is to be regulated by the latest Act, and that a single magistrate is competent to try such questions. I think it would be an unreasonable construction of the statutes to hold otherwise,—to hold that, because the original statute created the offence, therefore the original tribunal was always to continue to be the tribunal to try it. The amending statute practically extended the jurisdiction of the magistrates, or any one of them, over all the offences created by the original statute.

LORD YOUNG concurred.

LORD JUSTICE-CLERK.—I concur. But I am not prepared to sustain the objection to the competency of the suspension. If I could hold that two Judges were necessary while only one tried the case, I should be of opinion that the conviction was not under but beyond the statute, and in such circumstances nothing can limit our jurisdiction to interfere and give redress.

But I am quite satisfied that the suspension fails on the merits. No part of the judicial establishment provided by the first Act was imported into the second. A new judiciary was established by the Amending Act, and this new Court simply received power to try offences created by the original Act. That power has been competently exercised in the present case, and therefore there is no ground for suspension.

THE COURT accordingly refused the suspension.

W. B. GLEN, S.S.C.—R. A. VEITCH, S.S.C.—Agents.

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Mar. 16, 1875.
De Banzie v. Peebles.

JOHN CHADWICK DE BANZIE, Complainer.—*Burnet—R. V. Campbell.*
JOHN KIDD PEEBLES, Respondent.—*Balfour—Brand.*

Suspension—Indictment—Relevancy—Statute 21 *and* 22 *Vict. c.* 90 (*The Medical Act*, 1858), *sec.* 40.—Where a complaint charged the accused with a contravention of the Medical Act, 1858, sec. 40, in so far as he did "wilfully and falsely pretend to be or take or use the name of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon or apothecary, or other name, title, or description, implying that he is registered under said Act, or that he is recognised by law as a physician or surgeon or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary," *held*

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that a conviction proceeding thereon, bearing merely that the accused was convicted "of the offence charged," was invalid, in respect that it did not specify the act by which the statute was held to have been contravened.

A COMPLAINT was presented under the Summary Procedure Act, 1864, by John Kidd Peebles, procurator-fiscal of Court, to the Justices of the Peace for the county of Lanark at Airdrie, setting forth that John Chadwick de Banzie, residing in Airdrie, "has been guilty of an offence within the meaning of the Medical Act, section 40, in so far as on one or other or more of the bye-past days of February 1875 years, the said John Chadwick de Banzie, defender, did, within the burgh of Airdrie, and particularly within Graham Street and Stirling Street in said burgh, wilfully and falsely pretend to be or take or use the name of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon or apothecary, or other name, title, or description implying that he is registered under said Act, or that he is recognised by law as a physician or surgeon or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, in contravention of said section of said Act, whereby the said John Chadwick de Banzie has become liable upon summary conviction for such offence to pay a sum not exceeding £20," &c.

The case was heard at Airdrie on 18th February 1875, and a conviction pronounced in these terms:—"The Justices, in respect of the evidence adduced, convict the said John Chadwick de Banzie of the offence charged, and therefore adjudge him to forfeit and pay the sum of £20 sterling of penalty, and in respect it is inexpedient to issue a warrant of poinding and sale, ordain instant execution by imprisonment, and therefore, and in default of immediate payment of said penalty, adjudge him to be imprisoned in the prison of Airdrie for the period of three calendar months from the date of his imprisonment, unless the said sum shall be sooner paid," &c.

Against this conviction de Banzie, averring himself a natural born citizen of the United States of America, and producing what purported to be a diploma as doctor of medicine of the university of Philadelphia, brought this suspension, on the grounds, *inter alia*, that the 40th section of the Medical Act, under which the complaint was brought, provided a penalty for various distinct offences; that the complaint was insufficient, vague, and alternative in its form, and did not inform the accused of what particular offence he was charged; and that the conviction following thereon did not distinguish what (if any) was the complainer's offence.

There were other grounds of suspension stated on the merits [1] to the effect that, having right to the title of doctor of medicine, the use of that title could not bring the complainer within the scope of the section founded on, and proof of the genuineness of the diploma was asked.[2] The Court, however, intimated that the argument should be confined, in the first place, to the relevancy of the charge and the form of the conviction.

Argued for the complainer;—The offence created by the 40th section of the Medical Act, 1858,* was at least twofold, namely (1) the wilfully

[1] Pedgrift v. Chevallier, May 28, 1860, 29 L. J. Mag. Ca. 225; Ellis v. Kelly, Nov. 14, 1860, 30 L. J. Mag. Ca., 35; Turner v. Reynall, April 28, 1863, 32 L. J. C. P. 164; Haffield v. Mackenzie, April 19, 1860, 10 Irish Com. Law Rep., 289.

[2] Cullen and Flynn v. Linton, Dec. 5, 1862, 1 Macph. 120, 35 Scot. Jur. 66.

* The Medical Act, 21 and 22 Vict. c. 90, sec. 40, enacts,—"Any person who shall wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title, addi-

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and falsely pretending to be a physician, doctor of medicine, &c.; (2) the wilfully and falsely taking or using the name or title of a physician, doctor of medicine, &c., or any name, title, addition, or description implying that the person so taking or using is registered under the Act, or is recognised by law as a physician, surgeon, &c. But besides that two separate and distinct offences were thus enacted, there were several separate and distinct modes specified by which each might be committed. The charge, when disencumbered of the terms borrowed from the statute, simply amounted to this, that the complainer had contravened the 40th section of the Medical Act, 1858, without informing him which of the offences created by that Act he had committed, or which of the methods specified he had employed.

But even if in summary procedure the vagueness and generality of the complaint could be passed over, the conviction at least must bear a definite description of the offence found proved, and could not be sustained in such general terms as simply "of the offence charged," when the complaint contained so many alternative charges.

Argued for the respondent;—The offence created by the 40th section of the Medical Act was in reality one, namely, the pretending to be that which implied that the offender was registered under the Act, or was recognised by law as a medical practitioner, when in truth he was not, although it might be that several modes were enumerated by which the offence so created might be committed. It was not incumbent upon the prosecutor or the Court in a summary case to proceed with that strictness which was required in the High Court of Justiciary, provided the accused was made substantially aware of what he was charged with and convicted of.[1] In the present case he could be in no real doubt.

At advising,—

Lord Neaves.—This case is one of importance considering the interests it involves. Our duty is to see the law enforced, but in a manner consistent with the general principles of justice.

The charge libelled is one which involves serious consequences. But the public interests involved both deserve and require protection. The object of the 40th section of the Medical Act is to prevent what if not restrained would become a grave danger to the community, namely, the obtrusion into practice of unqualified persons representing themselves to the ignorant and simple as qualified medical practitioners, and this from a sordid desire for gain. It would be a great evil for the community that persons should be let loose upon it without proper medical qualifications, who yet assumed and pretended such in order to impose upon the medical needs or hypochondriacal fancies of mankind. It is that danger which the Legislature seeks to obviate.

But just in proportion as we see the necessity and value of these enactments must we be careful that justice is done and the due order of procedure followed.

In the present case, after bestowing on it every care and attention, I have come to be of opinion that the conviction cannot stand. The charge is vague and general, but still it is in the terms of the statute, and I am not prepared to say

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tion, or description implying that he is registered under this Act, or that he is recognised by law as a physician or surgeon or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding £20."

[1] Neilson v. Stirling, Oct. 31, 1870, 1 Coup. 476, 43 Scot. Jur. 130; Scott v. Morrison, April 9, 1872, 2 Coup. 218, 44 Scot. Jur. 377.

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whether the multiplicity of descriptions used are proper alternatives or not. But I consider that without bringing this vague and general charge to a specific head in the conviction the sentence cannot stand.

The Justices may have been right both in their appreciation of the facts and their view of the law. I do not say that a man though he possess a foreign medical degree, who holds himself out as having a degree conferred in this country, and practises on that footing, may not be reached under this statute. But that offence is certainly not clearly charged in this complaint or found proven in this conviction.

There is, however, another form of offence intended to be covered by the statute, namely, the pretending to be a registered practitioner without having the requisite qualification. Whenever it appears that that offence is clearly charged and found proven the conviction will be good.

But these two offences are so different that it is necessary they should be kept separate and distinct, if not in the complaint at any rate in the conviction, so that the accused may know what has been found against him. That is the point on which I think this case has failed. I do not wish it to be supposed that I think the evidence led did not clearly connect the accused with one or other of the offences charged, or that the Justices took an erroneous view of the law. On these points I reffain from indicating an opinion, and have at best but imperfect grounds for forming one. It is sufficient for the case that the conviction does not make known to the accused specifically the offence of which he has been convicted.

LORD YOUNG.—I think the general rule as to summary convictions is, that the fact which forms the ground of conviction shall be so stated as to enable the Court to see that it warrants the conviction, and that the convicting Justices have not mistaken the law. This may be done by reference to the complaint or charge, when that is so framed as to avoid all uncertainty regarding the fact; but either by such reference or by statement in the conviction itself the fact must distinctly appear.

In prosecutions for statutory penalties the common, certainly a common, case is that the statute in describing the offence makes use of general terms which embrace a variety of circumstances, and in that case it is clearly not enough to follow the words of the statute, for that would leave it quite uncertain of what particular fact in contravention of the Act the party was convicted. When the offence may be committed and the penalty incurred by any of a great variety of facts, it is not sufficient to support a conviction that it shall appear that the Justices thought it had been committed somehow in one or more of the several ways in which it might possibly be committed. The very fact which they held to be proved, and to import the offence for which they imposed a penalty, must, in my opinion, distinctly appear. Of the sufficiency of the evidence the Justices are generally the exclusive judges, but the legal sufficiency of the fact, assuming it proved, to warrant the conviction is a question of law of which they are not the exclusive judges, and hence the necessity of setting it forth so as to enable a Court of review to judge of it, and to correct an error of law should such have been committed.

Now, considering the present case with reference to these views it appears that the conviction proceeds on section 40 of the Act 21 and 22 Vict. c. 90, which imposes a penalty for falsely pretending to be a registered medical practi-

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tioner. The words of the clause comprehend a great variety of circumstances and facts by any of which the penalty may be incurred, and the complaint follows these words (although not quite exactly), without specifying the particular or individual fact by reason of committing which the party accused is charged with a contravention. It may be (in this I give no opinion) that the generality of the complaint might have been cured by the particularity of the conviction. But the conviction is necessarily as general as the complaint, being by simple reference to it. Whether the appellant incurred the penalty, according to the opinion of the Justices on the evidence, by taking the name of a "physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon or apothecary," or other and what other name, title, or description, does not appear. This generality of language may be allowable in a statute which is designed to include a great variety of individual cases, but in a conviction cannot be allowed. The Justices may not have mistaken the law, and probably did not, but there is nothing on the face of the conviction to give us reasonable assurance that they did not, and on the contrary the terms of it are such as may cover and conceal a very grave and serious error. It is quite possible, I do not say likely, that the Justices proceeded on the notion that the appellant by taking or using the name or title of doctor of medicine, he not having a British degree, and not being registered, implied that he was a registered practitioner, and an intention to represent that he was, and subjected him to the penalty. This, I need hardly say, would be a great error, and the terms of the conviction are, without any straining or any fanciful supposition, consistent with the suggestion that the Justices may have proceeded upon it. I am therefore of opinion that the conviction is bad, and ought to be set aside.

LORD JUSTICE-CLERK.—I am not disposed to treat lightly the objection taken to the alternative nature of the charge in the complaint. It is, indeed, quite true that, in a summary complaint, we do not look for such precision as in an indictment before the Court of Justiciary. If the party accused receives reasonable notice of the nature of the offence charged against him then any technical inaccuracy may be disregarded.

But to sustain this complaint would give too wide a latitude. The statute very properly enumerates the different titles, the assumption of which, implying registration, constitutes an offence under the statute. But the mere repetition of this statutory enumeration in the complaint is not the way to libel an offence under it. On the contrary, this way of libelling carefully withholds from the accused that notice of the specific offence with which he is charged which he is entitled to receive.

The offence under the statute is twofold. First, the assuming wilfully and falsely any of the titles enumerated; and, second, the assumption of them in such a manner as to lead the public to the inference that the person so designed is registered under the Act. It does not follow that the title itself must be fictitious in order to the commission of the statutory offence. If it is so assumed as to imply that the user is registered under the Act when he is not then the offence is committed. That being the case, it is evidently essential that the specific title assumed should be set forth in the complaint, and the mode specified in which the offence has been committed.

But I do not need to rest my judgment upon that. The conviction is equally faulty, for it leaves the accused in as much doubt what specific offence has been

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found proven against him as he was before of what specific offence was charged. A case[1] was indeed quoted under the Public-House Acts, in which I held a conviction good, although general in its terms, while the charge was alternative. But, on looking into the case, it clearly appears that the same species of facts might have established any one of the alternative offences charged, or all of them. But this case is quite different. Here we have a conviction so general that it is impossible to say what specific offence has been brought home to the accused; and, therefore, I am of opinion with your Lordships that it is not a conviction which we can sustain.

THIS interlocutor was pronounced:—"In respect the conviction sought to be suspended does not sufficiently specify the offence by which the Act is held to have been contravened, pass the bill, suspend the conviction and sentence complained of *simpliciter*: Ordain the sum of £20, being the penalty awarded against the complainer, to be repaid to him, and decern: Find the complainer entitled to expenses," &c.

ROBERT A. VEITCH, S.S.C.—W. B. GLEN, S.S.C.—Agents.

No. 8.

June 4, 1875.
Keith v. Lord Advocate.

WILLIAM TAYLOR KEITH, Petitioner.—*D.-F. Clark—D. Crichton.*
THE LORD ADVOCATE, Respondent.—*Sol.-Gen. Watson—Muirhead, A.-D.*

Liberation—Undue Detention on Warrant of Commitment—Statute 1701, *c.* 6.—A prisoner apprehended on 18th and committed to prison on 24th September 1874 on a charge of falsehood, fraud, and wilful imposition, was indicted for the Glasgow winter circuit and again for the Glasgow spring circuit ensuing, but on the one occasion the counsel for the Crown deserted the diet, and on the other did not call the case, the Court refusing a motion by the pursuer's counsel to direct the diet to be called. On 29th January 1875 he obtained a warrant for letters of intimation with a view of running letters, but failing to pay the fees the letters were not issued. On 13th May, having been continuously in prison since his first apprehension, he presented a petition for liberation to the High Court of Justiciary. The Court, on 4th June, refused the petition, in respect that a fresh indictment had been served on the prisoner for trial before the High Court on the 14th of that month, and that the public prosecutor had intimated that he was prepared to proceed to trial on that day.

Opinion (*per* Lord Justice-Clerk) that it was competent for the Court to entertain a petition for liberation at common law, notwithstanding the terms of the Act 1701, c. 6.

Trial—Indictment—Declaration.—Question, whether it is competent to proceed to trial against a prisoner on an indictment containing charges on which a declaration has not been taken from him.

HIGH COURT. Lord Justice-General. Lord Justice-Clerk. Lord Deas. Lord Ardmillan. Lord Neaves. Lord Young. Lord Mure. Justiciary Clerk.

A PETITION for liberation was presented to the High Court of Justiciary on 13th May 1875 by William Taylor Keith, a prisoner in the prison of Glasgow, under the following circumstances:—

The prisoner was apprehended on 18th September 1874 on a charge of falsehood, fraud, and wilful imposition. His declaration was taken on 21st and he was committed for trial on 24th September. On 5th December an indictment was served on him for trial at the ensuing winter circuit at Glasgow.

On 23d December the diet was called against the prisoner at Glasgow. The prisoner's counsel moved the Court to delay the trial, in respect of the absence of a material witness for the defence. The motion was refused,

[1] Scott v. Morrison, *supra*, p. 24, note 1.

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but an objection being then taken to the relevancy of one of the counts in the indictment the objection was sustained, and the diet was thereupon deserted by the public prosecutor *pro loco et tempore*. A new warrant of commitment was at once granted by the Judge on circuit, and the prisoner was recommitted to prison.

In order that he might run his letters under the Act 1701, c. 6, he, on 29th January 1875, obtained a warrant for letters of intimation. The letters were expede and signeted on 30th January, but being unable, as he alleged, from poverty, to pay the fee of 17s. 6d. at the Justiciary office, the letters were not issued. On the same day the Clerk of Justiciary wrote to the Crown agent requesting to know whether the Crown would advance the fees, and also applied to the Exchequer to know whether the fees would be remitted. Both applications were refused. Accordingly, the letters of intimation were never issued.

On 6th April 1875 a second indictment was served on the prisoner for the spring circuit at Glasgow. This indictment contained five charges, of which four were the same as those contained in the former indictment served. The case was not called at the instance of the Crown at the Glasgow spring circuit, the counsel for the Crown having discovered that no declaration had been taken from the prisoner, and no warrant of commitment granted on certain of the charges contained in the libel.

During the sitting of the Circuit Court the prisoner's counsel, on 23d April, moved the Court to order the diet to be called against the prisoner that the case might be disposed of, but the Court refused, and the prisoner remained in prison.

No farther steps were taken against the prisoner prior to the presenting of this petition for liberation. Intimation of the petition to the Lord Advocate was ordered, and a hearing was fixed for 21st May.

It was then argued for the prisoner in support of the petition;—There could be no doubt that this was a case of very grave oppression. Though the delay from the Christmas to the spring circuit might be excusable, further delay was an abuse of the forms of justice. The prisoner was entitled to insist upon the diet being called, and if the Crown did not appear to prosecute he was then entitled to be liberated. In refusing the prisoner's motion to this effect the Judge on circuit had denied him justice. The question was, what was now the remedy? The statute of 1701 had introduced the remedy of running letters, and the prisoner had endeavoured to take advantage of it, but had been prevented by poverty from serving the letters of intimation. Though the letters had not been formally served, the Crown office had been made fully aware of the state of matters, and the sixty days required by the statute had elapsed since they were certiorated of these facts. The statutory remedy introduced by the Act of 1701 did not limit the power of the Court, which existed prior to its passing, to prevent oppressive interference with the liberty of the subject,[1] and this was unmistakeably a case in which that power should be exercised.

Argued for the Crown;—There were sufficient reasons why the panel had not been tried at the winter and spring circuits. He would have been tried since in the High Court had he not intimated this petition for liberation. Having done so, it was not thought right to anticipate the action of the High Court. But the petition itself was incompetent. The Act 1701, c. 6, regulated the manner of a prisoner committed for trial obtaining his liberation, if his trial was unduly postponed, and no other course was competent. No example could be adduced of the Court entertaining such an application subsequent to the passing of the Act of 1701.

[1] Hume, 2, 98, *et seq.*

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The Court took the case *ad avizandum.*

On 4th June, when the case was put out for advising, the Court were informed that a fresh indictment had been served on the prisoner on 29th May for trial before the High Court on 14th June.

LORD JUSTICE-CLERK.—The petition which is now to be disposed of raises some considerations very important for the administration of the criminal law. It is presented by a prisoner in the jail of Glasgow, and the substance of the complaint which it contains is, that he was apprehended on the 18th and committed for trial on a warrant of the Sheriff of Lanarkshire on the 24th of September 1874, on a charge of falsehood, fraud, and wilful imposition, and also breach of trust and embezzlement, and that he has been detained in prison ever since without trial, and he now prays for liberation. This petition, which has evidently been prepared by the prisoner himself, is expressed in incoherent and indeed unseemly language, and contains imputations on various persons, including public officials, which could not, in the mode in which they are made, be with propriety the subject of investigation. I am not, however, disposed to attach any importance to the language in which these petitions are framed. The substance of the complaint has been thought, and rightly thought, to deserve a fair hearing from the bar, in which the complainer has had the assistance, according to honourable usage, of the Dean of Faculty, and I address myself entirely to the grounds which were then urged to us, and on which this application for liberation was supported, which did not embrace any of these vague and irrelevant charges.

The facts, so far as they are material, are few and simple. The prisoner was committed for trial, as I have said, on the 24th of September 1874. He was enlisted for the Glasgow winter circuit, to be held in December following, and it appears from the record that when the case came on his counsel moved for a postponement of the trial. This was not granted, but an objection was taken to the relevancy of one of the charges in the indictment, which objection was sustained. The diet was thereupon deserted *pro loco et tempore* by the public prosecutor, and the prisoner was apprehended on a fresh warrant and recommitted to prison. He was again indicted for the spring circuit at Glasgow, but the prosecutor did not apply to have the diet called, and an application by the prisoner to that effect was unsuccessful, and he now remains untried in the prison of Glasgow nearly nine months after the first warrant of commitment was issued. I think these facts afford, *prima facie,* strong ground for the complaint contained in this petition. That two Circuit Courts should have passed since the apprehension and commitment of the prisoner without his case having been tried is of itself an unusual and a serious matter. There are, no doubt, circumstances in which such a contingency may be unavoidable. A witness may be ill, or may have absconded, or new evidence may have been discovered, or the health of the prisoner may have given way. Events like these, over which the prosecutor has no control, may unavoidably or even justifiably protract the incarceration of the untried prisoner for such a period; nor do I say that the mere lapse of time is of itself necessarily a ground for our interference. But if there be no sufficient cause for delay, and especially if the cause be one within the power and control of the prosecutor, I do not doubt that we have the power, nor that, in the absence of sufficient explanation from the prosecutor, it would be our duty to give the complainer the remedy which he asks. We have, however, had a very candid

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and clear explanation from the Solicitor-General of the ground on which this prosecution has not proceeded. He informs us that having ascertained that in regard to four out of the five charges contained in the indictment no declaration had been taken from the prisoner, and that no warrant of commitment had been granted, the advocate-depute declined to proceed with the trial. This was the only ground stated to us to account for the delay.

I express no opinion whether the view on which the public prosecutor thus acted was well founded or not, because he acted on his own responsibility, and we cannot sit in judgment on the exercise of his discretion. But I am very clearly of opinion that the question whether he was right or wrong in the course which he took and in the effect which he attributed to the supposed omission in the procedure, however solved, cannot affect the decision to be pronounced on the prayer of this petition. It is enough that these were matters within the power and control of the public prosecutor, and if he elected not to proceed with the trial for which the complainer had been cited, these reasons can afford no justification for the further detention of the prisoner, if otherwise his incarceration has been protracted over an unreasonable and oppressive length.

Neither do I think it necessary to consider whether the application which was made to the Court on the part of the prisoner to have the diet called was one which ought to have been granted. The motion was disposed of by the presiding Judge, and we have no power to review his decision, but I do not think the prayer of the petition is in any degree strengthened by the fact of this motion having been made, nor would it have been weakened had no such proceeding taken place.

On these facts I should certainly have been inclined to the opinion,—though I admit the remedy is unusual,—that the prisoner should be liberated, not, indeed, to the effect of freeing him from prosecution, but to that of terminating his imprisonment. But we are now informed by the prosecutor that the prisoner has been served with a new libel, to be tried on the 14th of this month. It has also been represented that even if the complainer had served his letters of intimation on the Lord Advocate on 29th January he could not, under the Act of 1701, have thereby compelled his trial or liberation within the time which has since elapsed.

In these circumstances, and as the inclination of the majority of your Lordships appears to be in favour of this course, I am prepared, although with reluctance, to acquiesce in the refusal of the petition, but solely on the ground that the public prosecutor has intimated that he is prepared to proceed with the trial on the 14th June.

THE COURT concurred in the result of the Lord Justice-Clerk's opinion, and, "in respect that the public prosecutor has indicted the petitioner for trial on the 14th current," refused the prayer of the petition.

Æ. MACKENZIE, S.S.C.—CROWN AGENT.—Agents.

No. 9.

June 16, 1875.
Craig v. Peebles.

JAMES CRAIG, Complainer.—*Sol.-Gen. Watson—M'Kechnie.*
JOHN KIDD PEEBLES, Respondent.—*Balfour.*

Public-House—Certificate—Rei interitus.—Held that partial destruction of the premises for which a person held an unexpired public-house certificate did

not put an end to the certificate, so as to subject the holder to the penalty imposed on selling without a certificate, in respect that he continued to carry on his business within the partially destroyed building while repairs were being made.

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June 16, 1875.

Craig v. Peebles.

HIGH COURT. Lord Justice-Clerk. Lord Neaves. Lord Young. Justiciary Clerk.

THIS was a suspension of a conviction and sentence pronounced on 27th May 1875 by two of the Justices of the Peace for the county of Lanark at Airdrie, upon a complaint under the Summary Procedure Act, 1864, at the instance of John Kidd Peebles, procurator-fiscal of Court, setting forth "that James Craig, a spirit dealer, residing at West Merryston, in the parish of Old Monkland and county of Lanark, has been guilty of an offence within the meaning of the Public-Houses Acts Amendment (Scotland) Act, 1862, section 17,* in so far as on or about 8th May 1875 the said James Craig, defender, did, within the broken walls of an old public-house which was burnt down, situated in West Merryston, in the parish of Old Monkland and county of Lanark, unlawfully traffic in whisky or other exciseable liquors without having obtained a certificate on that behalf in terms of said Act."

Upon this complaint he was convicted, and sentenced to pay a fine of £7, with £2 of expenses, and failing payment to be imprisoned for six weeks.

Craig had, in April 1874, obtained from the Justices a certificate in ordinary form "to keep a public-house at West Merryston, in the parish of Old Monkland and county of Lanark;" and in April 1875 he obtained a similar certificate, the first certificate being in force for one year from and after 15th May 1874, and the second for one year from and after 15th May 1875. For each year Craig obtained an excise license.

The record of the Justice of Peace Court bore that a duplicate certificate was produced by the accused. There was no record of the parole evidence, but the following facts were not disputed.

Upon 1st May 1875 a fire broke out in the premises for which Craig held a license, and partially gutted the house, but Craig obtained leave from the Excise department to carry on his business within the walls until the premises should be put in a thorough state of repair or his stock in trade sold off.

The police, however, considered the premises dangerous, and as Craig refused to desist from carrying on his business the above mentioned complaint was served upon him.

Argued for the suspender;—The complaint was not relevant. If he had committed any offence it was certainly not selling without a certificate.

Replied;—The certificate entitled Craig to keep a public-*house*. The house had ceased to exist as such. If he wished to sell liquor in the ruins it was necessary for him to apply for and obtain a special permission under the 6th section of the Act of 1862.

LORD JUSTICE-CLERK.—The case is one of some novelty. But I am not prepared to affirm the proposition that, because an accident happens to premises for which a person holds a public-house certificate, which for the time would have rendered the premises unsuitable or undesirable for a certificate, if the person goes on, pending repairs, conducting his business in such premises, he com-

* This section enacts,—"Every person trafficking in any spirits or other exciseable liquors in any place or premises without having obtained a certificate in that behalf, in terms of this Act, shall be guilty of an offence, and on being convicted," &c.

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mits the offence charged. It is easy to figure extreme cases. But it is obvious that there might be such partial destruction of the subjects as would have prevented the Justices granting a certificate in the first instance, but where it would be very hard, not only to prevent a man, who had obtained a certificate for the premises, from carrying on his business there, but to convict him of an offence for so doing. In this case the substance of the complaint was, that the man was carrying on his business within the ruinous walls of his house, the sale complained of having occurred on 8th May, and the fire having occurred on 1st May. I do not think, in the circumstances, that the complaint was relevant. A certificate had been granted for the premises by the Justices, he still held the excise license, the premises were the same, and it is not easy to see how he could be prevented from selling upon that license. I do not say that he would be entitled to go on selling for a whole year without any intention to repair his premises, but considering that the sale complained of took place only a week after the fire occurred the charge and conviction are not well founded.

LORD NEAVES and LORD YOUNG concurred.

THIS interlocutor was pronounced:—"In respect that it is not disputed by the respondent, and appears from the duplicate certificate produced, that the complainer had obtained a certificate for the public-house mentioned in the libel, which was subsisting at the date of the alleged contravention, pass the bill: Suspend the conviction and sentence complained of *simpliciter*: Ordain the sum of £7 of penalty and £2 of expenses awarded against the complainer to be repaid to him, and decern: Find the complainer entitled to expenses," &c.

R. A. VEITCH, S.S.C.—CHARLES S. TAYLOR, S.S.C.—Agents.

No. 10.

June 16, 1875. Bain v. Mackay.

HENRY BAIN, Complainer.—*D.-F. Clark—Guthrie Smith.*
DONALD MACKAY, Respondent.—*Sol.-Gen. Watson—Johnstone.*

Statute—Implied Repeal—23 and 24 Vict. c. 84, and 35 and 36 Vict. c. 74 (Adulteration Acts).—The statute 23 and 24 Vict. c. 84, sec. 1, enacts "that every person who shall sell as *pure and* unadulterated any article of food or drink which is adulterated, *or not pure*, shall for every such offence, on a conviction of the same before . . . . forfeit and pay a penalty not exceeding £5."

The statute 35 and 36 Vict. c. 74, sec. 2, contains an enactment in the same terms, with the omission of the words in italics, and with a maximum penalty of £20. Sec. 4 incorporates both statutes, and sec. 12 provides that "nothing in this Act shall be held to take away any other remedy against any offender under this Act."

Held that the 1st section of the earlier Act was not superseded by the 2d section of the later Act, and that it was still competent to present a complaint under the 1st section of the Act 23 and 24 Vict., c. 84.

Adulteration—Discretion—Oppression.—A person was charged before a burgh police magistrate with selling, as pure and unadulterated, milk which was not so. There being no public analyst in the burgh, some of the milk had been sent by the police officials to an analytical chemist, who reported unfavourably. *Held* that it was within the discretion of the magistrate to refuse a motion for the accused, that a portion of the milk should be handed to another analytical chemist, whose fee the accused was willing to pay, for an independent analysis, and that his judgment on this point was not subject to review.

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HIGH COURT.
Lord Justice-Clerk.
Lord Neaves.
Lord Young.
Justiciary Clerk.

THIS was a suspension of a sentence pronounced by one of the bailies of Dundee upon a complaint at the instance of the respondent, superintendent of police and procurator-fiscal of the burgh of Dundee, setting forth that the complainer, a farmer near Dundee, and one of his servants, had been guilty of a contravention of, or an offence under, the Act 23 and 24 Vict., cap. 84, sec. 1, within the burgh of Dundee, in so far as, on Monday, the 26th day of April 1875, and within the shop in Annfield Road aforesaid, the said accuseds did, both and each, or one or other of them, sell to William Paterson and Henry Martin, sanitary officers in the Dundee police force, as pure and unadulterated, one pint of new or sweet milk or thereby, notwithstanding that the said milk was adulterated and not pure, the same having been mixed with skim milk, water, and other ingredients, whereby the said accuseds were liable, on summary conviction, to a penalty not exceeding £5.

The bill of suspension set forth that, on 26th April 1875, Bain sent his milk as usual into Dundee, that two police officers took a quantity of the milk from his cart, which they placed in bottles and removed to the police office. One of the bottles was sent to a Mr Macdougall (no public analyst for the burgh having been appointed), who analysed the milk, and returned a report, dated 27th April 1875, to the effect that it was "inferior milk, equal to an adulteration to the extent of 24 per cent of skim milk." The complainer was cited to appear before the police magistrate on 6th May 1875, when, at his request, the trial was adjourned till 13th May. His agent moved the Court to allow a portion of the contents of one of the sample bottles to be handed to an analytical chemist, whose fee he was willing to pay, for the purpose of analysis; but the magistrate refused to allow any access to the bottles, and at the trial the suspender had no means of contradicting Mr Macdougall's report. Upon 13th May, after evidence adduced, the magistrate pronounced the following sentence:—"Finds the foregoing complaint proved against the accused Henry Bain, by evidence adduced, and finds said accused guilty accordingly: Therefore fines and amerciates said accused in the sum of £2, 10s. sterling, payable to the clerk of Court: Sentences and adjudges the said accused to be incarcerated in the prison of Dundee, therein to be detained till said fine be paid, but not exceeding ten days from this date, and grants warrant to constables of police to incarcerate the said accused in said prison, therein to be detained accordingly."

The grounds of suspension chiefly insisted on were;—(1) That the statute founded on in the complaint had been repealed by the Act 35 and 36 Vict., c. 74; (2) that the magistrate had acted oppressively in refusing the complainer's motion for an independent analysis; and (3) that the statute did not sanction imprisonment, and the sentence was therefore *ultra vires* of the Magistrate, and illegal.

Argued for the complainer;—The 1st section of the Act 23 and 24 Vict., c. 84, must be held to be repealed and superseded by the 2d section of the Act 35 and 36 Vict., c. 74. It was a settled principle that when a later statute dealing with the same matter varied the procedure, or provided a new punishment, it repealed the former enactment, although it might not do so in express terms.[1] A comparison of the two sections would shew the perfect identity of the offence created by the former Act, and re-enacted by the later Act, with a heavier maximum penalty.*

[1] The King v. Davis, 1783, 1 Leach, Crown Cases, 271; The King v. Cator, 1767, 4 Burr. 2026; Michell v. Brown, Nov. 24, 1858, 28 L. J. Mag. Cases, 53—see Lord Campbell, p. 55; Youll v. Mappin, April 29, 1861, 30 L. J. Mag. Cases—B. Martin, p. 237.

* Stat. 23 and 24 Vict., c. 84, sec. 1.—"Every person who shall sell any

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2d, It would only have been reasonable, considering that there was no public analyst in Dundee, for the magistrate to have granted the complainer's motion for an independent analysis, which he was specially empowered to do under sec. 5 of the Act 23 and 24 Vict. c. 84. Mr Macdougall was merely *quidam ex populo*, and the complainer was virtually condemned on the evidence of one witness.

3d, The Magistrate had no authority to impose a sentence of imprisonment either under the Act of 1860 or that of 1872. Even if the 337th section of the General Police Act, 1850, were held to be applicable,† that section authorised a warrant of imprisonment only as a means of enforcing payment of the fine, and not, as was done here, in substitution of the fine.

Lord Neaves.—As regards the procedure, I cannot find anything oppressive or irregular on the part of the Magistrate.

With regard to the plea that the first Act has been repealed by the second,

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article of food or drink with which, to the knowledge of such person, any ingredient or material injurious to the health of persons eating or drinking such article has been mixed, and every person who shall sell as pure and unadulterated any article of food or drink which is adulterated or not pure, shall, for every such offence, on a conviction of the same before two Justices of the Peace at Petty Sessions in England, and in Scotland before two Justices of the Peace in Justice of the Peace Court, or before the Sheriff-substitute of the county, or before Justices of Petty Sessions, or a divisional Justice in Ireland, forfeit and pay a penalty not exceeding five pounds, together with such costs attending such conviction as to the said Justices shall seem reasonable."

Stat. 35 and 36 Vict., c. 74, sec. 2.—"Every person who shall sell any article of food or drink, with which, to the knowledge of such person, any ingredient or material injurious to the health of persons eating or drinking such article has been mixed, and every person who shall sell, as unadulterated, any article of food or drink or any drug which is adulterated, shall, for every such offence, on a summary conviction of the same, before two Justices of the Peace at Petty Sessions in England, or before two Justices of the Peace in the Justice of the Peace Court, or before the Sheriff-substitute of the county, or before any Magistrate acting under any general or local Police Act in Scotland, or before Justices at Petty Sessions, or a divisional Justice in Ireland, forfeit and pay a penalty not exceeding twenty pounds, together with such cost attending such conviction as to the said Justices, Sheriff-substitute, or divisional Justice shall seem reasonable, and if any person so convicted shall afterwards commit the like offence such Justices, Sheriff-substitute, Magistrate, or divisional Justice shall cause such offender's name, place of abode, and offence to be published at the expense of such offender in such newspaper or in such other manner as to the said Justices shall seem desirable."

† Section 166 of the Dundee Police and Improvement Act, 1871, 33 and 34 Vict. c. cliii., provides that all offences committed within the burgh against the provisions of the Act 23 and 24 Vict., c. 84, "may be tried by the Magistrate as police offences, under complaint by the Procurator-fiscal of the Police-court, and the penalties may be recovered and applied in the same way as penalties for police offences under the first recited Act" (13 and 14 Vict., c. 33).

Section 337 of the General Police Act, 1850 (13 and 14 Vict., c. 33), makes it lawful for the Magistrate "to convict or give judgment against the party complained against, and thereupon to decree, adjudge, and sentence him to pay the damages or penalty which have arisen or been incurred, and the expenses attending the proceedings, and to grant a warrant for imprisoning him until such damages or penalty and expenses shall be paid; provided always that such warrant shall specify the amount of such damages, or penalty and expenses, and shall also specify a period at the expiration of which the party shall be discharged, notwithstanding such damages, or penalty and expenses, shall not have been paid, and which period shall in no case exceed two months."

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the relation of the statutes is certainly not very clear. If the Magistrate had gone against any special enactment contained in the later statute superseding the former, the case would have been different. But the particular species of adulteration libelled is covered by the first statute, and its provisions in regard to that point have not been repealed or modified by the later statute, so as to take the case out of the jurisdiction of the Magistrates.

I am of opinion, therefore, that we must refuse the bill of suspension.

LORD YOUNG.—I am of the same opinion. I know nothing of the complaint in this case except what may be gathered from the bill of suspension, and judging from what is there set forth it seems to have been inaccurate in its terms. It is there said that the adulteration of the milk complained of consisted in its being mixed with skim milk, water, and other ingredients, and it was assumed in the argument submitted to us that the adulteration might have consisted in taking cream off the milk, thereby making it less rich. I would hardly think that that would justify a conviction for adulteration. Assuming, however, that the statement of the complaint is that there was an actual admixture, then the Magistrate in taking the evidence found that the complaint was true, and we must assume that he was right, for there is no power given to this Court to review his judgment on the merits.

It is said that the Magistrate ought to have exercised the discretion conferred on him by section 5 of the statute of 1860, and to have granted the motion that was made by the complainer, that an analyst should be appointed to examine a portion of the milk sold, but neither have we any jurisdiction to review the Magistrate's judgment in the exercise of his discretion. It has been committed to his discretion either to grant or to refuse such a motion, and it may be that he exercised it properly in refusing it. In more serious cases—where, for example, poison has been mixed with food, and given to some person, causing death—in which convictions proceed upon evidence which is satisfactory to juries, the Court may or may not hand over some of the material to the accused in order to be analysed. It is quite common for such a motion to be refused. The ordinary course is for the public prosecutor to prove his case, the evidence being subject to all those observations which the prisoner's counsel never fails to make upon the fact that the prosecutor has been placed in a more advantageous position than the accused with reference to the proof adduced. I cannot hold that this is a motion which, if made, the Magistrate is compelled to grant, where the statute contemplates that it shall be left to his discretion.

The only other question of importance is, whether the statute of 1860 has been repealed. I agree in thinking that the common sense view is that the statute of 1872 does not repeal the former, but simply gives the Magistrate power to inflict a higher punishment if he sees cause. There is nothing in the later statute forbidding a prosecution under the former, but, on the contrary, it is explicitly stated in section 12 of the Act of 1872 that nothing in this Act shall be held to take away any other remedy against any offender under this Act, and besides this general clause the statute also contains an incorporating clause (sec. 4). The remedy by means of a smaller penalty in the previous statute is not taken away by the later, and the prosecutor may, if he sees cause, limit the Magistrate's power as to the penalty to be inflicted by proceeding under the statute of 1860, which makes the maximum penalty to be awarded £5 only.

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The only remaining point is, whether it was within the power of the Magistrate to sentence the party complained against to imprisonment in default of payment of the penalty. The conviction is not in the form prescribed by any of the statutes, but it is substantially authorised by the 166th section of the Dundee Police Act. That section provides that any contravention of the Adulteration of Food Act may be tried by the Magistrates as an ordinary police offence, and the penalties recovered in the same way as penalties for offences under the first recited Act,—that is, under the General Police and Improvement (Scotland) Act, 1850 (13 and 14 Vict. c. 33),—section 337 of which provides that it "shall be lawful to grant a warrant for imprisoning the party complained against until the penalty, &c., shall be paid, provided the warrant shall specify the amount of penalty, and a period at the expiration of which the party shall be discharged, notwithstanding the penalty, &c., shall not have been paid, which period shall not exceed two months." It is hypercritical to say that the imprisonment is here awarded by way of substitution for the fine, or in addition to it. The imprisonment awarded is to continue until such time as the fine shall be paid, not exceeding a specified period, and the warrant is to be viewed as simply the mode of recovering the penalty. On the whole matter, therefore, I am for refusing the bill.

LORD JUSTICE-CLERK.—I concur. In regard to the complaint that there was no opportunity given to the accused to have a separate and independent analysis, in the circumstances the Magistrate probably rightly exercised the discretion committed to him; and at all events, we cannot interfere with that discretion. The article was perishable, and its nature and constituent parts would alter by time.

In regard to the objection founded on the warrant of imprisonment I entirely agree with Lord Young.

The question of the repeal of the Act of 1860 is really the most important. In the first place, the repeal of one statute by another subsequently passed by mere implication is not easily to be presumed; and, secondly, before such repeal can be inferred by implication, repugnancy between the provisions of the two statutes must be proved in whole or in part. This case does not reach that point, for the statute of 1860 is not merely kept alive by the subsequent Act, but referred to as still in observance, and part of its provisions form part of the machinery of the second Act. If a larger fine had been concluded for than is sanctioned by the Act of 1860 a more difficult question would have been raised. But it is not said that the procedure in this case came into collision with the second Act where it differs from the first.

I am therefore of opinion that we must refuse the suspension.

THE bill of suspension was refused.*

DAVID MILNE, S.S.C.—CHARLES HENDERSON, S.S.C.—Agents.

* Since this judgment was pronounced both the statutes 23 and 24 Vict. c. 84, and 35 and 36 Vict. c. 74, have been repealed by "The Sale of Food and Drugs Act, 1875," 38 and 39 Vict. c. 63, sec. 1, except to certain limited effects therein specified.

CASES

DECIDED IN

THE COURT OF SESSION, &c.

1874–75.

WINTER SESSION.

No. 1.

Nov. 2, 1874.

Kirkwood v. M'Callum.

JAMES D. KIRKWOOD, Objector and Appellant.—*J. P. B. Robertson.*
MALCOLM M'CALLUM, Respondent.—*Begg.*

Franchise—Tenant and Occupant—Sub-letting—Demitting Possession.—Where the tenant of a house let it furnished for three months in the year, ceding possession to the sub-tenant, but leaving his servant in the house, whose wages he paid, *held* that he had ceased to retain such occupancy of the house as to entitle him to a vote.

Registration Appeal Court. B.

JAMES D. KIRKWOOD, South Portland Street, Glasgow, a voter on the roll for the county of Bute, objected to Malcolm M'Callum being continued on the roll of voters for the county, as tenant and occupant of a house in Marine Place, Rothesay, in respect that he had let the premises on which he was enrolled for three months during the year preceding the last day of July 1874, and had thus not been occupant for a year as required by law.

The facts as stated in the special case were that Mr M'Callum had let his house as a furnished house for the months of June, July, and August in the years 1873 and 1874, and had ceded possession to the persons to whom it was let, receiving as rent £29 for the three months of each year. Mr M'Callum left his servant in the house, but he resided elsewhere himself during the three months. The servant served the persons who took the house, but Mr M'Callum paid the servant's wages, and he also paid all rates and taxes on the house.

The Sheriff (Fraser) repelled the objection, whereupon Mr Kirkwood appealed. The question of law submitted to the Court was—"Whether M'Callum retained the occupancy of his house in the sense of the statutes, after he had let it as above set forth, his servant still continuing in it, and the whole rates and taxes being paid by him?"

Argued for the appellant;—It had been decided that a tenant of a dwelling-house in a county ceased to be in the "actual personal occupancy" thereof by letting it furnished.[1] A tenant had, it was true, been

[1] Donaldson v. Graham, Dec. 2, 1865, 4 Macph. 129, 38 Scot. Jur. 77.

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Nov. 2, 1874. Kirkwood v. M'Callum.

recently held to retain the occupancy of his house, notwithstanding of his having let rooms therein as furnished lodgings.[1] But in the present case the tenant had ceded possession of the whole of his house, and it was obvious that his servant had been left in the house merely for the accommodation of the sub-tenant.

Argued for the respondent;—The expression "actual personal occupancy" was not defined by the Representation of the People Act of 1868, but the 58th section thereof declared that the Act should be construed as one with the enactments for the time being in force relating to the representation of the people in Scotland. Now, in the 9th section of the Reform Act of 1832 the expressions "personal possession," "actual personal occupancy," and "actual occupation" were all used as synonymous, and by the practice following on that Act personal residence was not required, occupation by servants being considered as sufficient to meet the intentions of the Legislature.[2] In the present case the claimant had left in the house his own servant, whose wages he alone paid, and her occupancy was equivalent to his own. No doubt, she did not personally occupy the whole house, but a tenant who let part of his house as furnished lodgings and did not retain enough to afford a qualification for the franchise had nevertheless been held entitled to vote, and this decision necessarily implied that he was, in the sense of the statute, in the actual personal occupancy of the rooms which he had let.[3] If such partial possession was sufficient in the case of a tenant there was no reason why it should not be sufficient in the case of a tenant's servant.

Lord Ardmillan.—I have no doubt upon this case. If the claimant had continued to reside in the house himself the case might have been different; but here the whole house was let, as a furnished house, to the tenant, and the claimant resided elsewhere. He is not therefore by law entitled to a vote.

Lord Ormidale.—I am of the same opinion. I think it is impossible to read the statement of the Sheriff in regard to the servant without being satisfied that during the period in question she was not the servant of the claimant at all, but entirely and exclusively the servant of the sub-tenant, for although the claimant paid the servant's wages she was entirely at the command of the sub-tenant, and the latter must have paid a larger rent in respect of her services. The claimant might have been temporarily absent without affecting his qualification, but in this case he gave up possession entirely to the sub-tenant, and in respect of this I think that the Sheriff has fallen into error, and that his judgment must be reversed.

Lord Craighill concurred.

The Court reversed the judgment of the Sheriff, and sustained the objection.

J. & F. Anderson, W.S.—Morton, Neilson, & Smart, W.S.—Agents.

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[1] Thomas v. Panton, Oct. 24, 1873, *ante*, vol. i. p. 17; Smith v. Lancaster, Nov. 17, 1869, L. R. 5 C. P. 246.

[2] Cay's Analysis of the Reform Act, p. 365; Swinton's Digest, p. 86; Nicolson, p. 65.

[3] Thomas v. Panton, *supra*, note 1.

GEORGE BLISS M'QUEEN, Claimant and Appellant.—*Darling.*
RALPH DUNN, Objector and Respondent.—*A. J. Young.*

No. 2.

Nov. 2, 1874.

M'Queen v. Dunn.

Franchise—Tenant and Occupant.—Held that a husband's occupation of a house of which his wife was tenant could not give him a qualification as tenant for the franchise.

Registration Appeal Court. B.

RALPH DUNN, writer in Melrose, objected to a claim for Captain George Bliss M'Queen to have his name entered in the register of voters for the county of Roxburgh as "tenant and occupant of Old Melrose mansion-house, offices, and policy, Old Melrose, in the parish of Melrose," on the ground that Captain M'Queen had not occupied the premises claimed on as tenant for twelve months immediately preceding the 31st July 1874.

The facts as stated in the special case were that the subjects in question had been taken on a verbal lease for the year from Whitsunday 1873 to Whitsunday 1874 by Mrs Eliza Russell, widow of the late Mr Russell; that she had occupied the subjects in the same way as yearly tenant for some years previously; that Captain M'Queen was married to Mrs Russell in the month of July 1873, and had since occupied the house along with her; that he took the subjects in question as tenant in his own name on a verbal lease from Whitsunday 1874, and that he and Mrs Russell, now M'Queen, had occupied the premises since under that lease.

The Sheriff (Pattison) rejected the claim, holding that right to the lease entered into by Mrs Russell did not pass to Captain M'Queen by his marriage to that lady, and that his occupancy prior to Whitsunday 1874 was not such as to give him the statutory qualification.

Captain M'Queen appealed, and the question submitted to the Court was—"Whether, by virtue of his marriage with Mrs Russell, the claimant acquired right to her then current lease of the subjects so as to entitle him to found upon his occupation between that date and Whitsunday 1874 as part of the statutory qualification requisite for his registration as a voter?"

Argued for appellant;—It was settled by the case of Gillon v. Muirhead[1] that an agricultural lease was not carried by the legal assignation of marriage to the effect of creating an irritancy where assignees were excluded. But this was not conclusive in a question of the right to vote. A man might not be a tenant in strict law and yet be tenant for the purposes of the franchise,[2] just as the husband of an owner was not owner and yet was allowed to be styled in the register "owner in right of his wife."[3] Section 9 of the Act of 1832 and section 14 of the Act of 1868 implied that, for the purposes of the franchise, a lease might come to a man by marriage. The subject of the lease here being the residence of the spouses, the appellant was entitled to possess it, and he would have been liable for the rent. He had therefore all the ordinary qualities of a tenant.

Argued for the respondent;—The qualification of the husband of an "owner" depended upon direct statutory enactment,[4] and but for that enactment would not exist. No similar provision was made by the statute giving a vote to the husband of a tenant.

THE COURT affirmed the judgment of the Sheriff.

J. STORMONTH DARLING, W.S.—JOHN STEWART, W.S.—Agents.

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[1] M. 1775, 15,286.
[2] Nish, Cay, 1839, p. 308.
[3] Smith v. Mackay, Dec. 19, 1868, 7 Macph. p. 287, 41 Scot. Jur. 172.
[4] 2 and 3 Will. IV., c. 65, sec. 8; 31 and 32 Vict. c. 48, sec. 14.

No. 3.

Nov. 2, 1874.
Rutherford v. Riddell.

FRANK RUTHERFORD, Objector and Appellant.—*Darling.*
ANDREW RIDDELL, Claimant and Respondent.—*A. J. Young.*

Franchise—County Voters Act, 1861, 24 *and* 25 *Vict. c.* 83, *sec.* 27—*Failure to appear.*—A claim to be enrolled on the roll of county voters having been objected to on the ground that the claimant's title was nominal and fictitious, *held* that it was no sufficient ground for rejecting the claim that the claimant, who had not been cited by the objector, did not appear personally, although a claim on the same qualification had been rejected in the previous year on his failure to appear when cited.

Registration Appeal Court. B.

FRANK RUTHERFORD, writer, Galashiels, objected to Andrew Riddell, residing at Torr House, Castle-Douglas, being enrolled as a voter for the county of Roxburgh, as proprietor of two fields occupied by Daniel Wilson at Midlem, in the parish of Bowden, on the ground that the claimant's title was nominal and fictitious, and that he was not in Court to support his claim. He admitted that he had not cited the claimant, or given him any notice to appear; but he referred to the fact that in last year's Registration Court Mr Andrew Riddell claimed to be registered on the same qualification, and after being duly cited, and having had intimation sent to him by letter, he failed to appear, and his claim was not admitted. The objector therefore maintained that the claim should be rejected.

Mr Riddell's agent produced in support of his claim a disposition, dated 30th and registered 31st January 1873, whereby, in consideration of the sum of £240 sterling then instantly paid to him, William Riddell, farmer, Hundalee, sold and disponed to him, Andrew Riddell, the subjects claimed on, with entry as at Martinmas 1872. Mr Riddell was not personally present.

The Sheriff (Pattison) repelled the objection, and admitted the claim, holding that the objection was not established, and that Mr Riddell not having been cited this year, or served with any intimation requiring him to appear, the proceedings at last year's Registration Court could not have the effect contended for.

Mr Rutherford appealed, and the question submitted for the decision of the Court was—"Whether, in respect of Mr Riddell's failure to appear in person to support his claim in the circumstances, he was to be held as confessed in the objection, and his claim rejected?"

Argued for the appellant;—The County Voters (Scotland) Act, 1861,[1] sec. 27, entitled him to oppose a claim without giving any previous notice to the claimant. Had the claimant been present the objection might have been instantly verified,[2] and looking to the result of his claim in the previous year he was bound to appear and support it when again repeating it this year, and, having failed, must be held confessed.[3]

The respondent was not called on.

THE COURT affirmed the Sheriff's judgment.

J. STORMONTH DARLING, W.S.—JOHN STEWART, W.S.—Agents.

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[1] 24 and 25 Vict. c. 83.
[2] King v. Mitchell, Oct. 24, 1870, 9 Macph. 15, 43 Scot. Jur. 6.
[3] Weir v. Blackwood, Oct. 19, 1869, 8 Macph. 3, 42 Scot. Jur. 14.

THOMAS JOHN DUNN, Objector and Appellant.—*A. J. Young.*
WILLIAM COTESWORTH, Respondent.—*Darling.*

No. 4.

Nov. 2, 1874.
Dunn v. Cotesworth.

Franchise—Occupancy—Salmon-fishings.—Held that occupancy of salmon-fishings under a lease for twelve months prior to 31st July was a good title to the franchise, notwithstanding the annual close-time.

Question as to the effect of a lease granting the privilege of rod-fishing merely.

THOMAS JOHN DUNN, solicitor, Melrose, objected to William Cotesworth of Cowdenknowes being retained on the register of voters for the county of Roxburgh, as "tenant of fishings in the Tweed, in the parish of St Boswells," on the ground that salmon-fishings were not lands and heritages of such a nature and character as to be susceptible of the actual personal occupancy for twelve months immediately preceding the 31st day of July in each year, necessary to confer the right of voting on the tenant thereof, fishing for salmon in the Tweed being, by the Tweed Fishery Acts, 1857 and 1859, prohibited between the 30th of November in any year and the 1st of February in the year following, and the occupancy of the tenant being thereby interrupted during that period.

Registration Appeal Court. B.

The Sheriff (Pattison) held that fishings were "lands and heritages" in the sense of the Reform Acts, and that there was no such break in the occupancy by reason of the Tweed Fishery Acts as affected the qualification of the tenant, and he repelled the objection.

Mr Dunn appealed, and the question submitted to the Court was—"Whether the objection founded on the nature and character of the subjects in respect of which the voter stands enrolled is well founded?"

THE COURT affirmed the Sheriff's judgment, on the ground that salmon-fishing was a heritable right, but reserved opinion as to what might be the effect of a lease conveying a privilege of rod-fishing only.

JOHN STEWART, W.S.—J. STORMONTH DARLING, W.S.—Agents.

ELPHINGSTON MAITLAND DALGLISH, Claimant and Appellant.—*Alison.*
WILLIAM WRIGHT, Objector and Respondent.—*Macdonald.*

No. 5.

Nov. 3, 1874.
Dalglish v. Wright.

County Franchise—Proprietor—Title—Building Society.—Held, in accordance with the case of Bishop v. Dove, Dec. 19, 1868, that a member of a building society was not entitled to be placed on the roll of voters as owner of a house allotted to him by an entry in the society's books.

County Franchise—Proprietor—Title—Sale of Heritage.—A purchaser of subjects, who has not obtained a disposition to the same till after 31st January of the current year is not entitled to the county franchise in respect thereof, unless he has, before that date, entered into a written contract of sale sufficient to bind both parties.

DALGLISH claimed to be placed on the roll of voters for the county of Stirling as proprietor of a house and garden in Lennoxtown. The claimant was a member of the Campsie Building and Investment Society. In 1871 a steading of ground was allocated by the society to the claimant, and a house costing £150 was erected thereon by the society, which the claimant had occupied from a date prior to 31st January 1874.

Registration Appeal Court. B.

On 20th December 1873 a meeting of the committee of the society, and of those members who had had property allocated to them, was held. The minute of meeting, which was initialed by the chairman, bore—After deliberating concerning the present position of the society, these

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Nov. 3, 1874. Dalglish v. Wright.

members who have had houses allocated to them intimated their willingness to bond their properties and pay over the balance of the cost of their houses to the society, provided the society, in general meeting, agrees to wind up its affairs."

At a meeting of the society, held on 16th January 1874, it was agreed to wind up its affairs as soon as circumstances would permit.

The books of the society shewed that the claimant had paid to the society, by way of instalments, sums amounting to £30, 12s. 8d. He made no further payment till 31st March 1874, when he paid the whole balance of the price, and thereafter obtained a disposition of the subjects. Wright objected to the claim, on the ground that the claimant had not been in possession of the subjects claimed on as true owner thereof for a period of six months prior to the 31st day of July 1874. The Sheriff (Blackburn) rejected the claim, holding this case to be ruled by that of Bishop v. Dove, 19th December 1868, 7 Macph. 301, 41 Scot. Jur. 179.

The claimant appealed.

Argued for him;—He was not within the scope of Bishop v. Dove; he took the subjects, not under the rules of the society, but by an independent contract of sale evidenced by the minutes, and completed before 31st January 1874.

Argued for the objector;—The minute could not be held as an offer binding upon the claimant to purchase a heritable subject, and therefore there was no contract of sale prior to 31st January 1874.

THE COURT affirmed the judgment of the Sheriff, holding that there was no completed contract of sale before 31st January 1874, and therefore that the case must be ruled by the decision in Bishop v. Dove.

T. F. WEIR, S.S.C.—MACKENZIE & BLACK, W.S.—Agents.

No. 6.

Nov. 3, 1874. Wardrop v. Cockburn.

WILLIAM WARDROP, Appellant.—*Macdonald.*
THOMAS COCKBURN, Objector and Respondent.—*A. J. Young.*

County Franchise—Schoolmaster—Side School—Defeasible Title—Statutes 43 *George III. cap.* 54, *sec.* 11, 24 *and* 25 *Vict. cap.* 107 (*Schoolmasters Acts*, 1803 *and* 1861).—When the master of a parochial side school occupies a schoolhouse and garden in virtue of his office his title to these subjects is not so defeasible as to prevent his being on the register of voters.

Registration Appeal Court. B.

WILLIAM WARDROP stood entered in the register of voters in the county of Berwick as "proprietor in liferent *ex officio* of house and garden in Burnmouth, in the parish of Ayton."

Thomas Cockburn objected to the voter's name being retained, on the ground that he was not proprietor in liferent of these subjects.

It was proved that the subjects were the house and garden of the schoolmaster of Burnmouth school, which was a side school in the parish, duly constituted as such, and that Wardrop was duly elected schoolmaster thereof by the qualified heritors and minister of the parish of Ayton at a meeting held on the 23d day of December 1869, the appointment to date from 15th January 1870, all under and by virtue of "The Parochial and Burgh Schoolmasters (Scotland) Act, 1861,"* which was expressly referred

* 24 and 25 Vict. c. 107, enacts,—Sec. 3. "The minister of every parish in which there is a parochial school shall, within three months from and after the passing of this Act, and on every occasion of a vacancy in the office of schoolmaster,

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Wardrop v. Cockburn.

to in the proceedings connected with the constituting the school a side school of the parish and the election of Wardrop. It was also proved that he had since held and continued to hold that office, and had in that capacity occupied and still occupied the subjects.

It was maintained by the objector that under and by virtue of the said statute, particularly the 6th section thereof, every side school teacher was liable to be removed from his office by the heritors and minister at any time on a notice of not less than three months requiring him to resign on their making provision for payment to him as therein mentioned; that therefore his title to the schoolmaster's house was defeasible, and he was not "proprietor in liferent" of the schoolmaster's house, or entitled to be registered as such in the register of voters.

The Sheriff (Pattison) sustained the objection, and expunged Wardrop's name from the register.

Wardrop appealed.

The question of law for the decision of the Court was—"Whether the title of the teacher of a side school in a parish, duly constituted as such, to the schoolmaster's house is defeasible, and therefore insufficient to afford him a qualification as a voter in the character mentioned in the register?"

Argued for Wardrop;—The title on which a side schoolmaster held his dwelling-house and garden was not one easily defeasible. After the three months subsequent to the passing of the Act of 1861 had expired the heritors,—and now the school board,—had no power to alter the position of the side schoolmaster unless the principal parochial school was vacant. The Sheriff had overlooked this provision of the Act of 1861.[1] It was settled law that a parochial schoolmaster was entitled to be upon the register of voters in respect of his occupation of the school-house and garden, and there was nothing so different in the position of a side schoolmaster as to disqualify him. The master of a side school being only removable by the vote of a public board, which was not to be expected to be capricious, was in a different position from bank agents, &c.

Argued for Cockburn;—Under the 6th section of the Act of 1861 a side schoolmaster was removable at the will of the school board upon three months' notice. Moreover, under the Act of 1803[2] the heritors were not bound to supply a side schoolmaster with a house and garden,[3]

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within six weeks after such vacancy shall have taken place, call a meeting of the heritors." . . . Sec. 4. "At the meeting aforesaid it shall . . be lawful for the heritors and minister to resolve to discontinue from and after a date to be fixed by them any subsisting side school in the parish." . . . Sec. 5. "It shall be lawful for the heritors and minister at the meeting aforesaid, or at any subsequent meeting duly called for that purpose, to resolve that a female teacher shall be established." . . . Sec. 6. "It shall be lawful for the heritors and minister, at such meeting as aforesaid to require the teacher of any side school in the parish, on a notice of not less than three months, to resign his office, on their providing to him during his life an annual payment equal in amount to the full salary to which at the date of the passing of this Act he had right by law; . . and at the expiry of three months from notice as aforesaid, if such teacher shall not previously have given in his resignation, the heritors and minister having made provision for such annual payments as aforesaid, the right of such teacher to his office shall cease and determine."

[1] 24 and 25 Vict. c. 107, secs. 3, 4, and 6, *supra*.

[2] 43 Geo. III. cap. 64, sec. 11.

[3] Heritors of Annan v. Herbertson, Feb. 21, 1837, 15 Sh. 645—9 Scot. Jur. 308.

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and there was nothing in this special case to shew that he had possession of this house in right of his office.

LORD ARDMILLAN.—For my part, I am quite satisfied on this point.

The question is necessarily raised in a somewhat broad form, but I have no difficulty.

Defeasibility, or the holding at the will of another on an arbitrary and capricious tenure, is a good objection. But to hold that this gentleman's right is defeasible at the pleasure, caprice, or will of another, would be clearly contrary to the truth of this case.

A right defeasible on the caprice or arbitrary will of another, such as that of a gamekeeper, butler, or gardener, has, by a long course of decisions, been held not to qualify.

But where such right depends not on mere arbitrary will or caprice, but upon the deliberate vote of a public body acting in a responsible position, such as the heritors and minister, or the school boards which have come in their place, there is no danger and no fair suggestion of capricious decision, and no reason for holding the rule regarding such defeasibility to prevail or apply.

There is, in my opinion, no good reason for holding that the teacher of a side school is in a different position from a parochial schoolmaster under a school board. I have no difficulty in coming to that conclusion.

Mr Young had a separate argument as to the obligations of heritors to give a schoolmaster's house, under the statutes 1803 and 1861.

These may not be the same for side schoolmasters as for parochial schoolmasters; but no such question arises here. This gentleman has got a house, and dwells in it; and if the heritors give a house to the teacher of a side school, and he occupies it as teacher, he is in the same position as a parochial schoolmaster. It is well understood that parochial teachers can only be removed by a deliberate vote of the governing body; and there is no reason to suppose that their vote will be given from caprice.

LORD ORMIDALE.—I come to the same result with your Lordship in this case; but I must be understood to reserve my opinion upon the question, whether there ought to be a distinction between the case where the qualification depends on the will of a single individual, and the case where it depends on the will of a public body.

It is sufficient to say that it does not depend here on the arbitrary or capricious will of the heritors and school board, whether the side schoolmaster in question can be deprived of his qualification or not. In the first place, his status of side schoolmaster cannot be affected so long as there is no vacancy in the parochial school. And, secondly, it is indisputable that the parochial schoolmaster holds his place *ad vitam aut culpam*.

I am therefore of opinion that the Sheriff has fallen into error in holding that the objection taken to the claimant in this case was well founded. It appears to me, on the contrary, that, in reference to the decided cases, he must be held to have established his qualification as proprietor in liferent of the subjects on which he founds.

LORD CRAIGHILL concurred.

THE COURT reversed the judgment of the Sheriff, and repelled the objection.

DAVIDSON & SYME, W.S.—J. & J. TURNBULL, W.S.—Agents.

JOHN MACKIE ADAIR, Objector and Appellant.—*Scott—R. V. Campbell.* No. 7.
JOHN KAY, Respondent.—*M'Laren.*

Nov. 9, 1874.
Adair v. Kay.

Burgh Franchise — Successive Occupancy — Representation of the People (Scotland) Act, 1868, *sec.* 13.—A person left a house at Whitsunday and took another in the same burgh in the beginning of June, and in the interval lodged at an inn. Objection that his occupation of a dwelling-house had not been continuous *sustained.*

KAY was enrolled as a voter in the burgh of Stranraer as tenant and occupant of a dwelling-house in George Street. Registration Appeal Court. B.

Adair objected that Kay had not been tenant and occupant of a dwelling-house in the burgh for the requisite period.

The facts stated in the special case were as follows:—Kay had occupied his present house since about the beginning of June 1874. For the year ending Whitsunday 1874 he was tenant and occupant of another dwelling-house in Stranraer. On removing therefrom at Whitsunday he had no other house taken, and for several days (until he got his present abode) he was neither tenant nor occupant of any house, but lodged at an inn in Stranraer. Until he entered his present abode his furniture was allowed to remain stored in his previous house.

The Sheriff-substitute (Rhind) repelled the objection.

The objector appealed.

Argued for him;—The occupation of the successive premises was not continuous.[1]

Argued for Kay;—The break of a few days during which the voter could not get a house was not sufficient to destroy his qualification.

LORD ARDMILLAN.—The present occupancy only began in June last. In order to have the qualification, the claimant founds, and must found, on his previous occupancy, under the 13th section of the Act of 1868. But he cannot found upon that occupancy unless it immediately precedes his present occupancy. If he had had another house ready taken when he left his former house it would not have affected his right to be enrolled that he had delayed for some days to enter his new house while it was being cleaned or papered, nor if he had actually gone to the new house would it have destroyed his vote that the missives of lease had not been made out or signed for a few days. But in this case he was neither tenant nor occupier of any house for some days. There was a distinct break in the occupancy. We must therefore reverse the Sheriff-substitute's decision, and expunge the name of John Kay from the roll.

LORD ORMIDALE and LORD CRAIGHILL concurred.

THE COURT reversed the judgment of the Sheriff-substitute, and sustained the objection.

MAITLAND & LYON, W.S.—MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—Agents.

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[1] Gray v. Swanson, Dec. 19, 1868, 7 Macph. 328, 41 Scot. Jur. 192; Brown v. Blackwood, Oct. 20, 1869, 8 Macph. 48, 42 Scot. Jur. 16; Waddell v. M'Phail, Dec. 2, 1865, 4 Macph. 130, 38 Scot. Jur. 79.

No. 8.
Nov. 9, 1874.
Douglas v. Adair.

WILLIAM DOUGLAS, Claimant and Appellant.—*M'Laren.*
JOHN MACKIE ADAIR, Objector and Respondent.—*Scott—R. V. Campbell.*

Franchise—Lease, Objection to Title of Granter of.—Objection to a person claiming to be enrolled as tenant and occupant of subjects that the granter of the lease under which he held had several years before executed a disposition *omnium bonorum* for behoof of creditors, and had not been retrocessed, *repelled.*

Question, whether an inquiry into the author's title, where the qualification of the claimant is sufficient, and his possession instructed, is competent in the Registration Court.

Registration Appeal Court. B.

DOUGLAS claimed to be placed on the roll of voters for the burgh of Stranraer, as joint tenant and occupant of workshops and foundry, which were entered in the current valuation-roll as worth £20 per annum.

He produced a lease of the premises for three years from Whitsunday 1870, and another, dated September 1873, for nineteen years, from Whitsunday 1873, bearing to be granted to the claimant and his brother by John Douglas senior, proprietor of the subjects. He and his brother had occupied the premises for some years.

Adair objected that John Douglas senior had no title to grant a lease of the subjects, he having in 1860 granted a disposition *omnium bonorum* for behoof of creditors. Copies of the disposition and of the notarial instrument upon the same were produced.

It was not proved that Mr Douglas senior had not settled all claims due by him when he granted the disposition *omnium bonorum*, and on the other hand it was not proved that he had been retrocessed.

The Sheriff-substitute (Rhind) rejected the claim.

The claimant appealed.

Argued for him;—The objection to the granter's title was incompetent in the Registration Court, and, further, it was unfounded, because a trust for behoof of creditors did not divest the granter.[1]

Argued for the objector;—So long as the disposition stood, the claimant's right was defeasible, and could not confer the franchise.

LORD ARDMILLAN.—I think this a good claim. The law on the subject of the effect of a disposition *omnium bonorum* by the author of the claimant might involve a question of subtlety, but there is no necessity here for going into that question. The claimant himself is, and has been for the necessary period, in occupation of the premises under a lease, with entry at Whitsunday 1873. He has paid the rates and taxes thereon, and he had been previously in occupation of the premises. The disposition *omnium bonorum* was not by him, but by his author, John Douglas. It is dated in 1860, and it was not followed by any change of possession. An inquiry into the author's title, where the qualification of the claimant is sufficient, and his possession instructed, is very rarely permitted in the Registration Court, and under the circumstances of this case the objection is not well founded.

LORD ORMIDALE.—The objection in this case is that the party who granted the lease in question had no power to do so, in respect that although he may have retained the radical right he had so long ago as 1860 executed a disposi

[1] Campbell of Edderline, Jan. 14, 1801, F.C. and M. "Adjudication," App. No. 11; Lockhart v. Wingate, Feb. 19, 1819, F.C.

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tion *omnium bonorum* for behoof of his creditors, and that the voter has not shewn that all the creditors have been paid. I doubt very much the competency of going into such a question as this in the Registration Court. It appears to me to be sufficient, having regard to the necessarily summary procedure of the Registration Court, that the voter here has been in possession of the subjects for the requisite time with the knowledge of the trustee under the disposition *omnium bonorum*, without any challenge of his right. The presumption is, looking at the lapse of time, and as this property is worth £20 a-year, that all the creditors have been paid, otherwise their trustee would have proceeded to vindicate and realise the property for their behoof. In the circumstances, I think the objection untenable.

LORD CRAIGHILL.—I concur. It would require a great deal of authority to shew that the validity of the title of the granter of the lease could be gone into in the Registration Court.

Even supposing such an inquiry competent, I am not satisfied that the title is bad. The disposition was after all only a burden on the title of the granter, and he was left in the administration of the property.

THE COURT reversed the judgment of the Sheriff-substitute, and repelled the objection.

MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—MAITLAND & LYON, W.S.—Agents.

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Nov. 9, 1874.
Adair v. Murray.

JOHN MACKIE ADAIR, Objector and Appellant.—*Scott—R. V. Campbell.*
CHARLES MURRAY, Respondent.—*M'Laren.*

Burgh Franchise—Dwelling-House.—A man who took his meals in his father's house, and generally slept there, rented a small room in the same tenement at 12s. per annum, in respect of which he was separately rated for the relief of the poor, and in which he occasionally slept. *Held* that he was not entitled to the burgh franchise as tenant and occupier of the room.

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JOHN ADAIR, solicitor, Stranraer, objected to the name of Charles Murray being continued on the roll of voters for the burgh of Stranraer. Murray stood enrolled as "inhabitant occupier as tenant of dwelling-house in Glen Street."

The following were the facts stated in the special case:—"Murray became, at Whitsunday 1873, tenant of a room in a house in Glen Street, at the yearly rent of 12s., by agreement with the factor of the proprietor. The said room was situated at the top of a stair in the house, and was about nine feet long by six feet wide, and had a window, but no fireplace. The voter's father was tenant and occupant of a room and kitchen on the ground floor of the said house, and was enrolled a voter as such. The voter, who was unmarried, resided with his father in the latter's house, getting all his meals there, and mostly sleeping there. When he did not sleep there, he slept in the room of which he was tenant, and in which there was a bed and some other articles belonging to him. He did not use the room in any other way. No one had any right to use or occupy, or did use or occupy, the room in any way except himself. He paid his rent half-yearly, and held regular receipts therefor from the landlord's factor. He was entered on the valuation-rolls of last year and of the present year as tenant and occupant of the said room at the annual value of 12s. He was in both years rated thereon to the relief of

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the poor, and had paid his rates for 1873, amounting to 6d., those for 1874 not being yet due.

The Sheriff-substitute (Rhind) repelled the objection.

The objector appealed.

Argued for him;—A dwelling-house was where a man dwelt. However small it might be, it must be a separate dwelling-house. The voter, in reality, lived with his father.

Argued for Murray;—The room in question satisfied all the requirements of the Act of 1868.

LORD ARDMILLAN.—I am afraid this is not a very good example of the species of franchise here claimed, or of the manner in which a qualification for the franchise can be arranged. A single room may, no doubt, be a separate dwelling-house, but I do not think that this room can be so regarded. The first element is the smallness of the rent, 12s. Then, there is the absence of a fireplace, which is not perhaps absolutely necessary to constitute a dwelling-house, but it is a usual feature to give to a room the usual character of a dwelling-house. We are told that there is a bed in the room, in which the voter occasionally sleeps, and some other articles belonging to him. But we are not told what these articles are; it is not said that there is even a chest of drawers, or a table, or any other article of the nature of furniture. So far as it appears, this is merely an empty room, with a bed and some minor articles, not named or described, in it. The residence of the man, the general occupancy of this man, is of another room, and in another house.

I am, therefore, for reversing the Sheriff-substitute's decision.

LORD ORMIDALE.—I am of the same opinion. And I may say that I find sufficient grounds for decision in the statement in the special case, to the effect that the voter resides with his father in the latter's house, getting all his meals there, and mostly sleeping there. His father's house, therefore, must be held to be the house in which he dwells. It is not enough for the purposes of the franchise that a man occasionally goes into a small room little better than a box to sleep, and calls that his dwelling-house. A dwelling-house must be a place where, in a substantial and reasonable sense, the man lives, and not a small apartment in which he occasionally sleeps. It is, no doubt, stated that the apartment referred to is rated for the poor, but I cannot regard it for this reason alone as a separate dwelling-house, which it must be in order to constitute a qualification for the franchise.

LORD CRAIGHILL.—I concur. It is clear that Murray is not an inhabitant occupier. He is an inhabitant non-occupier.

THE COURT reversed the judgment of the Sheriff-substitute, and sustained the objection.

MAITLAND & LYON, W.S.—MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—Agents.

No. 10.
Nov. 9, 1874.
Hewat v. Henderson.

RICHARD HEWAT, Objector and Appellant.—*Muirhead.*
JAMES HENDERSON, Respondent.—*Mackay.*

Franchise—Poor-Rates—Arrears—Representation of the People (Scotland) Act, 1868, *sections* 3 *and* 6.—*Held* (*diss.* Lord Craighill) that the poor-rates, which, under sections 3 and 6 of the Representation of the People (Scotland)

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Act, 1868, it is necessary that an inhabitant occupier should have paid before the 20th June of the qualifying year, are only the rates which have become payable by him during the year ending with the preceding 15th of May.

RICHARD HEWAT objected to the name of James Henderson, tenant of house, King Street, Castle Douglas, being retained upon the roll of voters for the stewartry of Kirkcudbright, on the ground that Henderson was in arrear of poor-rates, which had been assessed on him in respect of the house on which he was registered, and offered to prove the same.

The special case set forth that the said James Henderson had paid all poor-rates that had become payable by him in respect of said house for the year up to the 15th day of May 1874. The objector offered to prove that Henderson was in arrear of poor-rates which had been assessed on him for the said house for the years 1869-70 and 1870-71. Henderson's agent offered to prove that there were no arrears of poor-rates, and tendered certain receipts in proof of his averment.

The Sheriff-substitute (Nicolson) refused to allow any proof on the question raised by the objector, and repelled the objection.

Hewat appealed.

The question of law for decision of the Court was—"Whether the payment of all poor-rates for the year ending 15th May 1874 is sufficient to entitle the voter to have his name retained on the register of voters, irrespective of any question regarding arrears for former years?"

In the course of the debate some discussion took place upon the refusal by the Sheriff-substitute to take evidence as to whether or not there were any arrears of poor-rates due by the voter, and the competency of a remit to the Sheriff-substitute to take evidence on the point. The Court expressed a doubt whether the Sheriff-substitute had power to sit again and take evidence.

Argued for the appellant;—Nothing could be plainer than the words of the Act of 1868 (sections 3 and 6), that it was a necessary qualification for the franchise that an occupant should have paid all poor-rates that had become payable by him in respect of the premises that gave the qualification up to the preceding 15th of May. It was impossible to limit the application of the proviso to poor-rates for one year. The respondent relied upon the English case of Cull v. Austin.[1] The English Act[2] was expressed in different terms, and from some specialties in the English system of levying the rates not much assistance could be derived from English authorities on the point. But in Abel v. Lee,[3] the Court of Common Pleas expressed opinions favourable to the view maintained by the objector. The object of the provision was evidently to secure that no person should be admitted to the franchise who had not performed the duties incumbent upon him as a citizen, and this object would be to a large extent defeated, if it was in the power of a man to obtain the franchise, by paying up his poor-rates for one year on the eve of an election. Difficulties were suggested in the working of the Act, if it embraced arrears of poor-rates. But these difficulties were exaggerated. The statute did not require an occupant to be traced from one part of the country to another, in order to find out whether there were arrears of poor-rates due by him. The statute did not go beyond poor-rates payable in respect of the dwelling-house, or lands and heritages, as the case might

[1] June 3, 1872, L. R. 7 C. P. 227.
[2] 30 and 31 Vict. c. 102 (Representation of the People Act, 1867).
[3] Jan. 19, 1871, L. R. 6 C. P. 365.

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be, which gave the qualification. Even if the difficulties were much greater, they could not over-ride the express words of the statute.

Argued for the respondent;—"All poor-rates (if any) payable up to the preceding 15th day of May" in the 3d and 6th sections of the Act of 1868, meant rates due for the qualifying year. There might be more than one rate in one year—8 and 9 Vict. c. 83, sec. 41. Abel v. Lee was a special case, and the dicta of the Judges, so far as they imply the necessity of payment of arrears had been overruled by Cull v. Austin. It would be absurd to hold that arrears need not be paid under the English Act of 1867, and must be paid under the Scotch Act of 1868. These Acts being *in pari materia*, and substantially in the same terms, must receive the same construction. The construction contended for by the objector would make the Act unworkable. By the 18th section the collector of poor-rates was required to deliver to the assessor a list of the persons who had failed to pay all poor-rates (if any) that had become payable by them up to the preceding 15th of May. According to the objector's construction this list must extend back for forty years. Moreover, the objector's construction involved this anomaly, that it gave a premium on change of residence. A man who had remained many years in the occupancy of the same premises would be disqualified if he had left one poor-rate unpaid, whereas a man who had changed his residence would only be required to pay the poor-rate for the qualifying year.

At advising,—*

Lord Ardmillan.—The voter possesses the qualification required by law. He has paid the poor-rates exigible for the house which he occupies, and payable for the year of qualification, and up to the 15th of May. The objection—the only objection—is, that he has failed to pay an arrear of poor-rates, or poor-rates exigible for some previous year. The question is interesting and important, and turns on the construction of the 3d and 6th sections of the Act of 1868. There is no doubt about the obligation to pay poor-rates, nor about the right and power to enforce payment of arrears of poor-rates. No such question is here raised. The statute deals with no such question. This objection touches no such question. The words "arrear," or "bygone rates," or "past due rates," do not occur in these 3d and 6th sections, but are said to be brought in by construction. Is the 3d section or 6th section of this Act to be construed so as to include not only the poor-rates exigible for the qualifying year up to 15th May, but also all previous poor-rates for all previous years, that is to say, all arrears? If the Act says so expressly, *cadit quæstio;* the Act must be enforced. If it does not say so expressly, then can we reach that result by construction, that is by endeavouring to ascertain a meaning in the statute implied though not expressed? The Act we are construing bears to be "An Act for the Amendment of the Representation of the People in Scotland." The preamble makes this clear. It is undoubtedly an Act for extending the franchise. Therefore, it is an Act for amending representation by extending the franchise; and it must be construed as an enfranchising Act, and as an amending Act. There are some important canons of construction of statutes which should be kept in mind in entering on the interpretation. 1st, That must be the truest exposition of a law which

* The Court intimated that their decision was applicable to a number of cases relating to the burgh franchise in which the same objection had been taken.

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best harmonises with its design, its objects, and its general structure. These are the words of Vatell, quoted by Dwarris (p. 556), and referred to in some of the great English authorities. 2d, A statute should be construed so as to suppress the evil and advance the remedy. 3d. An amending Act is a remedial Act, and should be construed liberally. 4th. A statute *pro bono publico* should be construed so as to attain the end proposed—(Dwarris, 618). All of these principles or canons of construction are here appropriate and important. Where statutory words are clear and express there is no room for construction. The words must receive effect. But where construction is required the rules of construction must not be overlooked.

It appears to me impossible to maintain here that the 3d clause in this Act of 1868 is so clear and express as not to admit of doubt, and not to require construction.

Then there is no precedent or authority to support, and no practice to sustain the objection which has here been taken.

This is a new point, which in Scotland, so far as I know, or have heard suggested at the bar, has not hitherto been brought under judicial consideration; while in England, the latest, clearest, and most authoritative decision on the corresponding provisions of the English Act is opposed to this objection.

The case of Cull v. Austin in 1872 is really conclusive of this question under the English Act. It was there decided in the Court of Common Pleas, that, in support of such an objection as this, the objector must prove non-payment of a rate laid on in the previous year, and payable in the qualifying year. Arrears before that date are not taken into account. In the previous case of Abel v. Lee in 1871, also under the English Act, the point raised was somewhat different, for the course of the rate not paid ran into the commencement of the qualifying year. In the earlier case there are *obiter dicta* favourable to the objection. But the decision did not require them; and in the more recent case of Cull v. Austin the previous case of Abel v. Lee was quoted and considered, and a unanimous decision was pronounced against the objection urged, as here, in respect of non-payment of arrears. It is to be observed that Mr Justice Willes concurred in both decisions.

On such a question, arising on the construction of corresponding clauses in enfranchising Acts, it would be unfortunate if the law were different in Scotland from what it is in England. I do not think it is different.

The leading enactment in the 3d and in the 6th sections of this Act of 1868 is clear and general and enfranchising. "Every man" who, in the qualifying year, has a certain qualification during that year, is entitled to be registered as a voter, and to vote. That the claimant is qualified is not doubted. A proviso, which forms an exception or deduction from the enfranchising words, follows—(reads). The premises are those occupied for the year. The objector candidly avowed that he put no limit in point of time on his objection. He maintained that an unpaid rate for any year, though ten or twenty or twenty-five years ago, operates as a disqualification. I cannot arrive at that conclusion. I think it rests on an interpretation opposed to all the canons of construction to which I have adverted.

There is a period within which under this Act all the elements of qualification, or of disqualification, must be found, and that period is twelve months back from the last day of July in the year of the claim. Back beyond that period we do not pass. To that period, as co-extensive, commensurate, with the

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period of qualification, I think that the clause, when fairly construed, limits inquiry into the payment of poor-rates.

A case was put for the respondent which well illustrates this. Successive occupancy sustains a qualification otherwise good. It was admitted, and rightly, that failure to pay arrears of poor-rates on another house previously occupied, does not disqualify. The rate must be "in respect of said dwelling-house," not of a former house. Now, observe to what an absurd and unjust conclusion the sustaining the present objection would lead. The man who has changed his house, and had successive occupation, would not be disfranchised. The man who has not changed his house would lose the franchise,—the arrears of poor-rates being common to both. The failure,—the same in both cases,—would be innocuous in the one case, and fatal in the other case.

Nothing but express words in the Act could support an objection leading to such a result. To sustain the objection without express words, and merely on construction of words requiring construction, would, in my view, be unreasonable, and in opposition to sound principles of construction.

I think that the provisions in the 17th, 18th, and 19th sections of the Act, and also the schedules C and D, tend to confirm the view which I take. The words are of course an echo of the 3d and the 6th clauses, but the working of the statute in regard to the notice, and the list, in these schedules, would be scarcely practicable if it were necessary that arrears for many years must be in every case inserted. In Glasgow it would be very difficult to work the Act. Arrears are not mentioned in the clause, or in the schedules. They may be recovered, but with that we have nothing to do here. This objection has never yet been sustained in Scotland. It has been repelled in England. After hearing a full and able argument on both sides, and after careful consideration of the question of construction, I am of opinion that the objection should be repelled here also.

Lord Ormidale.—I deem it unnecessary to follow your Lordship into a disquisition on the general principles and canons of construction which are applicable to the question now to be disposed of by the Court. I may say, however, that the views which your Lordship has expressed on that subject, as well as otherwise on the case, are so generally concurred in by me that any additional observations of mine may be considered as supplemental merely.

It would be an anomalous and somewhat startling result were it to be held that this statute, which we are now considering, has a construction in Scotland, which the Court of Common Pleas in England, after the fullest discussion and consideration, have denied to the corresponding statute in force in that country with substantially identical words. It is said, however, that while the Court of Common Pleas came to such a conclusion in Cull v. Austin, a different and opposite conclusion would appear to have been come to by the same Court in the case of Abel v. Lee. But it is not to be overlooked that the case of Cull v. Austin came after that of Abel v. Lee, and that in the latter the judgment was *ex parte*, no appearance having been made for the respondent. The case therefore of Cull v. Austin, besides being more in point, having regard to its circumstances, is clearly the more authoritative of the two.

We must not only keep in view the clauses of the Act of 1868, with which we have more immediately to deal, but the whole context of that statute, and the statutes incorporated with it; for the 58th section provides that the Act

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"shall be construed as one with the enactments for the time being in force relating to the representation of the people in Scotland, and with the Registration and Valuation Acts." We are entitled therefore to read all these Acts along with the present, in order to see how far they affect the interpretation of the clause in question.

But, before doing so, let me advert to the words of the clause. Looked at by themselves merely, they would carry us back as far as it was possible for the Court to hold that poor-rates might remain unpaid. The words are plain in themselves; but are we bound or entitled so to deal with the statute? I think not. On the contrary, it appears to me that, not only the immediate context, but the whole Act, and not only the whole Act, but also the other Acts imported into it, as well as their objects, must be attended to, before the true construction of the particular clause in question can be arrived at.

The preliminary portion of the section provides for admission to the register of every man of full age, and not subject to any legal incapacity, "and who is, and has been for a period of not less than twelve calendar months next preceding the last day of July, an inhabitant occupier as owner or tenant of any dwelling-house within the burgh." Then we come to the proviso in question, that no man shall be entitled to be registered as a voter "who shall have failed to pay all poor-rates (if any) that have become payable by him in respect of said dwelling-house up to the preceding 15th May." What is the "said dwelling-house"? Surely that of which he has been "an inhabitant occupier as owner or tenant" for the "twelve calendar months next preceding the last day of July," as referred to in the earlier part of the clause. We have thus a construction of the proviso in question in the section itself, and, in my opinion, it is the only reasonable construction it is susceptible of.

We find further, in section 17, a provision for claims by persons improperly or erroneously exempted from payment of poor-rates; in section 18, a provision for notice to be sent to occupiers from whom any poor-rate is due; and in section 19, an enactment that the collector of poor-rates shall deliver to the assessor a list of persons who have failed to pay all poor-rates that have become payable by them up to the preceding 15th of May. Now, these provisions would be unworkable if the collector went beyond the year that gives the qualification, and got into an inquiry extending back, it might be, to twenty or thirty years, or even longer. A person claiming to be admitted to the register every year for a very long period may have occupied different premises, and he may have been in a distant part of the country the year immediately before the qualifying one; but how can it be reasonably supposed that in such circumstances the statute means that it must be ascertained whether there were any arrears of poor-rates, not for the qualifying year only, but for all prior years?

Again, we must look at the County and Burgh Voters Acts, and also the Valuation Act. The objects of these Acts, so far as the registration of voters is concerned, is to establish a machinery by which parties are to be placed on the roll by public officers, independently of the parties themselves. The 34th section of the Valuation Act provides that the valuation-roll shall be conclusive of the value of lands and heritages. I refer to that section, because the valuation-roll is made up annually, indicating that the period during which the incidents of the qualification are to be inquired into is limited to a year.

Again, the 2d section of the Burgh Voters Act provides for lists of voters to be made by the assessor, and without going into further details all its provisions

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proceed upon the footing that the public officer is to confine his inquiries to one year.

This brings us back to the provision in the Act of 1868, requiring the collector to send to the assessor a list of persons in arrear with their poor-rates. The assessor is to get his information through the medium of another public officer, viz., the collector of poor-rates. The inference is strong that, as the assessor does not require to go back more than a year, neither does the collector.

The Acts of Parliament to which I have now referred, as well as the whole spirit of the statute of 1868, thus tend to shew that the true construction of the clause in question is that it applies only to poor-rates unpaid for the qualifying year. The reason of the thing tends in the same direction. The statute, being an enfranchising one, ought to be liberally dealt with, and we must take care that we place no obstruction in the way of persons getting on the roll which the statute does not authorise.

On the whole, having regard to the considerations I have now alluded to, as well as those which have been more fully stated by your Lordship, I feel myself able satisfactorily to concur in the proposed judgment.

LORD CRAIGHILL.—There is difficulty in this question, and difference of opinion cannot create surprise though it may be cause for regret. After anxious consideration of all which has been brought under our notice, the conclusion to which I have come is that non-payment of poor-rates payable by the person claiming in respect of the premises on which, as occupant, he seeks to be enrolled for any year of his occupation, is a disqualification, and, consequently, that in this case the name of the voter should be expunged.

Let me say, in the outset, that the question for our decision appears to me to be entirely unaffected by anything which has been decided either here or in England. No Scotch decision was cited, presumably because none is to be found, and the English decisions which were brought up appear to me to be inapplicable, because the provisions of the English Act 30 and 31 Vict. cap. 102, touching the present question, are materially different from the provisions of the Scotch Act 31 and 32 Vict. cap. 48, which we are now called upon to interpret.

It is also right to explain that, in my view of the matter, the consideration that this is the first occasion on which the present question has been raised for the decision of the Court creates, as I think, no presumption either in favour of or adverse to the alleged disqualification. Those who, previous to 1868, were entitled to the franchise were not members of a class likely to be in arrear with poor-rates, and besides, for anything which appears, the probability is as great that no one in arrear has claimed since 1868 as that a person in occupation of premises affording a qualification has claimed, and has, without objection, been enrolled while in arrear.

Last of all, the suggestion of hardship is not entitled, in a question like the present, to serious consideration. If a person entitled to be a voter cannot pay poor-rates he ought to ask to be and he will be excused, but for the year or years in which he is so excused he will lose the benefit of his occupation. If, on the other hand, he can pay, and nevertheless refuses to pay, the consequence of his refusal is not a thing of which he can fairly complain, inasmuch as the loss of the franchise for the time is due to his wilful disregard of an incumbent obligation.

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Passing from these preliminary considerations, the reasons for the opinion which I have expressed will now be briefly stated. The first is, that the words submitted for interpretation are in themselves perfectly plain. The second is, that their natural meaning is not limited nor controlled by other expressions or provisions; and the third is that, on the contrary, the meaning which I ascribe to the words is suggested, or at any rate is countenanced, by the context, as well as by provisions to be found elsewhere in the statute.

Taking these in their order,—Could words be plainer than "All poor-rates, if any, that have become payable by him in respect of said dwelling-house up to the preceding 15th of May"? There is but one answer which, as I think, can be given to this question. Plainer words could not be used. Not one of them is of doubtful meaning. To be sure it has been urged that "up to the 15th day of May" implies that in construing the clause we are not to go beyond the year of which this month of May forms a part. But no reason which does not involve a begging of the question to be decided has been offered for such a limitation. In short, the plain and natural meaning of the words, if they are to be restricted, can be restricted only by shewing that there are expressions or provisions elsewhere in the statute which have the same effect as if words had been used in the clause by which it was expressly enacted that the poor-rates unpaid which were to operate as a disqualification were poor-rates payable only for the year prior to 15th May antecedent to the time at which the claim to the franchise was to be decided.

And this leads me, in the second place, to repeat that, as I think, there are no such counteracting expressions or provisions. The only thing which was suggested by the counsel for the respondent was the difficulty of giving the notice which, upon my interpretation of the clause, would be required when poor-rates had for years remained unpaid. But I am not satisfied that any difficulty could or would be experienced, and, even were this otherwise, it could not be so regarded as to involve the result that words which in themselves are unambiguous are to be read otherwise than as having their plain natural meaning.

In the third place, the context and the relative provisions in the Act 31 and 32 Vict. cap. 48, satisfy me that the natural meaning of the words is the true one. Take, first of all, the positive enactment "that every man shall in and after 1868 be entitled to be registered as a voter who is and has been for a period not less than twelve calendar months next preceding the last day of July an inhabitant occupier as owner or tenant of any dwelling-house within the burgh." Here there is a minimum period for qualification, but the occupation founded on in the claim may be of longer duration. How long it may be is not defined; it must be for a year at least, and whether longer or shorter "all rates" payable by the claimant in respect of his dwelling-house behove to be paid. The substantive enactment and this proviso are, as I read them, of equal comprehension. Further, there is a limitation as to time in the immediately preceding proviso. No man is entitled to be registered as a voter who at any time during the said period of twelve calendar months" shall have been exempted from payment of poor-rates. There is a similar proviso in the subsequent words of the clause—"No man shall be entitled to be registered as a voter who shall have been in the receipt of parochial relief within the twelve calendar months next preceding the said last day of July." What is the reasonable inference from the omission of limiting words in the intermediate provision

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unless that no limitation was intended? Finally, the form of notice in schedule C appears to me to be irreconcilable with a different interpretation. Those for whom it is intended are persons by whom all the poor-rates which have become due from them in respect of such premises up to the 15th day of May last have not been paid. This is a notice intended not for the learned but in most cases for the uneducated, not for lawyers accustomed to scan Acts of Parliament, that what seems the plain meaning of words may be evaded, but for persons who take words presented to them in their natural and ordinary meaning. And this being the case, it is hardly conceivable that the poor-rates, the non-payment of which they were informed would be a disqualification, were only the poor-rates for a year not specified, and not the poor-rates for every year of their occupation of the premises which remained unpaid.

THE COURT affirmed the judgment of the Sheriff-substitute.

TODS, MURRAY, & JAMIESON, W.S.—LINDSAY, HOWE, TYTLER, & Co., W.S.—Agents.

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Oct. 15, 1874.
Crawford v. Field.

ROBERT CRAWFORD, Pursuer.—*D.-F. Clark—Asher.*
THOMAS FIELD, Defender.—*Marshall—J. P. B. Robertson.*

Superior and Vassal.—A proprietor granted a feu of a piece of ground described as bounded on three sides by A Street, B Street, and C Street, with free ish and entry by all roads or streets made and to be made for the use of the feuars. A plan drawn upon the back of the feu-contract, and signed as relative thereto, shewed the streets, but this plan was not referred to in the deed. At its date only one of the three streets had been formed. The vassal was taken bound to pay a proportionate part of the cost of making the streets. In a question between the feuar and the superior *held* that the vassal was entitled to ish and entry by the ground upon which the proposed streets were to be formed, and that the erection of wooden buildings on the site of one of the proposed streets by the superior was an invasion of the vassal's right.

1ST DIVISION. Lord Gifford. M.

THIS was an action at the instance of Robert Crawford, distiller in Leith, against Thomas Field of Bowling Green, containing a conclusion that "the defender is not entitled to occupy, with buildings or other erections or enclosures, the solum of Burlington Street, opposite the warehouse belonging to the pursuer situated on the east side of Bangor Road, Leith."

In 1864, by feu-contract, the defender sold, alienated, and in feu-farm disponed, to and in favour of Thomas Bernard, "All and Whole that area of ground containing 27 poles imperial measure, being part of the defender's property of Bowling Green, Leith, bounded as follows:—On the north by the area of ground feued to Andrew Morton, ironfounder, on the west by Bangor Road, on the east by Albert Road, and on the south by Burlington Street, and including the wall built upon the said area of ground, and forming the south boundary thereof, with free ish and entry to the said area of ground by all the roads or streets made, or to be made, by the defender for the use and accommodation of his feuars at Bowling Green." The contract farther stipulated that the feuar should be bound to pay a proportion of the expense of maintaining the streets and roadways leading to said area of ground, and the said property of Bowling Green, until the same should be taken over as public streets and roads, and assessed for as such. A plan was drawn upon the back of the feu-contract, in which the area and the streets were delineated, and was signed by the defender as relative to the feu-contract. Mr Bernard erected upon the ground so feued to him by the defender a large warehouse. The warehouse was entered by a door opening into Bangor Road, and was lighted

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by windows looking into Burlington Street, which had been only partially formed.

In 1867 an agreement was entered into between Bernard, a Mr Philip, and the defender that Albert Road should not be formed. Philip then obtained from the defender a feu of part of Albert Road, and agreed to give part of it to Bernard in consideration of his consenting to renounce his servitude right over Albert Road.

The defender then granted a feu-right to Philip, including in it the whole solum of Albert Road, and Philip then conveyed the half of it to Bernard by disposition dated 19th December 1867.

In 1873 Bernard conveyed the subjects belonging to him to Crawford, the pursuer, with the whole rights and privileges thereto belonging.

The defender had erected certain buildings of wood on the site of the intended street, named Burlington Street, and so shut up the access from the pursuer's feu and obstructed the lights of the warehouse erected on it.

The pursuer pleaded;—The buildings and erections complained of are an invasion of the pursuer's rights under the said charter, and are illegal and unwarrantable.

The defender pleaded;—The intended street called Burlington Street not having been formed, and there being no obligation upon the defender to form said street, at all events *in hoc statu*, the pursuer cannot interfere with the defender in the use of his lands by temporary erections of the kind complained of.

The Lord Ordinary pronounced the following interlocutor:—"Finds that, according to the true import and effect of the writs and titles granted by him, the defender is not entitled to occupy or enclose the solum of Burlington Street, opposite to the warehouse belonging to the pursuer, so as to prevent the pursuer from having the use of the solum of Burlington Street opposite said warehouse: Therefore finds, declares, decerns, and ordains in terms of the conclusions of the action: Finds the pursuer entitled to expenses," &c.*

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* "NOTE.—In the view which the Lord Ordinary takes of this case the question is, what is the true import, nature, and effect of the feu-contracts or agreements of feu which the defender, Mr Field, entered into with his vassals? What did the parties to the feu-charters undertake to each other on the one side and on the other? What obligations are expressed, and what are necessarily implied?

"There are no questions in the present case as between singular successors, and there are none as to how far conditions of feu have been created real burdens on the property, for the question really is between the contracting parties themselves. The defender, Mr Field, is himself the granter of both the feu-charters in question, and the pursuer, although not the original feuar under these feu-charters, comes exactly in place of the original feuars, and is bound in precisely the same manner as they would have been.

"The feu-charters involved in the present question are two: (1) The feu-charter by the defender to Thomas Bernard, 29th June 1864, of the ground on which the pursuer's warehouse is now erected; and (2) The feu-charter by the defender to John Philip, 19th December 1867. The pursuer is now in right of the whole subject contained in the first feu-charter and of a portion of the ground embraced in the second. The question mainly turns upon the terms of the first feu-contract. By this deed the present defender feued to Thomas Bernard, the pursuer's author, an area of ground therein mentioned, which is described as bounded as follows:—'On the north by the area of ground feued by me to Andrew Morton, ironfounder, on the west by Bangor Road, on the east by Albert Road, and on the south by Burlington Street, and including the wall built upon the said area of ground, and forming the south boundary thereof, ... with free ish and entry to the said area of ground by all the roads or streets

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The defender reclaimed, and argued;—The description in the title was merely to shew the boundaries, and imposed no obligation on the superior

made or to be made by me for the use and accommodation of my feuars at Bowling Green.'

"At the date of this feu-charter the defender, Mr Field, was, and still is, proprietor and superior not only of the area feued, but of the whole ground around it on all sides. In particular, he was and is proprietor of the solum of the three streets by which the area is described as bounded on the east, south, and west sides. The north side is bounded by another feu granted by the defender. It is said that at the date of the charter only one of these streets, Bangor Road, was partially formed; but, however this may be, there is really no doubt about any of the streets, for, upon the back of the feu-charter, and signed by the defender himself, there is a very distinct plan of the feu, drawn to scale, shewing very completely Bangor Road, Albert Road, and Burlington Street, as bounding the feu on three sides thereof. It is said that this plan is not mentioned in the feu-charter as signed relative thereto. But if there was any force in this very technical objection, it is obviated by another plan annexed to Philip's feu-contract, in right of which the pursuer also is, and which is specially signed by the defender as relative to, the deed. Both plans shew all the streets in question, particularly Burlington Street, which is the pursuer's south boundary. It is perfectly plain, therefore, that the pursuer and his author took their feu and have built thereon, on the faith that it was to be bounded on three sides by the three streets specially named and described, and specially and precisely laid down on the signed plans annexed to the feu-charters.

"Now, the question is, can a superior, after granting such feu-charters and getting expensive subjects erected on the faith thereof,—it might be villas or shop property,—block up, without his vassal's consent, all or any of the streets bounding the feu on the faith of which the vassals had built, and free ish and entry by which he has expressly granted? It is vain to say the superior is leaving Bangor Road untouched, and only blocking up one side of the pursuer's feu, for if the superior has a right to block up one of the streets why not any of the streets, or why not all of them? And nothing can turn upon the fact, if it be the fact, that Bangor Road was partially formed at the date of the feu, whereas Burlington Street was not. In a question with the superior himself nothing can turn on such accidental circumstance. The pursuer says that Bangor Road was only formed the length of Morton's, that is, of a previous feu. The Lord Ordinary has allowed no proof of these facts, as he does not think them material to the issue.

"The Lord Ordinary is very clearly of opinion that, under feu-contracts like the present, the superior was bound, in common sense as well as in common fairness and honesty, at least to leave open the street ways by which his vassals' property was surrounded. It is true there is no obligation on the superior to make or form the streets, that is, to causeway or pave them, and he is not asked to do so, but at all events he must leave them open, and not cover them with buildings. The vassal would never have taken the feu had it not been surrounded by these streets. Its value was, or at all events might be greatly enhanced by its triple frontage, and it is out of the question for the pursuer to offer to prove that the true front only faces Bangor Road. The vassal is entitled to shift his front at pleasure and face any way he pleases, or, if he prefers, to face three ways at once. The pursuer was clearly entitled to make a gateway or access by Burlington Street. He is entitled to do so yet at any time—it is part of his contract. But this would be impossible if the defender is to be allowed to cover the solum of Burlington Street even with temporary buildings, and for an indefinite time. The same may be said of the pursuer's lights. He is entitled to have a street-way, and therefore uninterrupted lights on three sides of his feu. The Lord Ordinary thinks that the defender's offer to prove an 'understanding' that Burlington Street should not be made till a certain watercourse was drained is incompetent. Admittedly there is no obligation on any one to drain the watercourse, and nobody can tell when it will be drained.

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to form a street. The ground belonged still to him, and he was entitled to use it in any way that did not injure his neighbours. At all events, even if it were held that the superior was bound to form a street, he was not bound to form it at once.[1]

The pursuer argued;—Although the vassal was not entitled to enforce the obligation to have the streets constructed at once he was entitled to have the ground reserved for the purposes undertaken in the feu-contract. He had an interest to have space left vacant for light and air round his warehouse. Besides, he was entitled to ish and entry by the site of Burlington Street, even although it had not been made into a road.

LORD PRESIDENT.—This is a question between superior and vassal, and it seems to me that one class of the cases cited to us has no application—I mean that class of which the Trustees of Free St Mark's v. Taylor (7 Macph. 415) is the most prominent, where there are two parties deriving right from a common author, and under no obligation that is not imposed in the title. The question here is whether there is any agreement, express or implied, to form these streets, and whether that obligation is binding on the superior now—not as an obligation immediately prestable, but at some time or other to form roads or streets, and meantime to reserve ground for that purpose. Every case of this kind depends on the terms of the titles, and I think the Lord Ordinary was quite right in not allowing the inquiry which was asked for. The feu-charter in favour of Mr Bernard gives a subject which is described as bounded "on the west by Bangor Road, on the east by Albert Road, and on the south by Burlington Street," and on the north by another feu. Now, it is said on behalf of the defender that this subject, at the time when the feu was given off, had no frontage except to Bangor Road, because that was the only street which had been formed at that time. But it seems to me that if it had been

"On the short ground, therefore, of clearly implied contract, the Lord Ordinary holds the defender bound to leave the solum of Burlington Street unoccupied opposite the pursuer's property. He thinks the pursuer may himself pave or causeway Burlington Street at that point whenever he pleases. As to Albert Road, the principle has been recognised, for it has been shut up only by consent of everybody interested, and to these arrangements the defender was a party.

"The case chiefly relied upon by the defender was that of the Trustees of Free St Mark's v. Taylor and Others, 26th January 1869, 7 Macph. 415, 41 Scot. Jur. 232, but the cases are entirely different. Free St Mark's case was a case arising between singular successors deriving through a common author. It was a question there, not only whether real servitudes had been constituted, but whether mutual obligations towards each other had been effectually laid upon adjoining or conterminous feuars or vassals, and it was also a question how far the mention of an intended or projected street was really intended to bind any of the parties absolutely to make that street. None of these points arise in the present case, which is one directly between superior and vassal, and simply concerns the interpretation of an express or implied obligation. In the case of Dennistoun v. Thomson, 22d November 1872, 11 Macph. 121, 45 Scot. Jur. 73, which arose subsequent to that of Free St Mark's, there are important observations explaining the decision in Free St Mark's case, and one of the streets involved in Dennistoun v. Thomson was very similarly circumstanced to Burlington Street, and an implied obligation to leave the solum open was found effectual and was enforced. The present, however, is in all respects an *a fortiori* case."

[1] *Authorities* besides the cases referred to in the Lord Ordinary's note.—Barr v. Robertson, July 12, 1854, 16 D., 1049, 26 Scot. Jur. p. 567; Carson v. Miller, March 13, 1863, 1 Macph. 604, 35 Scot. Jur. p. 357.

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intended that Bangor Road should be the only access, the description of the subject would have been in very different terms, instead of describing it as bounded on three sides by streets. Then there occurs the clause "with free ish and entry to the said area of ground by all the roads or streets made or to be made by me for the use and accommodation of my feuars at Bowling Green." Now, if that clause had stood alone, and there had been nothing beyond it in the deed, and all we could have discovered about the superior's intention had been in the feuing plan, I should have said that this clause would not have given the feuar any right to any particular entry. But I think the meaning was to give him access by three roads, for in another part of the feu-charter there is laid on him an obligation to pay part of the expense of maintaining the streets and roadways "according to frontage." Now, I suspect the superior would be very unwilling to limit Mr Bernard's obligation to his frontage to Bangor Road, when, in fact, he would have all the frontage to Burlington Street as soon as that street was made; but what makes it quite clear to my mind is that there is a plan made for the purpose of this feu-charter. Now, it is quite true that the mere exhibition of a feuing plan imposes no obligation on the superior to make any particular road, or prevents him from altering the general plan unless it is expressly referred to in the charter. But here there is no reference at all. The plan was a special plan made for the purpose of this very feu-charter, and in it drawn to scale we have the streets laid down as part of the contract; it is a plan written into the charter. I think there is quite enough to shew an implied agreement to form these streets for the benefit of Mr Bernard and the other feuars. Then there is the matter of Albert Road, which I think throws a good deal of light on the views of the parties. The superior did not think he could supersede the formation of Albert Road without the consent of his vassals, and so he enters into an agreement with Philip and Bernard, by which it was agreed that the ground which had been intended for Albert Road should be feued to Philip, except a small part which Philip had to hand over to Bernard as the price of his consent to the abandonment of Albert Road. Mr Field would not have made that agreement unless he had thought that Bernard could have stopped him, nor would Philip have given up the ground. So it seems to me that this arrangement shews that Bernard had a *jus quæsitum*. It is not necessary to examine in detail all the expressions in the different deeds. I do not think the case is a doubtful one. There is quite enough to imply an agreement to set apart this ground for streets and roads, and I do not think the superior is in the meantime entitled to make any use of it inconsistent with that purpose.

Lord Deas.—There is no question here between singular successors in the superiority and singular successors in the property. All we have to consider is the fair construction of the contract between the superior and vassal. We have, first, to consider whether any right is given of ish and entry by these roads and streets, and if it is given, then we have to decide whether it is given immediately or only at a postponed period.

The argument founded on the roads and streets being declared the boundaries of the feu is a strong one. The superior describes the ground feued as bounded on three sides by what he calls roads or streets, and I do not see that he can dispute that these roads or streets are included in the privilege conferred of ish and entry. He might have described the ground as bounded on three sides by his other property, but that is not what he does.

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With regard to the feuing plan I agree with your Lordship that a reference to a plan of the particular subject endorsed upon the feu-contract is a very different thing, as regards its effect, from a reference to a general feuing plan.

The other question is, whether the right is given immediately. The vassal gets "free ish and entry to the said area of ground by all the roads or streets made, or to be made by me, for the use and accommodation of my feuars at Bowling Green." Now, some difficulty may arise from the double sense in which the word "make" is used when applied to streets. To make a street often means to pave a street, and that, I think, is the sense in which the word is used here. A street may be of importance to the vassal although it is not made in the sense of being paved, or a road may be of importance to him although it is not made in the sense of being metalled. The space on which the street or road is to be formed may be important in the meantime for light and air. It may also be important for access although neither paved nor metalled. If the right given here is not a present right the superior may exclude the vassal from possession of the area feued till the streets or roads are paved or metalled. The vassal could not till then build upon or make any profitable use of that area. That cannot have been the meaning of the contract. I think the reference to making the roads or streets was really introduced with a view to the vassal's obligation to pay a proportion of the expense of maintaining these roads or streets until that expense should be provided for by public assessment. I can have no doubt at all events that the interlocutor is right.

LORD ARDMILLAN and LORD MURE concurred.

THE COURT adhered, with additional expenses.

M'EWEN & CARMENT, W.S.—JAMES SOMERVILLE, S.S.C.—Agents.

No. 12.

Oct. 16, 1874.
Baird v. Glendinning.

SIR DAVID BAIRD, Bart., Petitioner and Respondent.—*Blair.*
PETER GLENDINNING, Respondent and Appellant.—*J. P. B. Robertson.*

Appeal—Sheriff-court Act, 1853, 16 *and* 17 *Vict. c.* 80, *sec.* 24.—In a petition for sequestration for rent in the Sheriff-court an interlocutor was pronounced, granting warrant on a judicial manager to make a payment to the petitioner. *Held* that this was to be regarded, in the circumstances, as an "interlocutor, giving interim decree for payment of money," in the sense of sec. 24 of the Sheriff-court Act of 1853, and that an appeal to the Court of Session was competent.

1ST DIVISION.
Sheriff-substitute of Haddington.
M.

THIS was a petition for sequestration for rent at the instance of Sir David Baird, Bart., against William Robertson, tenant of the farm of Whitekirk, and Peter Glendinning, the trustee on his bankrupt estate. The Sheriff-substitute appointed Mr James Ferguson Robertson to be judicial manager in the sequestration for rent, and subsequently pronounced the following interlocutor:—"Haddington, 30th April 1874.—The Sheriff-substitute having resumed consideration of this case, with the interim state of the intromissions of the judicial manager, approves of said state of intromissions so far as the judicial manager charges against the proceeds of the sales of the crop sequestrated the outlays made by him in labouring the farm in preparation for said crop: In respect the judicial manager has in his hands funds more than sufficient to meet the rent sequestrated for, due at the term of Candlemas, grants warrant to pay said rent to the petitioner, with the interest thereof, at the rate of £5 per centum per annum from the date at which the same became due till pay-

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ment; appoints the judicial manager to state in his account of intromissions any bank interest he is paid or is charged with; and appoints this cause to be enrolled for further procedure, when the whole sequestrated effects have been realised."

The respondent appealed to the Court of Session. When the case appeared in the Single Bills the petitioner objected that the action could not be appealed under the 24th section of the Sheriff-court Act of 1853. He maintained that it was not an "interlocutor giving interim decree for payment of money," nor was it a final interlocutor, as questions of the amount of interest to be charged required to be settled.

LORD PRESIDENT.—The Sheriff-substitute has pronounced this interlocutor—"In respect the judicial manager has in his hands funds more than sufficient to meet the rent sequestrated for, due at the term of Candlemas last, grants warrant to pay said rent to the petitioner, with the interest thereof, at the rate of 5 per cent per annum from the date at which the same became due till payment: Appoints the judicial manager to state in his account of intromissions any bank interest he is paid or is charged with; and appoints this cause to be enrolled for further procedure when the whole sequestrated effects have been realised."

It is objected that this is not an appealable interlocutor under section 24th of the Sheriff-court Act, 1853. But, on the other hand, it is said that a warrant ordaining an officer of Court to pay money is equivalent to an interim decree for payment. In strict construction there can be no doubt that it does not fall under the section of the Act. But the question comes to be, whether under interim decree an interim warrant is included. I think that it is within the policy, and also the fair meaning, of the statute. This is the proper, and indeed the only form to effect a payment of money, when the money is in the hands of an officer of Court. The Court will not give decree against one of its own officers, but will only order him to do what is necessary. It would be very inconvenient if the statute did not extend to a warrant of this kind. I am, therefore, for repelling the objection.

LORD DEAS.—The question is whether this interim warrant for payment falls under the 24th section of the Sheriff-court Act. I am not prepared to lay it down that every warrant for payment of money is an appealable interlocutor, but looking to the nature of this case and to all the circumstances I do not differ from the view taken by your Lordship.

LORD ARDMILLAN and LORD MURE concurred.

THE COURT repelled the objection.

HUNTER, BLAIR, & COWAN, W.S.—THOMAS WHITE, S.S.C.—Agents.

No. 13.

Oct. 17, 1874. Muir v. Muir.

2D DIVISION. Lord Mure. I.

WILLIAM HAMILTON MUIR AND ANOTHER, Pursuers.—*Black*—*Balfour.*
JOHN MUIR, Defender.—*Dundas Grant.*

Process—Reclaiming Note—Printing Record—Judicature Act, 1825, 6 *Geo. IV. c.* 120, *sec.* 18—*A. S.* 11*th July* 1828, *sec.* 77.—A defender was allowed to make extensive additions to the closed record, which introduced an entirely new defence, and formed the main subject of debate in the Outer-House. The Lord Ordinary having repelled the defences, the defender reclaimed, appending to the reclaiming note the print of the original record with the amendments in MS. *Held* that, considering the

extent of the additions, this was not sufficient compliance with the terms of the Judicature Act and relative Act of Sederunt 11th July 1828, sec. 77, which require the record to be printed and boxed with the reclaiming note, and the reclaiming note *refused* as incompetent. No. 13. Oct. 17, 1874. Muir v. Muir.

W. H. MUIR, S.S.C.—JAMES BARTON, S.S.C.—Agents.

THE LORD ADVOCATE, on behalf of the Commissioners of H. M. Woods and Forests, Pursuer.—*Sol.-Gen. Millar—Ivory.*
WALTER M'CULLOCH, Defender.—*D.-F. Clark—Marshall.*

No. 14. Oct. 20, 1874. Lord Advocate v. M'Culloch.

Salmon-Fishing—Prescription—Possession—Barony.—In an action brought against a proprietor of lands on the sea-coast to establish the right of the Crown to salmon-fishings in the sea *ex adverso* of his lands, the defender's titles shewed that his lands had formed part of a barony, of which the earliest extant title was a crown charter of confirmation and novodamus, dated in 1584, of the lands and barony, with fishings. By feu-charter, dated in 1587, the lands in question were disponed, with pertinents, by the baron to the defender's ancestor, fishings being mentioned in the tenendas clause only, and upon this charter the disponee was infeft. It was proved that the defender and his ancestors had possessed the salmon-fishings in question from time immemorial.

Held that the crown charter of 1584 being a sufficient title to salmon-fishings, if followed by prescriptive possession, and such possession having followed, the Crown was equally divested whether that possession had been by the crown vassal himself or some one deriving right from him, and that it was *jus tertii* for the Crown to found upon any defect, if such existed, in the transmission of the right from the crown vassal to the sub-vassal.

Observed that proof of immemorial possession of salmon-fishings by the defender and his ancestors raised a presumption that such possession had been enjoyed by the crown vassals from the date of the original grant.

Observed that if the question had arisen between the defender and the representative of the crown vassal the feu-charter of 1587, with the infeftment thereon, as explained by prescriptive possession, would have been a good title to salmon-fishings.

Observations on the effect of the tenendas clause in explaining the dispositive clause.

THIS was an action at the instance of the Lord Advocate, on behalf of the Commissioners of Woods and Forests, against Walter M'Culloch of Ardwall, concluding for declarator that the salmon-fishings in the estuary of the river Fleet, and in the sea *ex adverso* of the defender's lands and islands, belonged to the Crown, and that the defender had no right or title to these salmon-fishings. 2D DIVISION. Lord Young. R.

The pursuer averred that the defender held his lands under titles which contained no grant of salmon-fishings; and further, that he and his predecessors had not, under or by virtue of a barony title, or of a title *cum piscationibus*, or other title capable of being a basis for prescriptive possession, fished for salmon, grilse, or salmon-trout *ex adverso* of the lands; and *separatim*, that they had not done so for such a time nor in such a way as to give them a prescriptive right to the salmon-fishings *ex adverso* of the lands.

The defender set forth his titles, and averred that he and his predecessors had possessed the salmon-fishings under the said titles for time immemorial.

The earliest title produced by the defender was a crown charter of confirmation and novodamus, dated 18th March 1584, granted by King James VI. in favour of William Makculloch of Myretown, and Mary Makculloch his wife, in conjunct fee, &c. of the lands and barony of

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Cardiness, which, it was set forth in the quæquidem clause, had belonged to the said Mary Makculloch, and had been resigned by her in favour of her husband and herself, &c. By clause of novodamus in the same charter the Crown of new conveyed, disponed, and confirmed to the spouses the said lands and barony, "cum turre fortalicio manerie loco pomariis hortis molendinis silvis piscationibus partibus pendiculis annexis connexis outsettis et pertinen. earundem."

By feu-charter, dated 12th January 1587, bearing to be granted in implement of a prior contract, the said William and Mary M'Culloch feued out to their kinsman, William M'Culloch (therein designed as "in Nether Ardwall)," and his heirs and assignees, "totas et integras nostras quinque mercatas terrarum de Nethir Arduell antiqui extentus cum suis pertinentiis jacen. in nostra baronia de Cardirnes, et infra parochiam de Anwoth et senescallatum de Kirkcudbricht tenendas et habendas totas et integras prenominatas quinque mercatas terrarum de Nethir Arduell cum singulis suis pertinentiis prefato Villelmo M'Culloch heredibus suis et assignatis de nobis et nostris heredibus et successoribus dominis de Cardirnes in feudifirma emphiteusi et hereditate imperpetuum per omnes rectas metas suas antiquas et divisas pro ut jacent. in longitudine et latitudine in domibus edificiis boscis planis moris marisiis viis semitis aquis stagnis rivulis pratis pascuis et pasturis aucupationibus venationibus et piscationibus . . ." The charter contained a precept of sasine for infefting the disponee in the said lands "cum omnibus et singulis suis pertinentiis," upon which he was infeft by delivery of earth and stone.

William M'Culloch was succeeded by his son Thomas, who completed his title to the lands of Nether Ardwall by precept of clare constat and sasine thereon.

Thomas M'Culloch subsequently obtained a disposition, dated 27th February 1619, from William M'Culloch of Myretown, of the mid-superiority of the said lands with the pertinents as presently possessed by himself and his tenants. Following upon the procuratory of resignation in the said disposition, Thomas M'Culloch obtained from the Crown a charter of resignation, dated 29th March 1621, of the lands of Nether Ardwall, with pertinents, as possessed by the said Thomas and his tenants, fishings being mentioned only in the tenendas clause. He also obtained a separate precept of sasine of the same date, for infefting him in terms of the charter, upon which he was infeft.

Thomas M'Culloch had thus in his own person both the superiority and property titles to the lands of Nether Ardwall. From him the lands passed by a regular progress of titles to the defender. No separate titles under the feu-charter of 1587 were made up by any of Thomas M'Culloch's successors, and they continued to hold on apparency the base right created by the feu-charter of 1587.

In regard to a part of the fishings claimed by the Crown, those off the island of Knockbrex, the defender was in right of the crown grant of the island, with fishings; and the only question was as to possession.

A proof was led,* the import of which sufficiently appears from the opinions of the Judges. The Lord Ordinary (Young), on 17th March 1874, pronounced the following interlocutor:—"Sustains the defences, assoilzies the defender from the conclusions of the action, and decerns: Finds the pursuer liable in expenses," &c.†

* For the procedure in the Outer-House see opinion of Lord Ormidale, p. 37, before whom, as Lord Ordinary, the case originally depended.

† "OPINION.—I have considered this case since I heard it argued, and am now to state the opinion which I have formed.

"The purpose of the action is to claim for the Crown the salmon-fishings

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The pursuer reclaimed.

Argued for the pursuer;—The defender had no sufficient title to found specified in the conclusions of the summons. The defender resists the claim, on the ground that the fishings are part of the barony of Cardiness, and belong to him as proprietor of that part of the barony which is adjacent to the waters in which they exist. The Crown answers that there is no express grant of salmon-fishings either in the title to the barony before it was divided, or in the defender's title to the part belonging to him, and that there being no mention of fishings in the dispositive clause of any of the grants to the defender or his ancestors, but only in the tenendas, he can take no benefit from prescriptive possession, assuming it to be proved, which the Crown disputes.

"The original grant of the barony of Cardiness has not been produced, and is probably irrecoverable. There is no evidence regarding it. The earliest title produced is a crown charter of confirmation and novodamus, dated 18th March 1584, whereby the barony, as a previously created and then existing estate, was granted and confirmed to William M'Culloch of Myreton, and Maria his wife, and the longest liver, in conjunct fee, and to their heirs. This charter does not specify salmon-fishings, but only fishings. The barony might nevertheless include the salmon-fishings in question as part of it, although prescriptive possession would, by a rule *positivi juris*, be the only admissible evidence of the fact. When there is an express grant of salmon-fishings the matter is clear on the face of the title, and there is no room for extraneous evidence, unless, it may be, regarding the locality or extent of salmon-fishings granted in general terms. But as a barony does not necessarily or usually consist of land only, but may, and generally does, comprehend rights, privileges, and franchises which frequently are not specified, the question whether or not any particular right not specified is part of the barony is allowed to be cleared by extrinsic evidence, subject, in the case of salmon-fishings and some other cases, to the rule already noticed, that only prescriptive possession will suffice. The Crown does not dispute the law as thus stated, whereby extrinsic evidence of prescriptive possession is admitted to shew that a barony comprehends salmon-fishings, but contends that it is inapplicable to the case of the defender, who is not proprietor of the barony of Cardiness, but only of the lands of Nether Ardwell, which, although part of the barony, were separated from the remainder by ordinary alienation, as regards the property, in 1587, and as regards the superiority in 1619. This contention raises a large and important question, for it may, according to the decision of it, seriously affect the rights of proprietors in all cases where a barony has in course of time come to be divided, so as to be held in two or more distinct properties. As the charter of 1584 grants the lands *cum piscationibus*, it is almost superfluous to notice that, even without the element of barony, a question involving similar considerations would have arisen, it being clear law that in an ordinary title to lands fishings may be interpreted to mean salmon-fishings, upon evidence of prescriptive possession. It is, however, proper to consider the question with reference to the barony title, and unnecessary to determine how the rights of parties might have stood had there been no barony.

"The description of the barony in the charter of 1584 is—'Totas et integras terras et baroniam de Cardiness infra senescallatum nostrum de Kirkcudbryt,'—a description which necessarily left the subjects included to be ascertained, if a dispute arose, by extrinsic evidence; and while the barony remained entire, and was held as a single estate, it is not doubtful that it was competent by such evidence to prove that the salmon-fishings now in question were included. But the barony has since been divided by alienation; and the defender is now proprietor, and he and his ancestors have since 1587 been proprietors of that part of it which adjoins the waters the salmon-fishings whereof are in dispute. The question is, whether, assuming such prescriptive possession of these fishings, by himself and his ancestors since their acquisition of this part of the barony, as would have sufficed to shew that they were comprehended in the barony, had the possession been by the proprietor of the barony as an undivided estate, this

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possession. There was no grant of fishings in the dispositive clause of the feu-charter of 1587, which was the foundation of the alleged right, effect shall be denied to it in a question with the Crown, because the title is not to the whole barony, but only to that part of it to which the particular fishings, if comprenended in the barony, were naturally attached. I think this question must be answered in the negative. It seems to me reasonable to regard the possession, as it may be proved, of the defender and his ancestors as a continuance, with respect to their part of the barony, of the previous possession while the barony was entire. How long the barony existed as a subject of possession prior to 1584 does not appear, nor is it material, for with respect to salmon-fishings which are not of a character or value to be the subject of written leases or records, evidence of possession cannot go further back than human memory reaches, while if it goes so far, it is lawful, and, in the absence of anything to the contrary, reasonable, to carry it back by presumption as far as may be necessary to satisfy the requirements of law.

"But the Crown further maintains that the defender's title to Ardwell,—the part of the barony of Cardiness belonging to him,—contains no grant of salmon-fishings in the dispositive clause of any of the grants relied on, and that the mention of fishings in the tenendas is insufficient as a foundation for prescriptive possession. I am not satisfied that the authorities on which the Crown relies for this contention are applicable to the titles here, and am rather inclined to think that these titles, followed by prescriptive possession, assuming it to be proved, are sufficient on the ordinary law of prescription. But in the view which I take of the case it is unnecessary to dwell on this aspect of it. The defender's lands of Ardwell are in fact part of the barony of Cardiness as it existed at and prior—how long prior is unknown—to the year 1584, and his titles bear that they are so. Further, they are in fact contiguous to the waters in which the fishings in question exist, so that these fishings, if part of the barony, naturally attach to them. The defender undertakes to prove by legitimate evidence that these fishings are and have all along been part of the barony of Cardiness, and consequently were alienated from the Crown when the barony was granted, and I am of opinion that his title is sufficient to entitle him to prove this in answer to the present action at the instance of the Crown. His right was not derived from the Crown, but from the baron, although he now holds from the Crown the mid-superiority created by the baron's feu-charter of 1587, and I am not of opinion that the criticisms made by the Crown on the terms of his title from the baron are sufficient to preclude him from shewing, as in right of the baron with respect to this part of the barony, that the Crown has no right to the fishings which they claim, in respect they were alienated by the Crown along with the barony, of which, assuming prescriptive possession to be proved, they were a part. To express the same thing in other words, the possession of the defender and his ancestors is available against the Crown to shew that the fishings in question are part of the barony of Cardiness, and this being shewn, their title to that part of the barony, to which, from adjacency, the fishings naturally attach, is sufficient to sustain the possession, at least in a question with the Crown, to whom any defect in the title, as in a question with the author of it, is *jus tertii*. I do not think the title defective, but it is, in my opinion, sufficient for the decision that the Crown, claiming the fishings against the defender as proprietor of part of the barony, cannot object to his shewing, *habili modo*, that they are comprehended in the barony, and so do not belong to the Crown, to whatever part of the barony, since its division, they may now pertain.

"With respect to the evidence of possession, considered, as I think it ought to be, with reference to the character and value of the fishings, I am of opinion that it is sufficient. The fishings are, from geographical position and natural causes, of inconsiderable value, and the possession has corresponded to what was reasonably to be expected. For upwards of forty years there has always been some possession, more or less, of a sufficiently marked character to be matter of evidence, though the subject was plainly never regarded as important or valu-

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nor in the crown charter of 1621; and this want could not be supplied by the mention of fishings in the tenendas clause.[1] Further, the Crown was not divested of the salmon-fishings in question, unless they formed part of the barony of Cardiness. A barony title was sufficient to enable the baron to prescribe a right of salmon-fishing, but there was no proof and no presumption that there had been any exercise of the right by the baron at the date when the defender's lands were feued. Subsequent possession by the defender and his ancestors was not possession under a barony title, for a barony could not be communicated by a subaltern right.[2]

Argued for the defender;—The renewal of the barony title in 1584 was sufficient to divest the Crown, if the possession following upon it had been sufficient to explain it as a grant of salmon-fishing. In a question with the Crown, possession by the defender and his ancestors was equivalent to possession by the baron. As tenants possessed for their landlords, so vassals possessed for their superiors, though on their own account, if the subject was part of the feu. In the absence of any trace of the commencement of possession on the part of the defender and his ancestors, this possession must be presumed to have been a continuance, as regards their part of the barony, of the possession by the barons of Cardiness, and to have extended back to the original creation of the barony.[3] The word "fishings" in the barony title having been established so as to mean salmon-fishing as a pertinent of the adjacent lands, the conveyance of the lands with pertinents was a sufficient transmission of the right, especially as explained by mention of fishings in the tenendas, provided the possession of salmon-fishing under the titles had been uninterrupted.[4] The defender was entitled to found on the base right created by the feu-charter of 1587, which he possessed on apparency, as a good prescriptive title, although not renewed by subsequent in-

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able, not being so in fact. The material thing is, that the defender and his predecessors always asserted their right, making such use of it as was to be expected looking to its character, and that neither the Crown nor any other ever interfered to object, or assert a contrary right. If there was little possession, there was little to possess; and the defender and his ancestors had it all without dispute. It is, in the absence of anything to the contrary, reasonable to presume, as matter of fact, that this has always been the state of things, although the actual evidence covers only recent times.

"With respect to the little island of Knockbrex, which the defender holds on a separate title *cum piscationibus*, I have only to observe, that while there is, according to the evidence, nothing worthy of the name of a salmon-fishing on its shores, such fishing as was possible was practised by the defender and his predecessors, or with their permission.

"I am therefore of opinion that the decision must be against the Crown.

"I propose to put the judgment without any findings in point of fact—which I think unnecessary—sustaining the defences, and assoilzieing the defender from the conclusions of the action, with expenses."

[1] Stair, ii. 3, 60; Erskine, ii. 3, 23 and 24; Earl of Aboyne v. Farquharson, Nov. 16, 1814, F. C. and H. of L. April 22, 1818, 6 Paton, 380; Agnew v. Magistrates of Stranraer, Nov. 27, 1822, 2 S. 42 (N. E. 36.)

[2] Stair, ii. 3, 45; Erskine, ii. 3, 46; Montgomerie v. Dalrymple, March 2, 1813, F. C.; Baird v. Fortune, April 25, 1861, 4 Macq. 127, 33 Scot. Jur. 437.

[3] Lord Advocate v. Sinclair, June 14, 1865, 3 Macph. 981, 37 Scot. Jur. 530—(see especially opinion of Lord Curriehill), aff. June 7, 1867, 5 Macph. (H. L.) 97, 39 Scot. Jur. 459.

[4] Lord Advocate v. Sinclair, *supra*.

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feftments.[1] He did not require, therefore, to found upon the crown charter of 1621. But that charter was precisely in terms of the disposition, and procuratory on which it followed. If the right of salmon-fishing was resigned, it was re-granted. If it was not re-granted, it was not resigned, and still remained in the person of the original crown vassal in the barony. In either view, the Crown had no right to it.

At advising,—

LORD JUSTICE-CLERK.—There are some very important questions raised in this case, out of proportion to the value of the right in dispute; but as they have been raised, we must decide them.

The action is one at the instance of the Crown, for the purpose of having it declared that the Crown is in right of the salmon-fishings mentioned in the summons, lying along the river Fleet, and *ex adverso* of the defender's lands of Ardwell; and to have it found that Mr M'Culloch, the defender, has no right or title to these salmon-fishings. The defender defends himself upon his titles; and he says that he and his predecessors have been in possession for time immemorial. If he has a title to prescribe, and prescriptive possession, that will be sufficient.

1°. The first question in all such cases is of course the possession. The Lord Ordinary has found that the defender has proved his allegation in regard to possession; and upon the best consideration that I can give the proof I concur in the Lord Ordinary's view. The proof of possession is not exuberant undoubtedly, but it is exclusive as far as it goes. It is not exuberant,—not because the defender and his predecessors did not try to catch salmon, but apparently because there were very few salmon to catch, or at least they were not able to catch them. But the right of salmon-fishing may be exercised although nothing is caught; indeed, that is not at all an uncommon result of that occupation. And, therefore, on the whole matter, looking to the evidence, especially of Mr M'Culloch himself, which is very distinct and clear, and at the same time candid, and to the nature of the possession which is proved, I think there is sufficient proof of immemorial exercise of the right of salmon-fishing along the shores of the Fleet *ex adverso* of the defender's property. There is not the slightest trace of any one else, without the authority of Mr M'Culloch, ever attempting to use the right. Now, if that be so, it has a most important bearing on all the other questions.

2°. The next question is, when must this possession be presumed to have commenced? Now, I imagine that it must be presumed to have been contemporaneous with the original grant or title to which it has been attributed. That was laid down, on the authority of Lord Stair, by Lord Curriehill in the case of Sinclair,[2] in some important observations. And Lord Cranworth, in the same case, says, in the House of Lords, that the English rule is the same. The result is, that the possession, being from time immemorial, must be held to have commenced with the right or title to which it is attributed. It may be different if there be proof of the commencement of the possession, but otherwise this presumption is consistent with principle as well as with reason, for undisputed possession is the indication and the fulfilment of a valid title.

[1] Caitcheon v. Ramsay, Jan. 22, 1791, M. 10,810; Waddell v. Pollock June 19, 1828, 6 S. 999.

[2] Lord Advocate v. Sinclair, June 4, 1865, 3 Macph. 981, 37 Scot. Jur. 530 aff. 5 Macph. H. of L. 97, 39 Scot. Jur. 459.

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A second general principle is laid down by Lord Stair in words which, in this case, have a very important effect. He says (b. 2, t. 1, sec. 26),—"So effectual is possession *active*, besides that it is the ground of prescription whereby property and all other rights are introduced; and *passive*, sufficient to hold out all others who have not a good right, and it is always favourable in dubious cases." And then, he says,—"Possession, as distinct from right, is ascribable only to that title by which it did begin, in prejudice of him from whom the possession was acquired, and to whom it must be restored, notwithstanding any other right in the pursuer to which he might ascribe it, and which, after he had quitted the possession, might recover it. But as to all others from whom the possession flowed not, the same may be defended upon all rights in the possessor, or him from whom he hath tolerance or right." And, therefore, in this case, when the right to possess is challenged by a third party, who is not the immediate author of the possessor, the latter may defend himself on his author's title, whatever right he himself may have to the subject possessed; for it is enough that the true owner has authorised or tolerated a possession with which no one else has an interest to interfere. It also follows that the possessor may found upon his own possession in fortification of his author's title, because, whether his right to possess be absolute as between him and his author, or only temporary, as under a tack, or precarious, as by bare permission or tolerance, it is by authority and in fulfilment of his author's right.

We come now to consider the feudal titles in this case. There can be no doubt that, before possession can have the effect of an express grant of salmon-fishing, there must be a title and sasine to which the possession can be referred, and this may be either a grant with the general words *cum piscationibus* or a general grant of barony. In both these cases the right is carried, not as a separate tenement, although salmon-fishing may be of course a separate tenement, but as the accessory or pertinent of that which is expressed; and in both,—that is, both in the barony title and in the title *cum piscationibus*,—the possession serves to define the extent of what is comprehended in the general words. I apply these general principles, which I think are sound, to the position of the titles in the present case. The first title which we have is not an original title. It is a grant of confirmation and novodamus,—confirmation of a prior title and a new grant, the prior title being a right of barony in the person of Mary M'Culloch, and the re-grant being a grant to her and her husband, who are the grantees in the charter of 1584. It seems to have been assumed on the part of the Crown that, prior to 1584, it could not be said that there was any title to the salmon-fishings of this portion of the barony vested in the author of Mr M'Culloch, the defender. I doubt that very much. The possession, as I have shewn, must be assumed to have been contemporaneous, not with the charter of confirmation and novodamus, but with the original crown grant. The original crown grant is not before us, and we do not know the date of it, but this we do know, that it was a grant of barony, and that it must have been granted before 1584,—how long before we cannot tell. After the long possession for three hundred years I should have been very much inclined to say that that was quite enough for the decision of the present case, and that the presumption was that the possession had existed before 1584, and that it existed upon a sufficient title, and that it had existed long enough to shew that the barony included the fishings, it being quite certain that the barony title was antecedent, and probably long antecedent to the title of 1584. And that is all the stronger that

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the date of these rights is prior, both to the introduction by the statute 1617 of the long positive prescription, and also prior to the institution of the registers. But I do not think it necessary to put my opinion in this case upon that ground. It is certain that the charter of 1584 was quite a sufficient title on which, if followed by possession, the right of salmon-fishing might be acquired, but it was followed by possession, and has been so until now; and on the grounds which I have already stated I do not think it signifies in the least to this challenge on the part of the Crown whether the possession has been by the crown vassal himself, or by one deriving right from the crown vassal, or by one whose possession was tolerated and permitted by the crown vassal. The Crown was thus effectually divested of the right of salmon-fishing, and it is wholly immaterial that the date of the original right is unknown.

It was farther maintained in argument for the Crown that neither the feu-right of 1587—that is, the feu-right granted by the crown vassal under the charter of 1584, which is a title on which Mr M'Culloch and his predecessors have possessed from that date till now—nor the disposition of the *dominium directum* in 1619, conveyed the salmon-fishings on any title on which a right to them could be acquired by prescription; and it seemed to be contended that the original crown vassal was left with a title to prescribe, but without possession, while his sub-vassal in the *dominium utile*, and his disponee in the *dominium directum*, had possession without a title. But the reasoning is fallacious, for even if the crown vassal had not transferred to his sub-vassal the title to prescribe, as in a question with him or his successors, his sub-vassal in the lands is entitled to protect his possession by pleading his author's title against the Crown, and is also of course entitled to plead his own possession in fortification of that title. It is good adverse possession against a challenge by a third party.

Putting aside for the present the effect of the crown charter of resignation, as far as the superiority title is concerned, I go on to consider whether the feu-right of 1587 is not in itself sufficient to support the possession of the salmon-fishings, or to confer a title to prescribe as in a question with the crown vassal from whom these rights flowed. I am of opinion that that is not the question with the Crown, who is a third party; but if it were necessary to decide it, I entirely concur in the view that the Lord Ordinary has taken of that question, and in the very able reasoning on which it appears that he proceeded. In regard to the privileges implied in the *nomen universitatis* of a barony, it does not follow that if a portion of the barony is parted with, all the privileges will follow that portion. It is clear that some of them cannot be so communicated; but the title to the lesser *regalia* as pertinents of the barony will pass to the disponee of that part of the barony to which they are naturally pertinent. Prescriptive possession will shew conclusively that such is the case. As possession defines and fixes the limits of the barony itself, so possession will also define the extent of the part of it which is given off. It would have been a very hopeless contention on the part of the representative of the original crown vassal, assuming that he originally had a right to the salmon-fishing by his grant and possession, that the salmon-fishing still remained with him after a possession for 300 years by the sub-vassal.

But apart from the barony title, on which I do not enlarge, because the Lord Ordinary has exhausted that part of the case, I am very clearly of opinion, on the terms of the feu-right itself, that after the vassal had possessed for the prescriptive period the crown vassal could not have disputed his right. I think,

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that although the extent and nature of the subject is properly to be looked for in the operative and disposing words of the feu-right, and not in the tenendas, this rule is not conclusive. This charter proceeds on a contract, the terms and tenor of which profess to follow, and the question which would have arisen between the granter of the charter and his vassal would have been, what was the true import and meaning of the contract between the parties as it related to the fishings. To ascertain this the whole deed may be consulted, and when we find the words *cum piscationibus* in the tenendas we may, and indeed must, infer, as a matter of ordinary reasoning, that the contract referred to the fishings as well as to the other pertinents enumerated in the tenendas. No doubt the reference to the contract might not have applied in a question with singular successors, but still it is not to be thrown out of view in construing and ascertaining the true meaning of this feu-right. In regard to the question, how far the tenendas can be looked at as qualifying the subject-matter of the disposition, it is quite true that in crown charters this is a matter which has been somewhat strictly dealt with, on the principle that the Crown is not to be assumed to give off more than the words of the dispositive clause express. Even that, however, in the case of Sinclair, was made to yield to the manifest and reasonable construction of the whole instrument, and I simply refer to Lord Cranworth's and Lord Colonsay's views expressed in their opinions in the House of Lords as putting this matter now, as matter of Scotch conveyancing, entirely beyond doubt. The passage quoted from Mr Menzies' Lectures by Lord Colonsay [1] in that opinion seems to express the true rule, viz., that although in an original right it cannot be held to have the effect of a dispositive clause, still the tenendas may be looked at, especially in a question in regard to the matters which it is the appropriate clause for expressing, in order to shew what was the meaning of the grant, and the tenendas is the appropriate clause for specifying pertinents. But I am not aware of any case in which the same strictness has been observed in feu-charters from a subject superior, and I think the terms of the tenendas of the charter of 1587, coupled with the rest of the instrument, afford a sufficient support for the possession of the salmon-fishings which has followed.

It only remains to say one word upon the argument founded on the crown charter of resignation; but it will be observed that the defender does not require to defend his possession upon that charter at all. He holds still on apparency under the base right constituted in 1587; and if he has a good right under that it is wholly immaterial to him what the effect of his crown charter of resignation may be. But I shall only say that it seems to me that this is a much stronger case than the case of Sinclair, where it was very questionable whether the title had been continued through the progress. But in the present case the result is simply this,—there is a title of barony in the original crown vassal; he first gives off the *dominium utile* by a feu from himself, and then he conveys to his vassal the *dominium directum*. The disponee resigns in the hands of the Crown for new infeftment, and the charter of resignation is expressed in the same terms as those of the original disposition. One of two things follows, as was put in the case of Sinclair. If the title to prescribe a right to the salmon-fishings was constituted by the conveyance of the *dominium directum*, and was resigned by the vassal, it was re-granted, because the terms are precisely the same. If, on

[1] 5 Macph. H. of L. 106, 39 Scot. Jur. 463; see Menzies' Lectures, 3d ed. p. 551.

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the other hand it was not re-granted, then it was not resigned, and it was nc conveyed, and it remains still in the person of the original crown vassal in th barony. Whichever way that question is solved the result is the same; and am of of opinion that there is no ground whatever in any of the contentions th have been maintained for this challenge on the part of the Crown.

Lord Neaves.—The views now stated, both as to the facts of this case and to the law, are in perfect accordance with those I have arrived at. I cannot di tinguish this case from that of Sinclair. Perhaps, if there is any difference, t difference is in favour of the present case. The case of Sinclair was one ab argued, carefully considered, and authoritatively decided. It was not a unani ous judgment in this Court. There were three Judges on one side and two the other, but that circumstance, if ultimately the judgment stands in the Cou of last resort, gives additional weight to any judgment pronounced, because assures us, which we cannot read the report of the case without seeing, that eve point involved in the questions at issue was gravely considered and carefully d posed of. The opinions on the other side were of great weight. Lord M kenzie in the Outer-House, and Lord Deas in the Inner-House, brought forwa all the views adverse to the judgment that could be urged, and brought th forward in the strongest way. It was decided here by a judgment of hi authority—Lord Colonsay, Lord Curriehill, and Lord Ardmillan—against t Crown, and that judgment when taken to appeal was unanimously confirm by the three Judges who disposed of it in the House of Lords. One of th was Lord Colonsay who had joined in the judgment in the Court below; l Lord Colonsay, as we all know, was of so candid a mind that he would not h been slow to express a different opinion if he had been satisfied that there room for questioning the judgment that he had formerly concurred in. Th three Judges in the House of Lords, Lord Colonsay and two English Chancell were united in the ultimate judgment, and made the case of Sinclair one of cl authority that must be followed.

In that case various points was stated,—I do not say were established,—beca after all they were points that could be deduced from the existing authorities the law of Scotland before. Your Lordship has adverted to these. There is point that immemorial possession is always to be traced by presumption *retr* the time when it might have begun under the titles that existed, whatever th were. The other point is that a grant of barony is a foundation, without other special clause, for acquiring by prescriptive possession a right of salm fishing. And then there came questions of nicety, which may occasionally a where there has been a splitting of a barony—whether that will give to eac the parties who are disponees a right to salmon-fishing. There may be a pute between them as to who shall have it—whether the grantee shall have i whether the disponer shall retain it. But it could never be maintained that splitting into parts of a barony, which had a right of salmon-fishing, would invest the Crown with that right to salmon-fishing which had been establis against it in a habile manner. Here I see no reason to doubt that the righ salmon-fishing was alienated under the barony title in such a way as to di the Crown of it altogether.

Your Lordship has well said that the success of salmon-fishing is not the t that is given. It is the right to fish that is given, with or without success, there will be many a fishing without success; but if there is the continued a

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tion and exercise of the right to fish under a barony title, excluding the Crown, I see no reason for holding that it may not be quite good to that part of the lands with which the fishing has physically been connected.

I would further say, that suppose there was a base right given, that was sufficient to establish a right to salmon-fishing. It is not necessary that that base right which excluded the Crown at first be continued by renewals. Unless there follows some non-entry on a failure to renew, the absence of a renewal does not reinvest the superior. It may be possessed for years on apparency without any renewal of the right, and nothing will reinvest the Crown but either an utter cessation of possessing so as to bring out the Crown's supereminent title as the only existing one, or a resignation *ad remanentiam*, of which there is not the slightest vestige or allegation in this case.

I think it plain that there was immemorial possession here, and that from the continued assertion of that right, from time to time, to the exclusion of the Crown, that was sufficient to establish the right of this party, whether he stands upon the defensive merely, or would put himself in the further situation of taking an active title, which he does not require to do, in order to protect himself against the claim. On these grounds, I think, acting in complete accordance with the case of Sinclair, and having in that case a precedent and warrant for all we are now doing, this case must be decided in the way your Lordship has proposed, by adhering to the interlocutor of the Lord Ordinary.

Lord Ormidale.—This case originally depended before me as Lord Ordinary in the Outer-House; and a very elaborate argument was addressed to me there on the part of the Crown, with the view of satisfying me that no relevant defence had been stated, and that the pursuer was entitled at once to judgment independently of any inquiry as to the state of the possession,—it being maintained that it was of no consequence what the possession was,—there being an essentially defective title. I could not adopt that view, but, on the contrary, as explained in a note to my judgment allowing a proof, I indicated pretty plainly what would probably be the result, according to the views I then entertained of the case, if possession was proved to be with the defender.

Now, there was a proof, which was adduced before me as Lord Ordinary, which I have since carefully considered, and I concur entirely with your Lordships and with the Lord Ordinary in thinking that in the particular circumstances of the case the possession has been sufficiently established. In the words of the Lord Ordinary, the proved possession was little because there was little to possess. I think it is very obvious indeed that there was little to possess, and accordingly the possession is not of a very large or extensive character. But considering the nature of the subjects, the lie of the lands *ex adverso* of which the fishing is situated, and all the other circumstances, I think we have here all the possession that could naturally or well have been expected. And there is no other party interested by the proof that ever on any occasion laid claim to or exercised any right whatever on the river Fleet or estuary, so far as the present contention is concerned, to the salmon-fishing.

Therefore, assuming that there has been possession, the next consideration for the Court is, whether any of the points which were made on the part of the Crown in the argument addressed to us can entitle the pursuer to prevail. I so entirely concur in the views so well expressed by the Lord Ordinary in the opinion with which we have been furnished in an appendix that it might probably be

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sufficient for me to refer to that opinion as embracing my own views, and the opinion which I had formed when I allowed the proof. But out of respect to the very able and elaborate argument which was addressed to us here on the part of the Crown I think it right to notice what appeared to me to be the three chief points in that argument.

The first point which seemed to be relied upon by the pursuer was to the effect that, as there is no express disposition or grant of salmon-fishings, or of fishings at all, in the defender's title, the reference to fishings in the tenendas clause of his title cannot supply this defect, let the possession have been what it may. Now, I am not to dispute that, as a general rule, the dispositive clause of a charter or disposition must be looked at in order to ascertain what are the subjects of the grant or conveyance. But quite consistently with this rule, not only the whole terms of the dispositive clause itself, but also (when these, as in the present instance, from their generality or otherwise, require or admit of construction), all the other clauses, including the tenendas, can be competently examined and considered, in order that the true and full meaning of the dispositive clause may be determined. Opinions in accordance with this view appear to have been expressed in the House of Lords in the case of the Lord Advocate v. Sinclair,[1] particularly by Lords Cranworth and Colonsay. The former observed, —"I do not question the general proposition that nothing which is not mentioned in the dispositive clause can be held to pass merely because it is included in the tenendas clause. I will assume further that the word 'pertinents' cannot *prima facie* be taken to include fishing. But in construing crown charters, as well as other written instruments, common sense suggests that we must look to the whole contents of the instrument before we can say with certainty what is the true meaning of any particular clause in it." And afterwards the same noble and learned Lord remarked that "there cannot be any principle which prevents us from discovering the true meaning of any part of an instrument by a fair examination of the whole." Lord Colonsay, again, who followed Lord Cranworth in delivering his opinion, does not repudiate, but on the contrary, substantially adopts, and by illustration and authority supports and confirms it. I cannot therefore give effect to the pursuer's argument, founded on the circumstance that in the defender's title-deeds, or some of them, essential for his case, fishings are not expressly mentioned in the dispositive, but only in the tenendas clause, for I think that, in the words of Lord Cranworth, looking at the whole terms and contents of the deeds referred to, there is no room for reasonably doubting that a dispositive clause,—such, for example, as that which we find in the charters and dispositions constituting the title of the defender and his predecessors, to the effect that their lands were conveyed with annexis, connexis, parts, pendicles, and pertinents,—is sufficient (keeping in view the reference to fishings contained in the tenendas clause, as well as the whole tenor and contents of the deeds) to carry salmon-fishings.

The second point relied upon by the pursuer is even more technical and formal in its nature than that which has just been noticed, and I am very clear that it is not well founded. It is to the effect that as the symbols of net and coble appropriate to the conveyance of salmon-fishings are not expressed in the defender's title-deeds it cannot be held that any such right has ever been vested in him or his predecessors, let the possession have been what it may, and sup-

[1] 5 Macph. H. of L. 97, 39 Scot. Jur. 459.

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posing the titles to be otherwise unobjectionable. But it is only fair I should explain that although a proposition to this effect appeared to be maintained for the pursuer at the outset of the discussion I understood it to have been latterly abandoned, or, at any rate, not attempted to be enforced or supported. But, whether I am right in this or not, it appears to me that the proposition, as applicable to such a case as the present, where a right to salmon-fishing, separate and independent of certain specified lands, is not the subject of conveyance, is wholly untenable and inconsistent with long established practice and precedent.

If I am right so far, nothing more is necessary for a determination of the present controversy in favour of the defender. It may be right, however, that I should notice the only remaining point in the pursuer's argument, to the effect that although the possession of the defender and his predecessors, if it had applied to the whole barony lands as an undivided estate, would have been sufficient to support a right to salmon-fishings, it can have no such effect in regard to the separate portion of these lands which were separated from the barony, and feued out to the defender's ancestor. In making this point the pursuer has omitted, I think, to give sufficient effect to the circumstances,—1st, that the possession of the defender and his predecessors of the salmon-fishings *ex adverso* of the lands belonging to them has been proved to have existed for time immemorial; 2dly, that these lands are part of a barony, the titles to which are admittedly sufficient, with prescriptive possession, to constitute a right to salmon-fishing; and, 3dly, that there is neither proof nor even allegation by the pursuer that possession of the salmon-fishing *ex adverso* of the barony lands, or any part of them, has ever, since the creation of the barony, been had or exercised by the Crown or any party other than those in right of the lands.

Having regard to these circumstances, and giving them the effect to which they are fairly entitled, it appears to me to be a perfectly legitimate conclusion that, at the time the defender's lands were feued out the party then in right of the barony lands, including that portion of them now belonging to the defender, was in possession of, and had a right to, the salmon-fishing *ex adverso* of the whole of them, and, if so, that the defender's predecessor got along with his lands the salmon-fishing *ex adverso* of them. It may be impossible now, owing to the lapse of time, to establish this by direct and positive evidence; but that is not necessary, for, according to a well established principle in the law of prescription, noticed by Lord Curriehill in Sinclair's case, possession, when proved to have existed for time immemorial, is held, independently of direct or positive evidence, to draw back to the earliest title to which it can be ascribed; or, in the words of Lord Young, it is only "reasonable to regard the possession of the defender and his ancestors as a continuance with respect to that part of the lands of the previous possession while the barony was entire."

With these observations, I concur with your Lordships in opinion that the Lord Ordinary's interlocutor ought to be adhered to.

THIS interlocutor was pronounced:—"Refuse the reclaiming note, and adhere to the interlocutor complained against: Find the pursuer liable in additional expenses," &c.

DONALD BEITH, W.S., Solicitor H. M. Woods, &c.—WILSON & DUNLOP, W.S.—Agents.

No. 15.

Oct. 23, 1874.
Pirie v. Meikle.

WILLIAM PIRIE, Pursuer.—*Rhind.*
ARCHIBALD MEIKLE, Defender.—*Mackintosh—J. P. B. Robertson.*

Expenses—Jury Trial.—An action of damages for slander and a counter action of damages for assault were tried together before the same jury. In the action for slander the jury found for the pursuer on one of the issues, and assessed the damages at 1s. The Judge refused to certify that the case was suitable for jury trial under section 40 of the Court of Session Act, 1868. In the counter action for assault the jury found for the pursuer, and assessed the damages at £5. *Held*, in the circumstances, that the pursuer of the action for damages for assault was entitled to expenses.

1ST DIVISION. M.

IN April 1874 Archibald Meikle raised an action against William Pirie and George Pirie, concluding for £500 of damages for slander.

In June 1874 William Pirie raised an action against Archibald Meikle for £500 for assault.

Both actions arose out of a dispute which took place between the parties in a hotel in Musselburgh. Issues were adjusted, and the two cases were tried together before the Lord President. In the action for slander the jury gave a verdict finding for the defenders, the Piries, on several of the issues, and for the pursuer, Meikle, on an issue, "whether the defender, William Pirie did say of and concerning the pursuer that he was a kip-keeper (meaning thereby a brothel-keeper)," and assessed the damages at 1s. The Lord President refused to certify that the case was suitable for jury trial under section 40 of the Court of Session Act, 1868.

In the action of damages for assault by Pirie against Meikle the jury gave a verdict for the pursuer, Pirie, and assessed the damages at £5. The pursuer now asked the Court to apply the verdict, and find him entitled to expenses.[1]

LORD PRESIDENT.—The impression which I have formed of these cases, which I tried, is that they arose out of a discreditable brawl in a public-house. The pursuer of the action for slander having obtained only a shilling of damages applied to me to give him a certificate under the 40th section of the Court of Session Act of 1868, to the effect that the action was brought for the vindication of character, and was suitable for trial in the Court of Session. I refused to grant the certificate, because I thought it was not a case suitable to be tried in the Court of Session. But a demand is made for expenses in the action for assault. The result of the evidence was that the assaulted man, the father Pirie, was not prepared to bring any action until brought into this Court by the action for slander. But when that action was brought he brought the action for assault as a set-off to the other action. He had no alternative but to follow Meikle into this Court. He has obtained £5 of damages, and *prima facie* that would carry expenses. In consequence of Meikle having improperly brought his action Pirie was forced into this Court. I think that expenses should be given to the pursuer of the action for assault.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

JOHN A. ROBERTSON, S.S.C.—CHARLES B. HOGG, L.A.—Agents.

[1] Pedelty v. Mackenzie, May 21, 1874, 2 Macph. 1094, 36 Scot. Jur. 535

No. 16.

Oct. 24, 1874.
Coxe v. Cox.

SIR JAMES COXE AND MRS ROBINA COX OR IVORY, First Parties.—*D.-F. Clark—Mackay.*
ROBERT COX AND OTHERS, Second Parties.—*Sol.-Gen. Watson—M'Laren.*
MRS MARGARET M'CULLOCH OR COX AND ANNE IVORY, Third Parties.—*Adam—Kinnear.*

Succession—Testament—Implied Revocation.—Terms of a codicil which held to nominate residuary legatees in addition to and not in room of those appointed by a prior deed.

Succession—Legacy—Condition.—Held, upon the terms of testamentary writings, that a legacy given in substitution of a prior legacy was not intended to be subject to a condition attached to the former.

Succession—Testament—Implied Revocation.—A bequest of a share of residue to each of a testator's nephews and nieces *nominatim* held to supersede a residuary bequest to them as representing their father, contained in a prior writing.

2D DIVISION. B.

MR JOHN COX, Gorgie Mills, died on 16th January 1874.

By holograph will, dated 24th December 1850, he directed his executors, after payment of debts and legacies and an annuity to his widow, as follows:—"They shall divide the residue of my said means and estate equally among my next of kin, declaring that with respect to any of my next of kin who have predeceased or shall predecease me, leaving issue, that such issue shall succeed equally among them to the share which would have belonged to their parent if alive."

At the date of the will his next of kin then living were his brothers Robert, Abram, and James, and his sister Mrs Ivory. Another brother, George, had died before the date of the will (in 1847), leaving three children, Robert, Isabella, and Anne (Mrs Chiene).

By holograph codicil on a separate paper, dated 7th November 1859, the testator declared "that if Robert Cox, only son of my late brother George Cox, shall succeed to my estate of Gorgie Mills as my heir-at-law, his share of the residue of my moveable estate shall be only one-half of what it would otherwise have been, and the other half shall be divided amongst my remaining residuary legatees, in proportion to the sums otherwise falling to them."

By a holograph writing, also on a separate paper, dated 10th August 1872, the testator declared,—"In case I may not have made alterations on my last will, I now declare it to be my will and wish that my dear wife, Margaret Cox, be paid out of my funds the sum of £20,000 over and above the amount left her in other documents: That Robert Cox, my nephew, after succeeding to Gorgie Mills (subject to such occupation as my wife wishes during her life), shall be one of my residuary legatees, along with my dear wife, my nieces, Isabella and Anne Cox, and Anne Ivory; but before the residuary amount be arrived at my will is that my sister-in-law, Mrs George Cox, receive £2000, my brother, Sir James Coxe, £1000, and my sister, Mrs Ivory, £1000."

At the date of this writing Sir James Coxe and Mrs Ivory were the only surviving next of kin, the testator's brothers, Robert and Abram, having died without issue.

The residuary personal estate of the testator amounted to about £60,000. His nephew, Robert Cox, succeeded to his heritable property as heir-at-law.

A special case was presented by—(1) Sir James Coxe and Mrs Ivory; (2) Robert Cox, Miss Isabella Cox, and Mrs Anne Cox or Chiene, and her husband and marriage-contract trustees; (3) Mrs Cox, widow of the testator, and Miss Anne Ivory.

The first parties maintained that the residue of the testator's personal

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estate was divisible, in terms of his testamentary writings, into seven parts, and that his residuary legatees were Sir James Coxe, Mrs Ivory, Mrs Cox (his widow), Mr Robert Cox, Miss Isabella Cox, Mrs Chiene, and Miss Ivory.

The second and third parties maintained that the writing of 10th August 1872 operated as an implied revocation of the previous bequest of residue to Sir James Coxe and Mrs Ivory, and that the residue was accordingly divisible into five parts only.

A second question was whether Mr Robert Cox was entitled to an equal share with that of the other residuary legatees, or only to one half of such share.

The second parties further maintained that in the event of it being held that Sir James Coxe and Mrs Ivory were entitled to shares of the residue, they were also entitled to shares of the residue under the will of 1850, as coming in place of their father, Mr George Cox, in addition to the shares which they took individually under the writing of 10th August 1872.

The Court were of opinion,—(1) That the codicil of August 1872 was not a sufficiently distinct expression of intention to revoke the nomination of Sir James Coxe and Mrs Ivory as residuary legatees; (2) That the condition attached to the bequest of residue to Robert Cox in the codicil of November 1859 was revoked by the codicil of August 1872; and (3) That the nomination of Robert, Isabella, and Anne Cox as residuary legatees in the codicil of August 1872 came in place of and revoked the bequest of the share of residue which they would have taken under the will as representing their father.

THIS interlocutor was pronounced:—"Find . . . that under the testamentary writings of the late Mr John Cox, Sir James Coxe, Mrs Ivory, Mrs Cox, Mr Robert Cox, Miss Isabella Cox, Mrs Chiene, and Miss Ivory are entitled in equal shares to the residue of the said John Cox's personal estate, and decern."

LEBURN, HENDERSON, & WILSON, S.S.C.—MORTON, NEILSON, & SMART, W.S.—ADAM, KIRK, & ROBERTSON, W.S.—Agents.

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Oct. 27, 1874.
King v. Pollock.

ARCHIBALD KING, Pursuer and Respondent.—*Kirkpatrick—Millie.*
JAMES POLLOCK, Defender and Appellant.—*Moncreiff.*

Reparation—Negligence—Culpa—Gun.—A blacksmith sent for a gun (a muzzle-loader) belonging to him, which he had left unloaded at a farm bothy on the last occasion he used it, about two months before. When it was brought him, he asked the boy who brought it whether it was loaded, and upon the boy saying he did not know he lifted the doghead and found there was no percussion-cap on the nipple. He next attempted to draw the ramrod to test whether the gun was loaded or not, but failed in consequence of the rod being stiff from rust, or from the wood having swollen. Without further examination he placed the gun in a press or wardrobe in his smithy, where it was partially concealed. On the same day, the blacksmith having been called out of the smithy to speak to some one, a boy took up the gun, which from some unexplained cause went off, and severely injured a journeyman in the blacksmith's employment. *Held* that the blacksmith had reasonable cause to believe that the gun was not in a condition to be a source of danger, and accordingly that he was not guilty of such negligence as to render him liable in damages to the man injured.

2D DIVISION. Sheriff of Lanarkshire. I.

THE present action was raised by Archibald King, journeyman blacksmith, in the Sheriff-court at Hamilton, against James Pollock, blacksmith; John Dunn, farmer; James Dunn, son of the said John Dunn; and James Frew junior. The summons concluded against the defenders,

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jointly and severally, for payment of £500 damages, for injuries sustained by the pursuer through the culpable negligence of the defenders, or one or more of them.

Proof was led, which established the following facts :—

Pollock had been in the habit of occasionally shooting rabbits on a farm of which John Dunn was tenant. On 2d October 1872 Pollock asked James Dunn, a boy of fourteen, to bring his (Pollock's) gun from a bothy at the farm, where he had left it unloaded on the last occasion he used it, which was about two months before. Next morning accordingly James Dunn brought the gun to Pollock's smithy, and handed it to him. Pollock asked Dunn if it was loaded. Dunn replied that "he did not know if it was," or "not that he was aware of." Pollock thereupon lifted up the hammer of the gun, it being a muzzle-loader, and saw that there was no percussion-cap on the nipple. He thereafter attempted to pull out the ramrod in order to test whether the gun was loaded or not, but either from rust, or the wood being swollen, or some other cause, he did not succeed. Without further examination he placed it in a press or wardrobe in the smithy used for keeping nails and files, so that the gun was partially concealed by the folding doors of the press. In the afternoon James Frew jun., a boy of fourteen, came into the smithy, and was asked by Pollock to blow the bellows. While he was so employed Pollock was called out of the smithy to speak to some person, and during his absence Frew caught sight of the gun, and went to the press, and took it into his hands. While in his hands the gun from some unexplained cause went off, and numerous pellets were lodged in the right arm of the pursuer, who was pursuing his ordinary avocation as a journeyman blacksmith in Pollock's service. The pursuer was severely injured, and his arm partially disabled for life.

The Sheriff-substitute (Spens) found that no *culpa* had been proved against John Dunn, and that if any *culpa* had been proved against James Dunn it was too remote to be tangible by a Court of law, and accordingly assoilzied these defenders, but found that *culpa* had been proved against Pollock and Frew, and found them liable, jointly and severally, in £70 of damages.

Pollock and Frew appealed to the Sheriff (Dickson), who, on 2d March 1874, adhered.

Pollock appealed to the Court of Session.

The undernoted authorities were cited.[1]

At advising,—

LORD NEAVES.—This appeal relates to an important subject, and one requiring great delicacy in applying to the circumstances the general principles of law by which it must be regulated. The accidents that may occur from the use of fire-arms are numerous and formidable; and it is the duty of the Court to enforce with strictness the observance of all reasonable precautions in that use. Several cases have been cited, in which parties negligently placing fire-arms in such a position as led to their being injuriously used by others have been subjected in liability. In the present case the Sheriffs have decided that there was culpable negligence

[1] Dixon v. Bell, June 18, 1816, 5 Maule and Selwyn, 198; Illidge v. Goodwin, Dec. 22, 1831, 5 Car. and Payne, 190; Lynch v. Nurdin, 1841, 1 Ad. and Ell, N. S. 29; Abbott v. Macfie, Dec. 7, 1863, 2 Hurlston and Coltman, 744, 33 L. J. Exch. 161; Mackintosh v. Mackintosh, July 15, 1864, 2 Macph. 1357, 36 Scot. Jur. 678; Campbell v. Ord and Maddison, Nov. 5, 1873, *ante*, vol. i, p. 149.

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on the part of Pollock, and we have to say how far their judgment is well founded as regards that defender.

We must consider what the culpable negligence must amount to. It is impossible to hold that the owner or possessor for the time being of fire-arms is in the position of an insurer that no damage shall arise from their use. To found liability there must be fault of a tangible and intelligible description,—such a neglect of the interests of others as a man of careful and conscientious mind would not allow if his own family were concerned.

The gun in question belonged to Pollock, but it had not been recently in his possession. When he last parted with it it was not loaded, and therefore not a source of danger. When it again came into his possession he did not know that it was loaded. It is said that he did not use all means of ascertaining whether it was loaded or not. If it had been made out that he knew that it was loaded I should have been unwilling to disturb the judgment, but I think that he believed it to be unloaded. He shewed a desire to ascertain whether it was loaded. He asked the lad who brought it, who could not tell him. He then examined the nipple, and found no cap upon it. Now, had he known that the gun was loaded, and yet seeing that there was no cap upon the nipple, had determined to run the risk of the absence of a cap being a complete security, he might have been guilty of culpable negligence. But if he looked at the want of a cap as evidence of the gun not being loaded, his conduct assumes a different aspect. The only point that is made against him is his having tried to pull out the ramrod, and failed through its being stiff. He then placed the gun in a press in the smithy. When he was called to the door for a minute, the lad Frew began to manipulate the gun, and the accident followed.

I cannot see that there was here such negligence on the part of Pollock as to involve liability. I cannot do better than contrast this case with one which Lord Denman puts:—"If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third party, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. If, for example, a gamekeeper returning from his daily exercise should rear his loaded gun against a wall in the playground of schoolboys, and one of these should playfully fire it off at a schoolfellow and maim him, I think it will not be doubted that the gamekeeper must answer in damages to the wounded party."[1] Now, in all the circumstances figured by Lord Denman there is the plainest element of indifference to consequences. There is the knowledge that the gun is loaded, the place in which it is left,—one surrendered to boys,—and the probability that one of them will use it in the way described. None of these elements occur here. Pollock had not been in possession of the gun for some time. He does what he thinks right to find whether it was loaded or not. He puts it in a receptacle in his own smithy. He leaves it for a moment on business, in the presence of grown men, who might be expected to put a stop to any meddling with it.

Upon the whole, I think that, unless we are to hold that the possessor of a gun is responsible for all accidents that may occur with it, we must recall the interlocutors appealed against, and assoilzie the defender.

[1] Lynch v. Nurdin, 1841, 1 Ad. and Ell., N. S. 29.

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LORD ORMIDALE.—I entirely concur in the observations of Lord Neaves, to the effect that it would be quite extravagant to hold that the person in charge of a fire-arm is responsible for every injury that may be caused by it. The most that can be expected is that he should use all the precautions incumbent on a prudent man, having due regard to the dangerous nature of the instrument, and the safety of others.

The Sheriff-substitute, I think, puts it well, "that the question of Pollock's legal responsibility falls to be determined by a consideration of whether, on the facts proved, Pollock took those precautions which a prudent man might have been reasonably expected, in the circumstances, to take with reference to the gun in question." In deciding this question we must keep in view the facts which the Sheriff and the Sheriff-substitute concur in holding to be proved.

Two months would appear to have elapsed since Pollock had used the gun; and when he last had it in his possession it was unloaded. But when it was brought to him in the smithy he did not simply assume that it was in the same state as when he had left it. He took precautions to see whether it was now unloaded. He says in his evidence,—"I asked Dunn if it was loaded, and he said not that he was aware of, but he had not been using it. . . . I lifted the hammer, and saw that there was no percussion-cap." He is entirely corroborated in this by Dunn, who says,—"He asked me if it was loaded, and I said I did not know." And then he says,—"I saw Pollock lifting the hammer off the nipple." Pollock's attention was, therefore, undoubtedly directed to whether there was a cap upon the nipple; and we must hold it to be a fact that there was not. Pollock, however, was not even yet satisfied. He tried to draw the ramrod in order to put it down the barrel, but could not do so, owing either to its having got rusted in its place, or from the wood of which it was made having become swollen with damp. Instead of this telling against him, as was suggested in the course of this discussion, I think it may very well be founded on in his favour. He had left the gun unloaded about two months previously, and when he found the ramrod so stiffly wedged in its place that he could not draw it he might very naturally conclude that it had not been interfered with since he left it unloaded. The gun unfortunately turned out to have been loaded, for it went off in the hands of Frew. But how this exactly happened has not been cleared up. It has been suggested that some detonating powder had been left about the touch-hole, or that the percussion cap had got wedged into the dog-head, and in that way was not observed by Pollock. I must own that I think it just as likely that the lad Frew had some loose caps in his pocket, and that he put one on the nipple of the gun. Beyond saying that he had the gun for about a minute in his hands he can give no account of how it went off. He says he was knocked so stupid by what occurred that he can give no explanation on the subject.

Be that as it may, I cannot see that there is anything disclosed by the proof sufficient to inculpate Pollock, and to make him liable in damages. He appears to me to have used every precaution reasonable in the circumstances. As Lord Neaves has well observed, the owner or possessor of a gun does not insure the lives of the lieges against accidents from it. Still, as well from my unwillingness to do anything that might be construed into a relaxation of the rule that great care must be taken by any one in charge of a dangerous weapon that it is not the cause of damage to others, as for the reason that both the learned Sheriffs have evidently bestowed great pains upon this case, I have had great reluctance in

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coming to the conclusion that the judgment brought under review must be reversed, but I can come to no other.

I reserve my opinion on the question whether it is a sufficient precaution for a man who knows that a gun is loaded to remove the cap before laying it aside. That may depend on all the circumstances.

LORD JUSTICE-CLERK.—I concur. I think there is no doubt (1) that this gun was charged, but had no cap on the nipple; (2) that the appellant did not know that it was charged; and (3) that he had reasonable grounds for thinking that it was not charged.

Whether a man is guilty of negligence who leaves a gun, which he knows to be charged, with the cap off, is a question on which I give no opinion. It is certainly a very rare circumstance for a gun to go off without a cap. I would only suggest as a possible origin of the accident that the cap had been originally too small for the nipple, that some one had attempted to fire the gun, and the cap had been pushed down, but had not exploded; that the first percussion had expanded it, and that it had thus got wedged into the doghead.

THIS interlocutor was pronounced:—"Find that on the occasion libelled, James Pollock, the appellant (defender in Sheriff-court), examined the gun in question, for the purpose of ascertaining whether it was loaded, and that he found that there was no percussion-cap on the nipple of the gun: Find that the appellant did not know, and had no occasion to suppose, that the gun was charged with powder and shot, and that he had reasonable cause to believe that it was not in a condition to be a cause of danger: Therefore sustain the appeal, recall the interlocutors complained against as regards the appellant, and assoilzie him from the conclusions of the summons, and decern: Find the appellant entitled to expenses both in this Court and in the Sheriff-court," &c.

THOMAS LAWSON, S.S.C.—ALEX. MORISON, S.S.C.—Agents.

No. 18.

Oct. 29, 1874.
Sutherland's Trustees v. Clarkson.

WILLIAM MILLER AND OTHERS (Sutherland's Trustees), First Parties.—*Black.*

MRS MARY ANNE SUTHERLAND OR CLARKSON AND HUSBAND, Second Parties.—*Reid.*

MRS MARGARET MOWAT OR SUTHERLAND AND JOHN SUTHERLAND, Third Parties.—*Black.*

GEORGE SUTHERLAND, Fourth Party.—*M'Kechnie.*

Succession—Vesting—Trust.—Where trustees are directed to hold a fund for behoof of children, and to divide and pay the same when it can be conveniently done, and it is declared that in the event of a child dying without issue before receiving his share under the trust the same shall be divided among the survivors, payment to one beneficiary of his share fixes the period of vesting for all.

2D DIVISION.

JOHN SUTHERLAND died on 16th May 1856 leaving a trust-disposition and settlement executed the previous day, by which he directed his trustees to hold his estate for behoof of his wife and four children equally share and share alike.

The deed proceeded—"And I direct my said trustees, when the same can be conveniently done, to divide, pay, assign, and dispone the same accordingly, it being distinctly understood that my wife shall have the

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same share as one of my children, declaring that, in the event of any one of my children predeceasing me, or dying without lawful issue before receiving his share under this trust, the share of such child shall be divided between my wife and my other children equally amongst them, share and share alike; and declaring further, that in the event of my eldest surviving son, or his heirs, quarrelling this disposition and claiming right as heir to my heritage, he or they shall not have any right whatever to any share or portion of my moveable estate, and he is hereby in that case expressly excluded therefrom, and my trustees shall divide the same amongst my wife and other children."

The truster had been twice married. He was survived by his second wife, one daughter of the first marriage, who became Mrs Clarkson a few months after her father's death, and three sons of the second marriage, John, Alexander, and George, born in 1851, 1853, and 1854 respectively.

The trustees, being aware that the settlement was reducible so far as regards the heritage *ex capite lecti*, allowed the eldest son, upon his coming of age on 17th May 1872, to repudiate the settlement and take possession of the heritage, without requiring him to obtain a decree of reduction.

The trustees in 1857 paid to the truster's widow and daughter two-fourths of the free moveable estate, the other two-fourths being retained for behoof of the younger sons. There was no minute of the trustees allocating any part of the estate to Alexander or George.

Alexander died on 12th May 1872 unmarried and intestate, without any portion having been handed over to himself.

Mrs Clarkson, who, upon the assumption that the share provided to Alexander had vested in him, was excluded from his succession by his full brothers, maintained that the period of vesting was postponed till distribution, and that, consequently, the share was divisible, under the father's settlement, between the widow and the other children.

A special case was presented to the Court by—(1) Sutherland's trustees; (2) Mrs Clarkson and husband; (3) Mrs Sutherland, the truster's widow, and John Sutherland, the truster's eldest son; (4) George Sutherland, the truster's youngest son.

The questions submitted to the Court were,—"1. Did the share of the said trust-estate, provided to the truster's son Alexander, vest in Alexander prior to his death? 2. To whom, and in what proportions, are the parties of the first part bound to pay the foresaid balance of said share remaining in their hands?"

Argued for Mrs Clarkson;—Where trustees were directed to pay when the same could be conveniently done, a delaration in the trust-deed that vesting shall not take place till payment must receive effect, unless there was undue delay on the part of the trustees in making the division.[1] Here there was no undue delay, for till the eldest son came of age the amount of the fund divisible could not be ascertained.

Counsel for the other parties were not called upon.

The Court held that although it lay with the trustees to fix the period of payment, which was also to be the period of vesting, they could not fix different periods of vesting in the case of the different beneficiaries; that the payment to one beneficiary of her share proved that the convenient time had arrived, and the period of vesting was therefore fixed when the widow and daughter received their shares.

THIS interlocutor was pronounced:—"The Lords . . . are of opinion and find (1) that the share of the trust-estate of the late

[1] Howat's Trustees v. Howat, Dec. 17, 1869, 8 Macph. 337, 42 Scot. Jur. 116; Thorburn v. Thorburn, Feb. 16, 1836, 14 S. 485, 8 Scot. Jur. 239.

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John Sutherland, under his trust-disposition and settlement, provided to the truster's son Alexander, vested in Alexander prior to Alexander's death; and (2) that the balance of the said share is divisible in the following proportions, viz., one-third each to the parties of the third and fourth parts in the special case; and decern."

D. Currob, S.S.C.—Philip, Laing, & Monro, W.S.—H. W. Cornillon, S.S.C.—Agents.

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THE MAGISTRATES OF INVERKEITHING, Pursuers.—*D. F. Clark—Orr Paterson.*
ALEXANDER ROSS, Defender.—*Marshall—M'Laren.*

Superior and Vassal—Entry—Composition—Novodamus.—A vassal who held lands under old charters in favour of disponees, "their heirs and assignees," and by which the duties payable at entry of "heirs and assignees" were taxed at double the feu-duty, obtained in 1858 a charter of confirmation and novodamus. The clauses of confirmation and novodamus were in favour of the vassal, "his heirs and assignees whomsoever, excluding assignees before infeftment." The duties payable at the entry of "heirs and assignees" were taxed at double the feu-duty.

In an action of declarator of non-entry brought by the superior, *held* (1) that the taxing clause in the earlier charters must be read as applicable only to assignees before infeftment, and not as applicable to disponees; and (2) (*rev.* judgment of Lord Young), that the taxing clause must receive the same construction in the charter of novodamus, in respect that it did not appear that the terms of the entry were intended to be altered.

Question, Whether, in the construction of a charter it is competent to refer to the previous negotiations of the parties when a reference to these negotiations is made in the charter?

1st Division. Lord Young. R.

THIS action was raised on 6th May 1874 by the provost, magistrates, councillors, and treasurer of the royal burgh of Inverkeithing against Alexander Ross, concluding for declarator that the following lands belonging to the defender, of which the provost, and magistrates, and councillors were superiors, were in non-entry by the death of James Wilson, the last vassal infeft, viz.:—"(1) Eight-sixteenth parts of Crooks or Cruicks Easter; (2) one-sixteenth part of the lands of Crooks or Cruicks Wester, called Foul Briggs; (3) five-sixteenth parts of lands lying in Easter Cruicks, sometime possessed by John Lindsay, tenant thereof,—all as particularly described in the instrument of sasine in favour of the deceased Alexander Wilson, contractor, sometime residing at Granton, recorded in the General Register of Sasines at Edinburgh the 25th day of June 1858."

In his defences the defender stated that the superiors refused to give an entry except on payment of a year's rent, and maintained that he was only bound to pay double the feu-duty.

In support of this defence the defender founded chiefly upon a charter of confirmation and novodamus granted by the magistrates in June 1858. "Considering that the conditions and reservations under which some of the lands aftermentioned are held as expressed in the recent charters thereof are not conform to the conditions contained in the original and more ancient charters of these lands, and that questions have arisen between us and Alexander Wilson, contractor, residing at Granton, the vassal, as to the clauses, and conditions which are obligatory upon him, and we have agreed to compromise and transact all such questions, by the said Alexander Wilson paying to the town-council of said burgh the sum of £300 sterling upon our granting him a charter of confirmation and novo-

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damus, in the terms and manner afterwritten, and now seeing," &c., "we do hereby confirm for ever to and in favour of the said Alexander Wilson, and his heirs and assignees whomsoever (but excluding assignees before infeftment)," &c., "(1) All and Whole these eight-sixteenth parts," &c.; "and we . . . . . do hereby of new sell, alienate, and in feu-farm dispone to and in favour of the said Alexander Wilson, his heirs and assignees whomsoever, but excluding assignees before infeftment, and declaring that these presents shall not be a valid warrant for sasine after the term of Martinmas next (1) All and Whole these eight-sixteenth parts," &c., "with entry as at the term of Martinmas last, and we oblige ourselves and our successors in office to infeft the said Alexander Wilson and his foresaids, To be holden . . . the said Alexander Wilson and his foresaids paying yearly to us and our successors in office, or to our treasurer for the time being, for the several lands, as follows, viz., for the said eight-sixteenth parts of Crooks Easter the sum of," &c., "doubling the said feu-duties at the entry of every heir or assignee to the said several lands."

In all the charters prior to 1850 the grants were in favour of the disponees, their heirs and assignees, and the entry of "heirs and assignees" was taxed at double the feu-duty. In the case of some of the earlier charters of certain of the lands,* the words followed, "as use is of feu-farm."

The pursuers contended that the word "assignee," as so used in the earlier charters, could only be construed as meaning assignee before infeftment, and that the word "assignee" in the taxing clause of the charter of novodamus must be construed in the same way, the intention of the parties in inserting the clause, excluding assignees before infeftment, and requiring infeftment within twelve months, obviously being merely to force an immediate entry, and not to alter the taxing clause.

The earlier charters referred to are quoted in the opinion of the Lord President.

The Lord Ordinary pronounced this interlocutor:—"Finds that the pursuers are bound to grant an entry to William Wilson, contractor, Granton Villa, as vassal in the lands comprehended in the charter of confirmation and novodamus of date 2d June 1858, referred to in the record, being the lands first, second, and fourth specified in the summons, on payment of a duplicand of the feu-duties exigible for said subjects, the said William Wilson being ready and willing to take such entry; and appoints the case to be put to the roll: Grants leave to the pursuers to reclaim, if so advised."†

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* See Lord Deas' opinion, p. 55.

† "NOTE.—. . . With respect to the lands first, second, and fourth specified, and which are comprehended in the charter of novodamus of 2d June 1858, the question between the parties turns on the construction of the word 'assignees' as used in the reddendo in that charter. The pursuers maintain that it means only those to whom the personal right before infeftment is transferred, assignation being in that case only the proper form of conveyance. The defender, on the other hand, while conceding that the terms 'assignation' and 'assignee,' when used with technical accuracy, are only applicable, the one to the transference, and the other to the transferee, of the personal right, maintains that the term 'assignee' is sufficiently flexible to admit of another construction which will comprehend a disponee of the complete feudal right, when that clearly appears to be in accordance with the meaning and intention of the party using it, which he contends is the case here, and relies on the case of Hamilton v. Dunn, 15 D. 925.

"I agree with the defender,—1st, that the term 'assignees' is flexible, and may mean disponees of the feudal subject; and 2d, that this is the sense in which it is used in the charter of 2d June 1858. The exclusion of 'assignees before

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The pursuers reclaimed, and argued;—In none of the earlier charters was there any limitation of the superior's right to claim composition upon the entry of a singular successor, and so, if there was such limitation, it could only be found in the charter of confirmation and novodamus. In that charter there occurred, in the confirmation clause and clause of novodamus, the expression "excluding assignees before infeftment," while in the reddendo the usual expression "heirs and assignees" was used. The question was, did the expression in the two former clauses limit and explain that in the latter clause? It did not have any such effect, for the plain reason that the insertion of the expression was to benefit the superior, and not for the purpose of limiting or abandoning a right which he formerly had. The purpose was to make it clear that the disponee and his heirs alone could take infeftment, and to prevent him assigning the charter with open precept. It was not intended to make any change in the holding.[1]

The defender argued;—"Assignee" was a word of the widest signification, meaning a person to whom a right was conveyed in one way or another from the original vassal. Here the meaning which parties intended to put upon the word was clear, from the use of the words "excluding assignees before infeftment" in the dispositive clause. When in one clause of a charter a distinct meaning was impressed upon a word, a different meaning would not be given to the word in another clause except upon the strongest grounds, and the clearest indication that such different meaning was to be used. But there was no indication of any qualification of the word "assignee" in the reddendo clause, and it must there be read as excluding assignees before infeftment—that was, as meaning disponees or singular successors.

When there was a new grant *in gremio* of a deed it was not competent to refer to former grants. In all cases in which the Court had held that it was competent to go back to the old infeftments the novodamus expressly stipulated that such should be the case.

The clause of the charter of confirmation and novodamus, giving the consideration of granting, bears that the deed was intended to settle all disputes between the parties, and the question of entry must be held to

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infeftment' shews clearly that the term is not used in the sense of assignees before infeftment, and disponees is the only other meaning that it admits of. That it does admit of this meaning is settled by the case of Hamilton v. Dunn.

"The pursuers further maintain, that it appears from the negotiations and correspondence, which resulted in the charter of 1858, that the novodamus was for the purpose of settling some controversies about mineral rights, and that it was not in the view of the parties to make any change upon the reddendo with respect to casualties or otherwise. But, first, I think it is not allowable to refer to negotiations or correspondence in order to construe the charter; and, second, the original charters of the lands embraced in the novodamus have not been produced, and I understand are not now obtainable. Farther, the previous charters by progress produced are not clear in the pursuers' favour for an untaxed entry of singular successors, and it is the legitimate purpose of a novodamus to make the reddendo, including the taxation of casualties, certain."

[1] Bell's Prs. sec. 728; Bell's Ill. vol. ii. pp. 34 and 37; Boyd v. The Vassals of the Estate of Linlithgow, Elchies, *voce* Superior and Vassal, No. 13; Hamilton v. Dunn, July 16, 1853, 15 D. 925, 25 Scot. Jur. 576; Magistrates of Inverness v. Duff, M. 15,059; Thomson, May 22, 1810, F. C.; Craig, 2, 12, 8 and 9; Ersk. 2, 3, 20, and 23; M'Leod v. Ross, 1777, 2 Paton, 430; Stewart v. Duke of Montrose, Feb. 15, 1860, 22 D. 755, 32 Scot. Jur. 308; Harvie v. Stewart, Nov. 17, 1870, 9 Macph. 129, 43 Scot. Jur. 73.

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have been one of these questions. In that charter "assignee" meant "disponee."

At advising,—

LORD PRESIDENT.—This is a declarator of non-entry at the instance of the Magistrates of Inverkeithing against Alexander Ross. There is no dispute that the defender's lands are in non-entry, or that the pursuers are the superiors. The dispute is whether the vassal is or is not entitled to be entered on payment of a double of the feu-duty. The parcels of ground in dispute are those mentioned in the first, second, and fourth conclusions of the summons, and the pursuers contend that in regard to each of these they are entitled to a year's rent. The defender contends that the entry is taxed at a duplicand of the feu-duty. The Lord Ordinary has found that the entry is so taxed, and he has not pronounced any further order. The question is one of considerable importance, and in considering it, it is necessary to give attention to the charters which have been laid before us. As regards the first and second parcels, we have not the original charter. In regard to the fourth, we have an original charter. But in regard to the other two, although we have not the original, we have charters by progress, which distinctly set forth the reddendo and the terms of entry. The first parcel is the eight-sixteenth part of Easter Crooks, and is contained in a charter of confirmation of 1690, in which the reddendo is thus expressed,—"The said Master Duncan Whyt and his foresaids paying yerily for the lands above written to us and our successors or treasurer for the tyme, the soume of threttie-four pund ten shilling Scots money, and that at two termes in the year, Whitsonday and Mertimies, be equall portiones, in name of few-ferme, doubleing the said few-ferme in and at the entrie of everie air or assigney, or airs or assigneyes, to the foresaid lands, with ther pertinents, as use is, of few-ferme."

The second parcel is one-sixteenth of Wester Crooks, and the earliest charter of it which we have is dated 23d February 1826. It is a charter of resignation, in which the reddendo is thus stated,—"For payment to us and our successors in office, or our treasurer for the time, for the use and behoof of the community of the said burgh, for the said one-sixteenth part of Crooks or Cruicks Wester, of the sum of four pounds six shillings and six pennies Scots, at the term of Lammas yearly, in name of feu-farm, beginning the first year's payment at Lammas next to come, with the double of the said feu at the entry of every heir or assignee to the land."

The fourth parcel of Easter Crooks comes to be united with another sixteenth of Easter Crooks, and now stands as five-sixteenths of the lands of Easter Crooks. The original charter of the one-fourth is dated in 1603, and in it the reddendo is thus expressed,—"Reddendo inde annuatim predicti Thomas Mitchell et Isobella Broun ejus spousa heredesque eorum et assignati ut supra nobis et successoribus nostris seu Thesaurariis pro tempore pro dictis terris cum pertinentiis ejusdem summam triginta solidorum usualis monete regni Scotie tanquam firmam antiquam seu annuum redditum de predictis terris solvi solitum, nec non summam duodecim librarum monete predicte in augmentationem rentalis extendendo in toto ad summam tredecim librarum et decem solidorum monete prescripte, annuatim solvendarum ad duos anni terminos consuetos festa viz. Pentecostes et Sancti Martini in hieme per equales medias portiones nomine feudifirme Duplicando dictam feudifirmam seu annuum redditum in introitu cujuslibet eorum heredis vel assignati tantum ad dictas terras cum pertinentiis jacentes ut supra

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prout usus est feudifirme tantum pro omni alio onere seruicio seculari questione seu demanda que de predictis terris cum pertinentiis prefato burgo spectantibus per quoscumque juste exigi poterint quomodolibet vel requiri."

Then by a charter of confirmation, 20th September 1664, we have the total subject extending to five-sixteenths of Easter Crooks, and the expression is in substance the same, "Doubling the said feu-ferme at the entrie of any of their heir or heirs or assignees to the said lands, with the pertinents whatsomever, as use is of feu-ferme." It appears to me that in regard to all these the expression is substantially the same.

The duplicand is said to be payable at the entry of every heir and assignee to the feu. Keeping in view that the right of the superior to a year's rent on entering a vassal is a clear legal right, I am of opinion that there is no taxation of the entry of singular successors in the original charters. It would be dangerous to hold that the superior intended to change the reddendo merely because a different expression has been used in charters by progress.

For the purpose of illustrating this I refer to a charter of resignation, of date 4th April 1850, which bears that "in consideration of the sum of £21, 11s. 3d. Scots money, instantly paid to our treasurer, do hereby give, grant, and dispone for us and our successors in office perpetually, confirm to and in favour of John Forrest, clerk in the National Bank of Scotland's office, Edinburgh, the great-great-grandson of the deceased John Craich, sometime bailie of Inverkeithing, his heirs and disponees, secluding assignees before infeftment, heritably and irredeemably," and then there follow the words "doubling the feu at the entry of every heir or assignee to the same." It might be contended that, as assignees before infeftment are excluded, and as the conveyance is to John Forrest and his heirs and disponees, assignees must mean disponees; but this would be a dangerous supposition, as nine years before a singular successor is entered on payment of a composition. Therefore it would be rash to infer from the use of the particular expression by a conveyancer in a charter by progress that there is a purpose by the superior to abandon his right.

But what the defender mainly rests his case on is a charter containing a novodamus. When you have a novodamus you may very properly suppose that the charter contains something which was not in former charters. Now, this charter of confirmation and novodamus, which is dated 2d June 1858, contains a very distinct cause of granting,—"Considering that the conditions and reservations under which some of the lands aftermentioned are held as expressed in the recent charters are not conform to the conditions contained in the original and more ancient charters of these lands, and that questions have arisen between us and Alexander Wilson, contractor, residing at Granton, the vassal, as to the clauses and conditions which are obligatory upon him, and we have agreed to compromise and transact all such questions, by the said Alexander Wilson paying to the town-council of the burgh the said sum of £300 sterling upon our granting him a charter of confirmation and novodamus, in the terms and manner afterwritten." Now, this charter contains the whole of the three parcels of land in question, and the object of granting the novodamus is to reconcile differences which had arisen between the ancient and recent charters. When we examine the charters we find what the discrepancies were. In the old charters the reservation of the minerals is for the use of the superior, and in the recent one the reservation was absolute. The first time the absolute reservation occurs is in

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a charter of confirmation in 1728. In the older charters the reservation is always in the same terms as in the charter of 1603. "Reservando nobis et successoribus nostris burgensibus predicti burgi de dictis terris aut aliqua earundem parte potestatem lucrandi effodiendi et abducendi carbones lapides duffatis faillis clay cum libero introitu et exitu in et ad eadem ut expedit nostris usibus tantum intra libertatem prefati burgi." After 1728 the reservation of minerals is absolute. Now, so far as I can see there are no other discrepancies between the modern and ancient charters. There is no change of the entry of singular successors or of heirs. In this novodamus we have a restoration of the old qualified reservation of minerals. The vassal paid £300 for his charter, and he expects that he should get something for his money. What he gets is the qualified reservation, and this is a very distinct reason for granting the novodamus. But it is said that the charter is so expressed as necessarily to alter the mode of entry. It may be so, and if it is done with sufficient clearness to show that such was the intention it will be effectual. But the grant of novodamus is not to be extended beyond the words which occur in the confirmation clause,—"We, the said provost, bailies, treasurer, and councillors, for ourselves and our foresaids, and representing as aforesaid, do hereby confirm for ever to and in favour of the said Alexander Wilson, and his heirs and assignees whomsoever (but excluding assignees before infeftment)," and in the clause of novodamus, "do hereby of new sell, alienate, and in feu-farm dispone to and in favour of the said Alexander Wilson, his heirs and assignees whomsoever, but excluding assignees before infeftment, and declaring that these presents shall not be a valid warrant for sasine after the term of Martinmas next." In connection with this the defender has pointed out that the reddendo clause is thus expressed,—"The said Alexander Wilson and his foresaids paying yearly to us and our successors in office, or to our treasurer for the time being, for the several lands as follows, viz., for the said eight-sixteenth parts of Crooks Easter, doubling the said feu-duties at the entry of every heir or assignee to the said several lands." The argument was that as assignees before infeftment are excluded, therefore assignees cannot mean assignees before infeftment, and must mean singular successors or disponees. But the reason of the expression appears from the novodamus, where assignees before infeftment are excluded, and it is declared "that these presents shall not be a valid warrant for sasine after the term of Martinmas next." The object is plainly to ensure that the charter should be immediately feudalised. The circumstance that there was an alteration in the reservation of minerals made it necessary that the charter should be immediately feudalised. There is one person at least in the burgh whose interest it is to have as many transfers as possible, and this clause secures that there shall be as many infeftments as possible. But, having thus found a sufficient explanation for the words, I cannot think that it was intended by them to alter the reddendo. The result therefore of my opinion is that the entry of singular successors is not taxed.

LORD DEAS.—This is a question between superior and vassal. The vassal claims right to an entry upon payment of double feu-duty, and the superior demands a year's rent. The vassal's claim is founded on two different grounds,—1st, It is said that under the original charters the entry of singular successors, as well as of heirs, is taxed at a double of the feu-duty; and 2d, that assuming this not to be so, the benefit of such taxation was extended to singular successors by the charter of confirmation and novodamus granted and accepted in

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1858. These two pleas are altogether distinct, and require to be separately considered.

The lands in dispute are those described in the first, second, and fourth conclusions of the summons, viz.,—1st, Eight-sixteenths of Cruicks Easter; 2d, one-sixteenth of Cruicks Wester; and 3d, five-sixteenths of Cruicks Easter.

It will be convenient to consider the titles of the last-mentioned lands first, because it is of these lands only that what appears to be an original grant has been produced; or, rather, to speak quite precisely, an original grant of four out of the five-sixteenths has been produced, to which another sixteenth was afterwards added, which the pursuers have slumped along with the four-sixteenths in the fourth head of their summons, and held to be in the same position with the four-sixteenths.

The grant of the four-sixteenths (therein called a fourth part) of Cruicks Easter, is dated 24th March 1603. It conveys the lands (reserving a certain privilege as to the coal, &c.) to Thomas Mitchell, and Isobel Brown, his wife, and longest liver of them, in conjunct fee, and to the heirs procreated, or to be procreated between them, whom failing to the said Thomas Mitchell, his heirs and assignees whomsoever, for payment of a specified feu-duty,—"Duplicando dictam feudifirmam seu annuum redditum in introitu cujuslibet eorum heredis vel assignati tantum ad dictas terras cum pertinentiis jacentis ut supra prout usus est feudifirme tantum pro omni alio onere," &c.

The earliest deed produced applicable to the additional one-sixteenth of Cruicks Easter is a charter of confirmation dated 20th September 1664. The reddendo clause of that charter is identical in its terms with the reddendo clause of the charter of 1603, and I need not repeat the quotation.

Now, it appears to me that upon the terms of these charters there is no question open. It has been decided that a reddendo clause in the above terms does not include taxation of the entry of singular successors, and that the word "assignees" in such a clause means assignees before infeftment.

The case of the Magistrates of Inverness v. Duff and Others, 2d February 1769, is precisely in point. The reddendo there was for payment by the vassal "hæredes sui et assignati" of a specified annual sum, "nec non duplicando dictam feudifirmam primo anno introitus cujuslibet hæredis aut assignati et dictas terras aliaque præscripta, prout usus est feudifirmæ duplicatæ, pro omni alio onere," &c. In an action of declarator of non-entry against the defenders, who were singular successors, they pleaded that they were assignees in the sense of the reddendo clause, and therefore entitled to be entered on payment of double feu-duty. The report bears—"The Lords found the defenders liable to the town of Inverness for a full year's rent upon getting an entry from the town."

This judgment proceeded upon the footing that the word assignees, as used in the reddendo clause, meant assignees before the charter should be feudalised by infeftment. All the authorities affirm that to be a sound proposition—Stair, 2, 3, 5; Erskine, 2, 7, 5.

The feu-rights in the case of the Magistrates of Inverness, like the charter of 1603 in this case, had been granted at a time when the vassal could not voluntarily alienate the feu to any one not *alioqui successurus* without the authority or consent of the superior, which remained necessary till the passing of the Act 20 Geo. II., c. 50. In a question whether and how far the superior has relaxed that rule the words used by him in the charter have always been con-

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strued strictly in his favour. In modern conveyances,—now that all restrictions on the transmission of heritable estate have been removed,—the words "heirs and assignees," in an ordinary disposition, are understood to cover disponees as well as assignees properly so called. But the technically correct rule was that stated by Sir George Mackenzie (Lib. 3, tit. 5) that "if sasine be once taken on an heritable right it cannot thereafter be transmitted by assignation, but by disposition;" and, according to this rule, the word "assignees" in a reddendo clause was held to mean assignees to the grant so long, but so long only, as it stood upon what we still familiarly call a personal right to the lands, meaning thereby a right not followed by infeftment. It was, however, by no means a valueless privilege to the vassal to be authorised to transfer his right to the lands so long as he had not taken infeftment. Nor was it unusual for the vassal or his heirs to find it necessary to apply to the superior for an entry while holding an open charter,—examples of which are given by Lord Curriehill in Hamilton v. Dunn, 15 D. 945-6. That a feu-charter in favour of a party *et heredibus et assignatis quibuscunque* did not entitle the feuar to assign or convey before infeftment was brought out in the strongest of all ways, viz., in a process of recognition, in the case of Lady Carnegie, 5th February 1663, M. 10,375, followed by the case of Lockhart, 14th January 1696, M. 6411.

The only variation between the terms of the charters applicable to the five-sixteenths of Cruicks Easter, granted in 1603 and 1664, and the subsequent charters prior in date to the charter of novodamus of 1858, consists in the omission in the later charters, of the words "as use is in feu-farm," which were in the two older charters. But it is not said that this mere omission can have the effect of innovating upon the reddendo as expressed in the charters of 1603 and 1664, and the result necessarily is that, as regards these five-sixteenths of Cruicks Easter, this case, unless in so far as affected by the novodamus of 1858, stands upon all fours with the case of the Magistrates of Inverness.

As regards the eight-sixteenths of Cruicks Easter, the earliest charter produced is a charter of confirmation dated 25th February 1790. The reddendo of that charter is in the same terms with charters of 1603 and 1664 applicable to the five-sixteenths, and the same omission of the words "as use is in feu-farm" occurs in the subsequent charters prior to 1858. The remarks already made as to the five-sixteenths are therefore equally applicable to the eight-sixteenths of the lands of Cruicks Easter.

With regard to the one-sixteenth of Cruicks Wester only two deeds are produced altogether,—a charter of resignation dated 23d February 1826 and a charter of confirmation dated 27th March 1851. In both of these deeds the reddendo clause is for payment of a specified annual sum "with the double of the said feu at the entry of every heir or assignee to the said lands, and that for all burden, secular service, question, or demand, which can be exacted or required furth thereof." The words "as use is in feu-farm" are not in either of these deeds, but I did not understand it to be contended that the want of these words, especially in the absence of the original grant, which may have contained them, will warrant us in holding that "assignee" meant anything else than "assignee before infeftment," if this be the legitimate meaning of the word in the charters of the other lands in dispute.

But assuming all this to be decided adversely to the defender, his second contention is,—and here he has the judgment of the Lord Ordinary in his favour,—that the reddendo clause was innovated upon and changed by the

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charter of confirmation and novodamus of 2d June 1858, so as to extend the taxing clause to all singular successors.

In judging of this contention we must not only set out with the assumption that this was not so under the titles as they stood prior to 1858, but we must keep in view the grounds and principles which obviously led to the conclusion arrived at in the case of the Magistrates of Inverness, although not fully embodied in the report of the case. This is necessary in order to enable us to judge of the effect of the variations from the previous deeds, which are to be found in the deed of 1858, and it is for this reason mainly that, in the first part of my opinion, I have so far explained these grounds and principles as being sound in themselves, in place of simply citing the authority of the case of the Magistrates of Inverness.

That in the deed of 1858 there are certain variations from the phraseology of the previous deeds is undoubted. The question is whether these have the effect of extending the application of the taxing clauses in the original grants which were in full operation at and prior to the date of that deed.

In this respect the case is quite different from the cases of Hamilton v. Dunn, 16th July 1858, in which the question was (as in the first branch of this case) as to the import and effect of the original grants. The grounds upon which the majority of the Court in that case held the entry of singular successors in general to be taxed as regarded Wester Kilbowie were substantially, 1st, that in place of saying "as use is in feu-farm," there were long and special stipulations applicable to different circumstances, indicating that nothing was left upon this general rule of law; 2d, that while heirs were to be entered on payment of double feu-duty, the assignees mentioned, in place of being put on the same level with them (as in the case of the Magistrates of Inverness) were to pay quadruple the feu-duty; and 3d, that the deeds specified by which the assignees mentioned were to enter were deeds appropriate to the entry of singular successors after infeftment, viz., by "charter of confirmation, resignation, or otherways as can be best devised."

The grounds on which a like conclusion was arrived at, by the majority, with respect to Easter Kilbowie and Milton of Duntocher (which the parties did not distinguish from it) were substantially, 1st, that the superior in place of binding himself to receive heirs and assignees, bound himself to receive the heirs and successors of the vassal and of the vassal's heirs. 2d, These heirs and assignees were to be received upon payment, by each heir, of five merks Scots, and, by each assignee, to whom the lands should "happen to be disponed in haill or in part," of ten merks, which, in place of being double feu-duty, in either case, was a mere fractional part of the feu-duty, which was £81, 13s. 4d. Scots per annum. This, it is obvious, was not "as use is in feu-farm," and, accordingly, these words were not used. 3d. The assignees who were to be entered on payment of ten merks were, as the quotation just made bears, assignees to whom the lands should be "disponed" in whole or in part, implying that the class of "successors" who were to be received, was not limited to proper assignees but comprehended disponees.

A weighty minority thought that these reasons were not sufficient to overcome the presumption in favour of the superior's right to a year's rent; but, whether they were sufficient or not, that case cannot solve the present, in which we have the additional presumption which always arises against innovation of the original grant, and which can only be overcome by shewing that the superior and vassal had transacted and agreed to make the particular innovation in dis

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pute. It may be that that presumption is not quite so strong where the alleged innovation is in favour of the vassal as where it is against him, because the superior's agent generally prepares the deed; but still it is a well established and strong presumption either way.

I am not prepared to say that there is any general incompetency in referring to contemporaneous documents passing between the superior and vassal, in ascertaining whether innovation had been transacted for or not. An important authority on that point came under our notice in the late case of Harvie v. Stewart, 17th November 1870, 9 Macph. 129. An older case between the predecessors of the parties was there referred to, in which a variation was said to have been made in a charter of confirmation granted in 1794, on the terms in which the coal in the lands had been mentioned in the original titles. In 1804 the vassal sought to reduce the charter in so far as regarded that variation. Lord Armadale, Ordinary, assoilzied from the reduction, but this upon the express grounds, 1st, that the charter "was adjusted by the men of business of the parties in Edinburgh, upon production of the original titles, and after a very tedious discussion for years before them;" and 2d, in respect that the said charter declares that the reservations therein are conform to the ancient rights and infeftments, which ancient rights and infeftments the pursuer has not produced in this process." To this judgment the Court adhered *in terminis* on 30th May 1810 (quoted 9 Macph. 133-4.) In the present case the charter in dispute itself supplies to a great extent the necessary narrative for ascertaining what the innovation intended by it was, and drives us, so far as that narrative is imperfect or ambiguous, to the previous titles and the contemporary documents for the explanation of what it leaves doubtful. The charter narrates "that the conditions and reservations under which some of the lands aftermentioned are held as expressed in the recent charters thereof are not conform to the conditions contained in the original and more ancient charters of these lands, and that questions have arisen between us and Alexander Wilson, contractor, residing at Granton, the vassal, as to the clauses and conditions which are obligatory upon him, and we have agreed to compromise and transact all such questions by the said Alexander Wilson paying to the town-council of our burgh the sum of £300 sterling upon our granting him a charter of confirmation and novodamus in the terms and manner afterwritten." Nothing could be more explicit to shew that the questions which were to be compromised and transacted were solely questions which had arisen, and that these related entirely to conditions and reservations which were differently expressed in the recent charters from what they had been in the original and more ancient charters, and an examination of the title-deeds themselves indicates pretty clearly that this difference did not relate to the tennendas or reddendo clauses, but to the reservation of minerals.

But this is placed beyond all doubt by what took place at the time, as recorded in writings which must be presumed to have been known to and acquiesced in by the vassal who entered into the compromise and transaction which was proposed to him by the superior. The town-council on 5th February 1858, on the narrative that the vassal was applying for a charter with a limited reservation of the minerals in favour of the burgesses only, in place of the unqualified reservation contained in recent charters, remitted to the town-clerk, Mr Fraser, to investigate how this matter stood, and to report. Mr Fraser accordingly examined all the title-deeds, and reported how the clauses as to

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minerals were expressed in the various charters, and thereupon the town-council authorised him to take the opinion of counsel on the subject, and to ascertain whether the vassal "would enter into a compromise, which might be taken into consideration along with the entry-money" (meaning, obviously, the entry-money he was to pay on that particular occasion, which was afterwards fixed at £300), to all which the vassal agreed, and the charter of confirmation and novodamus was granted and accepted accordingly.

None of the variations reported by the town-clerk as occurring in the progress of titles had any reference to the tenendas or reddendo clauses, and it is plain that no question had arisen between the parties as to either of these clauses. The object in adding a novodamus to the confirmation obviously was that the vassal might have an unequivocal conveyance to the property of the minerals as *partes soli*, subject only to a limited use thereof reserved to the burgesses of the burgh. No trace of an intention to alter or interfere with the bearing or legal effect of the tenendas or reddendo clauses anywhere appears.

Holding it now to be clear that the narrative of the charter of 1858 does not set forth or indicate any intention to innovate upon the tenendas or reddendo clauses of the then existing investiture, let us next see what the words in that charter are which are supposed to have this effect.

The Lord Ordinary mentions them in the note to his interlocutor. He says,—"The exclusion of 'assignees before infeftment' shews clearly that the term is not used in the sense of assignees before infeftment, and disponees is the only other meaning that it admits of."

Now, with a view to precision, it is right to observe that it is not in the tenendas or reddendo clauses that these words occur. It is in the confirmation clause of the charter and in the dispositive clause of the novodamus that the new words are introduced. The words of the tenendas and reddendo clauses are identical with the words of the corresponding clauses in the only charters produced applicable to the one-sixteenth of Cruicks Wester, and they are also identical with the words of the corresponding clauses in the only charters produced applicable to the other disputed lands, viz., the eight-sixteenths and the five-sixteenths of Cruicks Easter, subject to the explanation that the older titles of these two last mentioned parcels contained the words, "as use is of feu-farm," which had been dropped out of the later titles.

Of course the construction of the word "foresaids" in the tenendas clause is affected by reference back to the confirmatory and dispositive clauses, so as to make the tenendas clause to import that the lands are to be holden of the superiors by Alexander Wilson, his heirs and assignees whomsoever, but excluding his assignees before infeftment. In other words, assignees before infeftment are not to hold the lands at all. But this only adds to the importance of the observation that it is into the confirmatory and dispositive clauses of the charter of 1858 that the new words are introduced; for the result of that is that the lands are not confirmed and conveyed to assignees before infeftment upon a different holding or reddendo from what they had previously been, but they are not confirmed or conveyed to assignees before infeftment at all. If the purpose was to extend to disponees after infeftment the same privilege of a taxed entry which had been previously conferred on assignees before infeftment this would certainly be a very strange and ineffectual mode of attempting it.

But the words introduced indicate no such purpose. Let it be kept in mind that with reference to the titles, as they stood prior to 1858, it was clear law that

the words doubling the feu-duty at the entry of every heir or assignee conferred upon the vassal and his assignees before infeftment, but before infeftment only, a privilege, the importance of which I have already pointed out (although not so important now as it once was). To add to the words "every heir or assignee" the further words, "but excluding assignees before infeftment," was simply to neutralise that privilege, and this, which is the legal construction of the words, I have no doubt was the object of the town-clerk (acting for the superiors) who added them. The superiors had an interest (whether legitimate or not) to compel assignees before infeftment to accept of untaxed entries, not to speak of the interest of the town-clerk to increase his fees for charters and infeftments, and the words added were either calculated to produce these effects, or they could have no effect at all. I see that the same gentleman, as town-clerk, had introduced the same words into one of the previous charters of the five-sixteenths of Cruicks Easter, viz., the charter of resignation of 4th April 1850, but dropped them out again in the very next charter in the print of the same lands, dated 27th March 1856. There is no evidence whatever before us that the vassal transacted to give up the privilege competent to assignees before infeftment, and nothing I have said is meant to indicate that he must submit to have the added words continued in subsequent charters.

Be this as it may, however, I cannot hold that the addition of words which, in their terms, take away the privilege of an untaxed entry from a class of persons who had that privilege before, extend the privilege to an unlimited class of persons who had it not before. And yet that really is the result of the Lord Ordinary's judgment.

Although the parties have argued the case to us fully and ably upon both its branches, I do not observe that the Lord Ordinary indicates any doubt that but for the charter of 1858 the judgment must have been in favour of the superiors.

Taking that view of it, the question is not, as in Hamilton v. Dunn, and other cases of that class, what would be the construction of certain words in an original grant. The question is, whether, in a charter by progress, words have been used sufficient to innovate upon and alter the original grant. The introduction of a novodamus, for the purpose already explained, into the charter of confirmation did not prevent the charter from being, in other respects, a mere charter by progress; and taking the case so, I am clearly of opinion that the benefit of the taxing clauses has not been extended, by the charter of 1858, in the way contended for by the defender.

LORD ARDMILLAN.—There seems little room for doubt as to the facts of this case. The question raised is entirely one of construction of feudal title.

The pursuers are superiors of the subjects. The defender, Mr Ross, acquired the *dominium utile* of the subjects in May 1873 from William Wilson, who was the disponee of James Wilson, the last entered vassal. The disposition to William Wilson is dated 13th August 1868, and was followed by sasine on 14th August 1868. James Wilson after granting that disposition died in 1872.

William Wilson, disponee of the last entered vassal, is willing to enter with the superiors. But he maintains, and the defender, Mr Ross, as his disponee maintains, that he (William Wilson) is entitled to an entry on payment of the duplicand of feu-duty, which, he contends, is the composition at which the entry of a disponee or singular successor is taxed by the charter of confirmation and novodamus granted in June 1858. The pursuers deny that William Wilson is

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entitled to enter on payment of a taxed composition, and they demand payment of a year's rent.

The question depends, as I think, on the ascertainment of the true meaning of the charter of novodamus, read of course in connection with the older titles. The language of the novodamus is most unusual; the meaning is by no means clear; and the question of construction is, in my view, attended with extreme difficulty.

We must look, in the first place, at the original charter of 24th March 1603. The construction of that charter is not quite free from doubt; but reading it by the light derived from the authorities, both institutional and judicial, I concur in the opinion expressed by your Lordships, that the entry of a disponee or singular successor is not by that charter taxed to a duplicand of the feu-duty. The words "*cujuslibet eorum heredis vel assignati*" are qualified by the words "*prout usus est feudefirme;*" and these qualifying words are considered by all our authorities as most important. At the date of this charter, in 1603, there can be no doubt what was the feudal usage of Scotland on the subject of the entry of vassals. Therefore, giving effect to the reference and to the usage as referred to, I arrive at the same conclusion as your Lordships in regard to this charter. I come to the same conclusion in regard to the construction of the charter of 1690; and also, though not without some difficulty, in regard to the construction of the charter of 1826.

But the real difficulty arises on the construction of the charter of confirmation and novodamus in 1858.

This charter proceeds on the consideration "that the conditions and reservations under which some of the lands after-mentioned are held, as expressed in the recent charters thereof, are not conform to the original and more ancient charters of these lands, and that questions have arisen between us and Alexander Wilson, the vassal, as to the clauses and conditions which are obligatory on him." This introduction to the charter is important, as explaining the meaning of the charter. The cause and consideration of granting is disconformity between the conditions of recent charters and the conditions of the original and more ancient charters. In construing the grant of novodamus we must bear in mind that this disconformity in previous charters was the occasion and consideration of the grant. The charter then proceeds to narrate that "we (the superior and the vassal) have agreed to compromise all such questions." By these words I understand all questions which had arisen, or such as had arisen between the superior and vassal out of the disconformity which I have explained between the old and the recent charters. No other questions appear to have arisen. The mode of effecting the compromise and transaction of such questions which had been agreed on is then stated. The vassal pays £300, and the superiors grant a charter of confirmation and novodamus in the terms now before us. It is rightly maintained for the vassal that the terms of the charter, and especially of the novodamus as expressed, form the counterpart of the payment which he made; and that he is entitled to enforce it according to its true meaning. On the other hand, it is rightly contended for the superiors that the cause or consideration of granting the novodamus was the discovery of disconformity between the old and recent charters, and that the questions which had arisen related to the clauses and conditions in these conflicting charters, and that the agreement to compromise and transact embraced only all such questions as arose out of such disconformity.

The ascertainment of the true meaning of this introductory part of the charter is of great importance, and I shall have occasion for a moment to return to it.

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In the meantime, I proceed to consider the terms of the clause of confirmation, and the terms of the clause of novodamus.

By this charter the superiors do confirm the subjects, which are fully described, "to and in favour of the said Alexander Wilson and his heirs and assignees whomsoever (but excluding assignees before infeftment)." Then the superiors proceed "of new to sell, alienate, and in feu-farm dispone to and in favour of the said Alexander Wilson, his heirs and assignees whomsoever, but excluding assignees before infeftment, and declaring that these presents shall not be a valid warrant for sasine after the term of Martinmas next." The obligation to infeft is "to infeft the said Alexander Wilson and his foresaids,"—and it is a fair remark, that this seems a singular obligation if by "foresaids" are meant disponees and not merely assignees before infeftment. The tenure is thus set forth,—"To be holden of us and our successors in office in feu-farm and heritage for ever by all the rights, meaths, and marches of the same, ancient and accustomed, as they lie in length and breadth." I am disposed to concur with the counsel for the defender in holding that the word "rights" may be a mistake for the word "righteous" meaths and marches. But still the holding is to be apparently according to ancient and accustomed possession. No new condition of tenure is in this clause set forth or suggested. Then the charter proceeds to set forth the sums annually payable by Alexander Wilson as feu-duty, which is followed by the words "doubling the said feu-duties at the entry of every heir or assignee to the said several lands." The words, "as use is," or similar words equivalent to the words "*prout usus est feudefirme*," do not occur in this charter of novodamus. The omission of these words is strongly and very properly founded on by the vassal, because such words have in several cases been held as qualifying the language in the context.

Now, the question before us turns on the construction of the word "assignees," as used in the reddendo in this charter of novodamus. I am of opinion that a charter of novodamus, in so far as it is a novodamus, has the character of an original grant. It is a grant *de novo*. In the words of Lord Stair, "the clause *de novodamus* doth dispone the fee as by an original right." Whatever is within a clause of novodamus by a subject superior is held to be validly granted, if the superior had the power to grant it. A variation from the original grant, if in favour of the superior, is unfavourably viewed by the law. He cannot augment his own rights and impair his vassal's rights in a charter of novodamus, unless by transaction with the vassal. Where the words require construction, an intention to withdraw or to restrict the rights of the vassal cannot be presumed in a charter of novodamus. The clause must, *in dubio*, be construed against such withdrawal or restriction of right. But where there is in the novodamus a concession of right by the superior, and where the right of the vassal is extended or amended, there is no such adverse presumption or unfavourable canon of construction. In such a case the power to make the concession being beyond question, the words of the grant must receive a fair, and, as regards the vassal, a not unfavourable construction, and their true meaning must be ascertained.

Now, what is the true meaning of the reddendo in this clause of novodamus, read in connection with the other clauses in the charter?

In approaching this question of construction I am disposed to go very much along with the argument for the vassal. The words must be fairly construed as they stand. There is no presumption against the vassal's claim. For my part, I must say that I think the claim is not in itself unreasonable. The superior's

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right to demand a year's rent from the vassal on his entry may surely be surrendered by the superior on substitution of a duplicand of feu-duty. There is no presumption to exclude it; and looking to the relative rights of superior and vassal as now recognised, and as affected by equities which have arisen in the progress of society, I am disposed to think that the law would not look unfavourably on a construction in support of such a substitution.

I think it right also to add, that the date of this charter of novodamus is, in the question of construction, of some importance. This charter was granted in 1858, and I am not aware of any case in which a decision unfavourable to the vassal on such a question has been pronounced where the charter of novodamus was of recent date.

According to our older law, a feu was inalienable without consent of the superior. While such was the relation between the superior and the vassal it was to be expected that the clauses of a charter would be read in favour of the superior's rights, which the law then fully supported, and against the rights claimed by the vassal, which the law then refused to recognise. Therefore, charters dated during that early period of our law seem to have been construed *in dubio* in favour of the superior. But, when we look at the progress in the course of legislation on the subject—to the Act 1469, c. 37, an Act anent aprisers for debt—to the statute 1669, c. 18, anent adjudications—to the statute 1681, c. 17—and above all to the statute 20 George II. c. 50,—it seems impossible to doubt that the unfavourable presumptions, and the severe rules enforced in the construction of old charters have now lost much of their force, and are no longer applicable.

In the case of Hamilton v. Dunn, July 16, 1853, the charters were of date 1643 and 1659, a period when the vassal's right to alienate the feu had not been fully recognised, and yet, even in that case, and in regard to such a charter, the opinion of a majority of the Court was in favour of the vassal. In the case of the Magistrates of Inverness, and several of the other cases quoted, the charters were of old date, and suitable rules of construction were applied. In no case has a charter granted since the 20th of George II. been construed on a presumption so unfavourable to the vassal. If I understand aright the opinion of Lord Curriehill, whose opinion in the case of Hamilton v. Dunn was in favour of the superior, he would have taken a different view if he had been construing a modern charter. Therefore, up to the point of entering on the ascertainment of the meaning of this particular clause, my view of this case is favourable to the vassal.

But notwithstanding this, and setting aside as inapplicable all unfavourable presumptions or rules of construction adverse to the vassal's claim, I have come to the conclusion that, reading the words of the charter before us fairly, and endeavouring to ascertain their true meaning, it was not intended to alter the former holding, to change the customary entry, or to substitute a duplicand of feu-duty for payment of a year's rent. The charter was granted as the result of a compromise and transaction, and that was limited to disputes arising out of the disconformity of charters. There is no indication or suggestion of any question having arisen in regard to the conditions of entry before the date of this novodamus; there is no disconformity on that subject between the more recent and the more ancient charters; and there was, so far as we can see, no necessity, no occasion, and no desire, for compromise or transaction in regard to entry. The omission of the words "as use is," is, I admit, not without importance, for the

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introduction of these words has in several cases been viewed as qualifying the language of the context by reference to the prior usage. But here, where the new grant was issued as the result, and in terms of a compromise and transaction not relating to the subject of the vassal's entry, I do not think that the omission of the words "as use is" can have the effect contended for by the vassal.

Then I do not think that the use of the word "assignees" is of itself sufficient to support the defender's plea. A fixed and inflexible meaning is not attached to the word, and it does not necessarily and exclusively express assignees to the personal right and before infeftment. But it may do so; and it has frequently done so; and in this case, when I consider the introduction to the charter—the whole structure of the charter—the obligation to infeft "Alexander Wilson and his foresaids," which would be inapplicable if it meant his disponees,—and the fact of the existence of other questions regarding minerals, really turning on disconformity between the old and the recent charters—I feel unable to resist the conclusion at which your Lordships have arrived, that taxation of this entry by substitution of a duplicand feu-duty for a year's rent was not intended by the parties in 1858—not demanded by the vassal, and not conceded by the superior. I have considered this case with great anxiety. The views which I entertain in regard to the change in the relations between superior and vassal, and in regard to the presumptions and canons of construction in application to modern charters of novodamus, tended to dispose me to concur, if I could, with the Lord Ordinary's judgment. But notwithstanding these views, and not rejecting or overlooking the equitable considerations to which I have adverted, I have been unable to read the words of this charter before us otherwise than as your Lordships have done.

LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor: Find that the entry of singular successors to the lands first, second, and fourth mentioned in the conclusions of the summons is not taxed: Find the pursuers entitled to expenses since the date of the interlocutor reclaimed against, and remit to the Auditor to tax the account of the said expenses, and report to the Lord Ordinary, reserving all other questions of expenses; and remit to the Lord Ordinary to proceed with the cause, and with power to decern for the expenses now found due."

J. & A. PEDDIE, W.S.—LINDSAY, PATERSON, & HALL, W.S.—Agents.

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Oct. 30, 1874.
Robeson v. Waugh.

ROBERT ROBESON, Pursuer and Appellant.—*Guthrie Smith—Blair.*
ROBERT WAUGH, Defender and Respondent.—*D.-F. Clark—M'Kechnie.*

Sale—Horse—Warranty—Mercantile Law Amendment Act, 1856, 19 *and* 20 *Vict. c.* 60, *sec.* 5.—To establish an express oral warranty of goods sold it is necessary to prove the very words used.

Sale—Horse—Fraud—Mercantile Law Amendment Act, 1856, *sec.* 5.—In an action for payment of the price of a horse the defender disputed liability, on the ground that the pursuer had represented the horse to be sound while he knew it to be unsound, and that the defender had rejected it on the day after the sale. *Held* that, although it was proved that the horse was unsound at the date of the sale, the sale was valid, in respect that it was not proved that the seller either warranted it to be sound or knew of the unsoundness.

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1st Division, Sheriff of Haddington. M.

THIS was an action in the Sheriff-court of Haddington by Robert Robeson, farmer, Springwells, against Robert Waugh, farmer, Eweford, concluding for payment of £60, the price of a mare sold and delivered by the pursuer to the defender at Dunbar on 27th July 1873.

The defence was that the mare had been warranted sound and had turned out to be unsound.

A proof was led, in which the following facts were established:—Both the pursuer and the defender were members of the East Lothian and Berwickshire Yeomanry Cavalry. During the drill at Dunbar in the summer of 1873 the pursuer rode a grey mare, which he wished to sell. The defender was brought to look at the mare, on a Tuesday, on the sands of Dunbar during the drill, by a friend of the pursuer, a Mr Hogarth. The interview was thus described by the pursuer in his evidence,—"Defender asked me what I was wanting for the mare. I asked £70. He said it was too much. Defender asked if I would warrant her. I said, 'No, that she had never been lame with me.' I also said 'there is Mr Hogarth, he knows the mare as well as I do;' whereon Hogarth said that he 'never had seen her lame.' We did not make a bargain."

On the following Sunday the defender sent his groom with instructions to ask a Mr Elliot to buy the mare for £60, or a smaller sum. The groom not seeing Mr Elliot entered into negotiations for the purchase of the mare at £60. The mare had by this time been sent away from Dunbar, and was brought back. The pursuer met the defender in the Railway Hotel, Dunbar, on the Sunday evening, when a sale was concluded, and the pursuer received a cheque for £60. The following morning the defender rode the mare and found she was lame, and he stopped the cheque at the bank.

The negotiations at these meetings are set out fully in the Lord President's opinion.

The Sheriff-substitute (Shirreff) pronounced an interlocutor, in which, *inter alia*, he "finds in point of fact, 1, that the defender spoke to the pursuer regarding the mare in question, on Monday the 21st or Tuesday the 22d of July 1873, when the pursuer stated that the mare had never been lame while in his possession; 2, that the defender again spoke to the pursuer on Thursday, the 24th July, when the pursuer, in answer to his question, said to the defender that said mare was sound; 3, that in consequence of the pursuer's representation that the said mare was sound the defender sent his servant, Richard Fortune, to ask his friend, Mr Elliot of Lamberton, to purchase said mare on Sunday, the 27th of July last; 4, that failing to find Mr Elliot, Fortune agreed to purchase the said mare on behalf of the defender at the price of £60 sterling; 5, that on the evening of the same day the defender gave the pursuer a cheque for £60 sterling as the price of said mare: . . . . . Finds in point of law, 1, that the statement that the mare was sound, made by the pursuer to the defender, was such a statement as rendered the pursuer liable in warranty; 2, that the defender was entitled to return said mare as disconform to warranty, and is not liable in payment of the price: Therefore assoilzies the defender from the whole conclusions of the action, and decerns."

The Sheriff, on appeal, affirmed this interlocutor.

The pursuer appealed, and argued;—The statements made by the pursuer amounted to no more than that the mare had never been lame with him. It had not been proved that she ever was lame before. There was therefore no case of fraud.[1]

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[1] Scott v. Steel, Dec. 9, 1857, 20 D. 253, 30 Scot. Jur. 129; Behn v. Burness, Feb. 24, 1863, 32 L. J. (Q. B.) 204.

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The defender craved to be allowed to amend the record, and was allowed to add the following statement and plea, on payment of £4, 4s. of expenses:—(Stat. 8) "At the date when the said mare was sold to the defender as aforesaid, and for a long time prior thereto, she was unsound in her legs from contraction and navicular disease. At the time of the sale the pursuer well knew that the mare was unsound, and he not only concealed this fact from the defender, but, on the contrary, represented her to be sound." (Ans. 8) "Denied."

"Additional plea in law.—(4) The pursuer having been aware at the time of the sale that the said mare was unsound, and having represented her to be sound, cannot recover the sum sued for."

The defender argued;—A representation might amount to a warranty. It came to be a question whether the parties intended that the statements should constitute warranty. There was here a case of direct warranty. The pursuer's statement amounted to this, "I will uphold the mare as sound."[1]

At advising,—

LORD PRESIDENT.—This action is brought to recover payment of the price of a mare said to have been sold by the pursuer to the defender on the 27th day of July 1873. The defence is that the mare was warranted sound, and has turned out to be unsound. Another defence has recently been stated. I will afterwards allude to it; but the original defence was founded on the alleged warrandice.

The first question is whether the mare was unsound, and upon that question I can entertain no doubt that the mare was unsound. The second question is, was she warranted?

The first meeting between the parties is said to have taken place on a Tuesday. There were two witnesses to this meeting, the pursuer and Hogarth, who both distinctly say that the pursuer was asked to warrant the mare, and refused to do so. The defender gives a different account of the meeting. He says,—"When I reached the mare I said, addressing myself to Mr Hogarth, 'Is she sound?' Hogarth said, in the hearing of the pursuer, 'Yes, she is as sound as a bell.' I looked at the mare, and asked the pursuer if she was sound? He said 'Yes, she is sound.' He further said, 'that he had hunted her for two years, and she never had been lame.'" Now, it is clear that some such conversation passed, and the pursuer and Hogarth say, in addition, that there was a demand for a warranty, which was refused. One thing is clear that on the Tuesday no warranty was granted. Even admitting that all that the defender says is true, the words used would not amount to a warranty under the 5th section of the Mercantile Law Amendment Act. The second meeting was on the Thursday, and the pursuer has no recollection of it. This is not surprising, as it was a mere casual meeting, and did not last for more than a minute. The account which the defender gives of the meeting is as follows:—"On the following Thursday I was with Mr Miller of Newhouse, who had asked me to change horses with him for the rest of the week, as his horse had got a kick, and I was drilling on the flank. I said to Miller, 'Here is a mare that I once thought of buying,' and I asked him to come and take a look at the pursuer's mare. That was during the fall-out for refreshment. Miller and I went and looked at the mare. We just looked at her casually. Pursuer was leading her, or at any rate was near her. I nodded to

[1] Smith's Mercantile Law (1871), p. 510; Addison on Contracts (1869), p. 216.

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the pursuer, and before anything was said by me Miller, looking at the mare, said, in the pursuer's hearing, 'She is a nice looking mare if she is all sound.' I said to the pursuer, 'Mr Robeson, the mare is sound, is she not!' Pursuer answered, 'She is quite sound, and a good mare, and you should buy her.' I said, she is too dear, and I walked away with Miller to the refreshment tent." It would be absurd to attach any importance to such words, which were merely *verba volantia*. Therefore, in regard to the two first meetings, even if we were to take the account of the defender as correct, the words used would be of no avail.

Another matter occurred before the time when the mare was delivered. It is stated by Waugh that he went to church on the Sunday, and then he says—"Before leaving home I told my groom, Richard Fortune, who drove me to church, to go and see Mr Elliot, and tell him to try and buy 'the grey mare' of the pursuer's, and not to go above £60, but to buy as cheap as he could." Now, looking to the circumstance that Waugh had already asked for a warranty, and been refused, or at least failed to obtain it, it is strange that, in giving instructions to his groom to purchase the mare, he should have said nothing as to warranty. Elliot would have been quite entitled to go and buy the mare for £60 without any question as to soundness. The defender, having failed to get a warranty, had made up his mind to take the mare without warranty. There seems to be some doubt whether Richard Fortune was not entitled to buy the mare himself. I am inclined to think Fortune negotiated but did not enter into any contract. In consequence of this the mare which had been sent away was brought back, and then there is a contract between the pursuer and defender.

With regard to the last meeting there is a discrepancy between the account of the pursuer and defender. The defender thus describes what passed:—"I then said to him, 'If you will warrant the mare to me thoroughly I will give you the £60 sterling.' He said, 'She is perfectly sound;' he had hunted her for two years, and she had never been lame with him. I then agreed to purchase the mare for £60." He afterwards gave a cheque for the sum. "In handing the cheque to the pursuer I said, 'Now, Mr Robeson, if the mare is not what you represent her to be you will hear from me.' He said, 'The mare is all right.'" On the other hand, the pursuer says that "the same Sunday afternoon, between four or five o'clock, the defender came to my lodgings; he grumbled about his servant having given too much for the mare, and wanted me to take less than £60, which I declined to do. Defender accompanied me to the Railway Hotel; he got a blank cheque from Mr Anderson, which he filled up for £60 and handed to me. It is No. 5 of process. This was done in the front room down stairs on the left hand of the front door on entering. There was another gentleman in the room at the time, but I do not know who he was. There was nothing said then about the soundness of the mare, and I did not warrant her sound. My brother William, and Mr Elliot of Lamberton, came into the room before the defender left, and were told of the sale. Defender said if the mare did not turn out well he 'would give us a good swearing next year.'" Now, here there is certainly a discrepancy, but there is more reason for believing the one statement than the other. It would have been very odd if the pursuer, having refused formerly to give a warranty, had at last consented to do so; but I do not think it has been proved that words were used which, under the circumstances, could be construed as giving an express warranty. I have entered thus minutely into the facts of the case, because they bear upon the question of law, and I am clear that what is proved does not amount to an express warranty. If an express warranty is not re-

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duced to writing, there must at least be satisfactory evidence of the words spoken—the very words spoken—which are alleged to constitute such express warranty.

The defender has thought fit to place on record an amendment in the following terms:—

"Stat. 8. At the date when the said mare was sold to the defender as aforesaid, and for a long time prior thereto, she was unsound in her legs from contraction and navicular disease. At the time of the sale the pursuer well knew that the mare was unsound, and he not only concealed this fact from the defender, but, on the contrary, represented her to be sound."

"Ans. 8. Denied."

"Additional plea in law.—(4) The pursuer having been aware at the time of the sale that the said mare was unsound, and having represented her to be sound, cannot recover the sum sued for."

Now, this is a very serious charge, and amounts to nothing less than an allegation of fraud. No one, however, can doubt that the mare was unsound; and if we are to believe the evidence of the veterinary surgeons who have been examined, it would be difficult to say that the pursuer did not know of the unsoundness; but we all know that in such evidence there is usually great exaggeration, and it is impossible to believe that the mare was so apparently unsound. She was seen by the defender and other farmers, who are accustomed to examine horses, and they do not seem to have thought her lame. The pursuer, we know, had been hunting her all the season, and rode her not only on the Sands of Dunbar, where her lameness might not be observed, but also to and from his place of residence. He was accompanied by his brother and by neighbours, who do not seem to have observed any unsoundness. I, therefore, come to the conclusion that the unsoundness was not of an obvious kind. It is only from the nature of the unsoundness that we can say that the pursuer knew of it, as there is no direct evidence of his knowledge. To hold the charge of fraud proved would be a very strong thing, and, in my opinion, the defender has failed to make out his charge. I am therefore for altering the judgment of the Sheriff, and giving decree for the amount concluded for.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT pronounced the following interlocutor:—"Recall the interlocutors of the Sheriff-substitute and the Sheriff complained of: Find that on the 27th of July 1873 the pursuer sold to the defender a grey mare at the price of £60, and delivered the same to the defender, receiving in return a cheque on the defender's bankers for the price of £60: Find that on the following day the defender returned the mare to the pursuer on the ground that she was unsound, and that the pursuer had warranted her sound, and at the same time the defender stopped payment of the said cheque: Find that the mare at the date of the sale was unsound; but find that the pursuer did not warrant the said mare to be sound: Find that the pursuer at the time of the sale represented to the defender that the mare had never been lame while in his possession; but find that the defender has failed to prove that at the date of the sale the pursuer was in the knowledge of the unsoundness of the said mare: Find that the said mare was sold under a warrant of the Sheriff . . . . . Find the pursuer entitled to expenses both in this Court and the inferior Court," &c.

WM. B. HAY, S.S.C.—WM. SCOTT STUART, S.S.C.—Agents.

No. 21.
Oct. 30, 1874.
Austin v. Shennan.

JAMES AUSTIN, Inspector of Poor of Closeburn, Pursuer and Respondent.—*Macdonald.*
ROBERT SHENNAN, Inspector of Poor of Kirkgunzeon, Defender and Appellant.—*Sol.-Gen. Watson—Guthrie Smith.*

2D DIVISION. Sheriff of Wigtown. M.

Poor—Poor-Law Amendment (Scotland) Act, 1845, 8 *and* 9 *Vict. c.* 83, *sec.* 71—*Inspector's Disbursements.*—In an action by the inspector of poor of the parish of Closeburn against the inspector of poor of the parish of Kirkgunzeon (1) for relief of a pauper's aliment, (2) for repayment of the travelling expenses incurred by the pursuer in obtaining information as to the settlement of the pauper, and (3) for the expense incurred in prosecuting the husband of the pauper for desertion, *held* that the second and third items could not be recovered under the 71st section of the Poor-Law Amendment (Scotland) Act, 1845.

JAMES SOMERVILLE, S.S.C.—W. S. STUART, S.S.C.—Agents.

No. 22.
Oct. 30, 1874.
Hill's Trustees v. Thomson.

JOHN HILL AND ANOTHER (Mrs Hill's Trustees), First Parties.—*Marshall.*
ALEXANDER THOMAS NIVEN (Mrs Finnie's *Curator Bonis*), Second Party.—*Marshall.*
WILLIAM HILL THOMSON AND OTHERS, Third Parties.—*M'Kie.*

Succession—Trust—Apportionment—Insanity of Trustee—Exercise of Power.—The sole trustee under a settlement was directed to hold a sum for behoof of a family of children, and was invested with the amplest discretionary powers as to the proportions in which the sum should be paid, and the times and manner of payment. The trustee, after making unequal payments to the beneficiaries to account of their shares, became hopelessly insane. She had previously assumed a co-trustee, who after her insanity assumed another trustee under the Trusts Act, 1867. *Held* that a valid bequest had been made to the children as a class, and that the powers conferred upon the trustee were a burden on that bequest; that since these powers could not be exercised by the trustee named in the settlement, the effect was not that the powers were transferred to the assumed trustees, but that the burden flew off, and the bequest to the children as a class became unqualified, and accordingly that the fund fell to be divided in such proportions as, when added to the payments to account previously made, would produce equality among the beneficiaries.

2D DIVISION. I.

BY her trust-disposition and settlement, Mrs Hill, who died in 1868, conveyed her estate to her daughter Mrs Finnie as sole trustee.

By the last purpose of the trust Mrs Finnie was directed to "retain in her own hands" one third of the free residue of the estate, "and apply the same for the use and behoof of the surviving children of the marriage between the Rev. William Thomson, my son-in-law, and Catherine Hill or Thomson, my daughter, now deceased, and that at such time or times, and in such way and manner as my said trustee, in whose judgment and discretion I have perfect confidence, may think most conducive to the welfare of the said children, with full power to her to divide and apportion the said provision among the said children, or to apply the same for their behoof, in such shares and proportions as she may think proper, without the interference or control of any one or more of the said children, who shall have no vested interest therein."

The deed contained no power of assumption of new trustees.

At the death of Mrs Hill there were two sons and three daughters of Mr and Mrs Thomson in life.

On 13th February 1873 Mrs Finnie assumed Mr John Hill as a co-trustee under her mother's settlement.

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On 19th May 1873 Mrs Finnie, who had fallen into a state of mental incapacity, was removed to a lunatic asylum.

Mrs Finnie had before her insanity paid to Mrs Thomson's two sons one-fifth each of the sum available for distribution among the Thomson family, and a smaller sum to each of the three daughters, all to account of their respective shares of the residue of Mrs Hill's estate. A sum had since that time become free by the death of an annuitant under Mrs Hill's settlement, and another sum would become available for distribution on the death of another annuitant.

Mrs Thomson's children having called upon Mr Hill and another trustee, whom he had assumed in 1874, with the consent of the Court, in terms of the Trusts Act, 1867, to pay them the sums available for division, the trustees expressed their willingness to do so if they had the power, but they were advised that it was not in their power, at all events without judicial authority, to exercise the discretion which had been reposed in Mrs Finnie alone.

A special case was presented to the Court by (1) John Hill and another, the acting trustees under Mrs Hill's settlement, (2) A. T. Niven, C.A., who had been appointed *curator bonis* to Mrs Finnie, and (3) Mr and Mrs Thomson's children. It was stated in the special case that there was no prospect of Mrs Finnie's recovery.

Mr Niven as *curator bonis* stated that he was prepared to acquiesce on the part of Mrs Finnie in any division of the funds which the Court should hold to be within the powers of the trustees.

The questions submitted to the Court were;—"1. Whether the parties of the first part, as the acting trustees and executors under the trust-disposition and settlement of Mrs Hill, are, during the incapacity of Mrs Finnie, entitled to distribute among the parties hereto of the third part the whole or any part of the one-third share of the residue which the truster directed Mrs Finnie to retain and apply for behoof of the children of Mr and Mrs Thomson? 2. Whether the sums presently available for division are to be distributed equally among the parties hereto of the third part, or in such proportions as, when added to the payments to account previously made, will make the payments to all the five children of equal amount?"

At advising,—

LORD JUSTICE-CLERK.—We have had an able argument from the bar upon the question, to what extent the Court could assume the right or power of directing parties, not named by the testator, to exercise a discretionary power.

This is not an application to us for special powers, and if special powers were to be conferred on these trustees it would need to be under a more formal application.

In regard to the powers of the Court in such a case very delicate questions might arise. On the one hand, where there is a manifest *delectus personæ* and intention to entrust such a power as here to a particular person, the Court might hesitate to transfer the power to another. On the other hand it is quite clear that where a discretionary power is conferred upon ordinary trustees, not implying *delectus personæ*, the Court might more readily confer these powers on new trustees. I am, however, very clearly of opinion that these questions do not arise in this case.

The view I take is derived from the words of the settlement, and by these words I am of opinion that a valid bequest is made to the children of Mrs Thomson as a class, and the power conferred on Mrs Finnie is merely a burden on

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that bequest. The provision that they are to have no vested interest is merely to prevent the beneficiaries from interfering with the exercise of this power. Nothing vests in them individually to that effect. What has happened here is that the discretionary power cannot now be exercised and never can be, but the effect of that is not that the power is to be transferred to the other assumed trustees, but that the burden flies off and the bequest to the children as a class becomes unqualified.

I am of opinion that the trustees are entitled to divide the whole free fund at present available, and the remaining sum as soon as it is set free, and that, as the discretionary power is at an end, the division should be in such proportions as to produce ultimate equality.

We have not been told the ages or condition of these beneficiaries—whether they are married or unmarried—and some information will be necessary before we pronounce judgment.

LORD NEAVES.—I am of the same opinion with your Lordship.

It is material to notice that this is not an application to us to exercise our discretionary powers.

We are only asked to decide on the law of the case, and on the terms of the bequest. Our *nobile officium* is not invoked, and we have merely to give a legal decision as to the import of the documents before us.

If we had to decide on the question of our discretion, it would be a matter of great delicacy, and it would depend on the nature of each case, whether the Court should interfere. In a case where an advance was necessary for the support of a person remotely interested I can understand that we might interfere. But I think that we should not make an inquisitorial investigation into the behaviour and moral character of such a person—or be moved by anything but considerations of strong necessity. The original trustee might do so, but I think the Court would not. No such question, however, arises here.

LORD ORMIDALE.—I entirely concur in your Lordship's view of this case, and in the explanations you have given of the principles upon which the proposed judgment is to proceed.

It is satisfactory to me to think that it is not necessary to consider how far the Court could itself exercise the discretion conferred on a testamentary trustee who has become incapacitated as in the present case. Before the Court could do so it would at least be necessary that the age and circumstances of the beneficiaries were ascertained and stated. But even were all that distinctly before the Court, it would be an extremely delicate question whether the discretion committed by the testator to the trustee nominated by her, and to that trustee alone, could be competently exercised by any one else or by the Court; and in regard to that, or any such question, it is to be understood that my opinion is reserved.

THIS interlocutor was pronounced:—"The Lords . . . are of opinion and find (1st) that the parties of the first part, as the acting trustees and executors under the trust-disposition and settlement of Mrs Hill, during the incapacity of Mrs Finnie, are entitled to distribute among the parties of the third part the whole of the one-third share of the residue which the truster directed Mrs Finnie

to retain and apply for behoof of the children of Mr and Mrs Thomson, as the same may arise for division, and (2d) that the sums presently available for division are to be distributed among the third parties in such proportions as to produce ultimate equality, and decern."

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WILLIAM KENNEDY, W.S.—JOHN N. FORMAN, W.S.—Agents.

JAMES FLETCHER, Pursuer and Respondent.—*Asher—Pearson.*
JOHN DAVIDSON, Defender and Appellant.—*M'Kechnie.*

No. 23.
Nov. 3, 1874.
Fletcher v. Davidson.
1st DIVISION.
Sheriff of Ross, Cromarty, and Sutherland.
M.

Process—Appeal—Removing—6 *Geo. IV. c.* 120, *sec.* 44.—In an action by James Fletcher of Rosehaugh against James Davidson, tenant of one of his farms, laid on A. S. 14th December 1756, anent removings, the conclusions were that the tenant should find caution for arrears, and for the rent of the remaining years of the lease, failing which, to remove from his farm.

The Sheriff ordained the defender to find caution, and subsequently, in respect that he had failed to find caution, decerned against him "in terms of the summons." An appeal to the Court of Session was refused as incompetent under the 44th section of the Judicature Act, 1825.*

GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—W. K. THWAITES, S.S.C.—Agents.

EDWARD JAMES STOPFORD BLAIR AND OTHERS (Maxwell's Trustees), Petitioners.—*Sol.-Gen. Watson—Mackintosh.*
EDWARD HERON MAXWELL AND OTHERS, Respondents.—*D.-F. Clark—Duncan.*

No. 24.
Nov. 4, 1874.
Maxwell's Trustees v. Maxwell.

Trust—Trustee—Power to resign—24 *and* 25 *Vict. c.* 84; 30 *and* 31 *Vict. c.* 97 (*Trusts Acts*, 1861 *and* 1867).—A marriage-contract executed prior to the Trusts Act of 1861 provided that if any trustee desired to resign it should be in the power of the other trustees to discharge him. The whole trustees being desirous to resign, presented a petition, founding on the Trusts Act 1867, for the appointment of a judicial factor and for authority to resign. It was opposed by the beneficiaries. *Held* that the trustees had power to resign under the Trusts Acts 1861 and 1867, and that the power was not excluded by the terms of the marriage-contract, and a judicial factor appointed.

MR E. J. STOPFORD BLAIR AND OTHERS were the trustees under the marriage-contract of Mr and Mrs Edward Heron Maxwell, dated 14th October 1847, and held a considerable amount of property for behoof of the spouses and their children, some of whom were in minority and pupillarity. The contract contained this clause:—"In case any trustee should become incapable of acting as such, or should desire to be relieved of the said trust, it should be in the power of the other accepting and surviving trustees therein named, or to be assumed, if they should deem it expe-

1st DIVISION.
Lord Gifford.
M.

* . . . "When any judgment shall be pronounced by an inferior Court, ordaining a tenant to remove from the possession of lands or houses, the tenant shall not be entitled to apply as above by bill of advocation to be passed at once, but only by means of suspension, as hereinafter regulated."

The process of advocation was abolished, and appeal substituted by the Court of Session Act, 1868 (31 and 32 Vict. c. 100), secs. 64 and 65.

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dient, to discharge and exoner him of the said trust upon his denuding thereof in favour of the others."

In consequence of disagreement with Mr and Mrs Maxwell all the trustees resolved to resign, and presented this petition to the Court, founded on the Trusts Act, 1867,[1] secs. 9, 10,[2] 12, 16. They prayed the Court (1) to appoint a judicial factor; (2) to authorise the petitioners to resign; (3) to grant them a discharge.

The petition was opposed by Mr and Mrs Maxwell and their two eldest children, who had attained majority, who maintained that the trustees were not entitled to resign without accounting for their management and intromissions. The trustees declined to enter into an accounting because there was no person who could give them an effectual discharge until a judicial factor was appointed.

After some ineffectual negotiations, while the case was in the Outer-House, for the appointment of new trustees, the Lord Ordinary, on 21st July 1874, pronounced this interlocutor:—"In respect that the whole persons nominated and appointed as trustees by the interlocutor of 7th current have failed or declined to accept the office, and in respect that the respondents decline to name or suggest any other persons as trustees, nominates and appoints Mr Thomas Martin, chartered accountant in Edinburgh, to be judicial factor upon the trust-estate created by the antenuptial contract of marriage between the respondents Edward Heron Maxwell and Helen Stopford Blair or Heron Maxwell, his spouse, dated 14th October 1847, with all the usual powers, he always finding caution before extract: *Quoad ultra* continues the cause for such further proceedings as may be competent: Finds the petitioners entitled to payment of the expenses hitherto incurred by them in the present petition and proceedings, and that out of the trust-estate," &c.

The respondents reclaimed, and argued;—The application of the trustees for the appointment of a judicial factor preliminary to resignation was competent only under the 10th section of the Trusts Act, 1867,[3] and that section provided only for the case of a sole trustee. Besides, the marriage-contract contained a limited power of resignation, and the 19th section[4] of the Act of 1867 declared that the statutory powers were only to have effect subject to the limitations of the deed.

The petitioners argued;—The power of resignation was conferred on trustees in unqualified terms by the statute of 1861.[5] That power was

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[1] 30 and 31 Vict. c. 97.

[2] Sec. 10,—"If any trustee entitled to resign his office is at the time sole trustee, he shall not be entitled to resign until, with the consent of the beneficiaries under the trust of full age and capable of acting at the time, he shall have assumed new trustees, who shall have declared their acceptance of office, or he may apply to the Court stating his wish to resign and praying for the appointment of new trustees or of a judicial factor to administer the trust, and the Court, after intimation to the beneficiaries under the trust, or such of them as the Court may direct, shall thereafter either appoint a judicial factor, or on the application of the beneficiaries or any of them may appoint trustees, in the same manner as is provided under the 12th section of this Act; and after such appointment, either of judicial factor or of trustees, the petitioning trustee will be entitled to resign; and any retiring trustee or trustees who may have already retired shall be bound when required, and at the expense of the trust, to execute all deeds necessary for divesting them of trust property, conveying the same to the trustees or trustee or judicial factor acting in the execution of the trust."

[3] Quoted *supra*, note 2.

[4] Quoted in the Lord President's opinion.

[5] 24 and 25 Vict. c. 84, sec. 1,—"All trusts constituted by virtue of any

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not taken away by the statute of 1867, and the trustees now sought to exercise it in the manner most convenient for the administration of the trust.

At advising,—

LORD PRESIDENT.—This petition is presented by the whole accepting and acting trustees under the marriage-contract of the reclaimers. The object is to enable them all to resign their office; and the mode in which this is proposed to be done seems very reasonable in itself, if it is consistent with the statutes. Being all desirous to resign they are anxious that no embarrassment should be thereby caused in the administration of the trust. They therefore propose the appointment of a judicial factor as a preliminary step, and they have been willing to give every facility for the appointment of new trustees.

The question is, whether the proceeding is justified by the statutes of 1861 and 1867.

Two objections have been taken. First, it is said that the trust-deed contains a clause which prevents the application of the clauses in the statutes. Secondly, it is maintained that there is no authority for a plurality of trustees taking the steps which the petitioners have done for the appointment of a judicial factor, but that only a single remaining trustee can competently avail himself of this form of procedure.

1. The clause in the marriage-contract was framed long before the passing of the first statute, and of course with reference to the existing law, under which no trustee had power to resign. The clause enabled any trustee to resign, subject to the condition that the other trustees agreed to his resignation. But the Act of 1861 afterwards in unqualified terms gave to any gratuitous trustee the power to resign his office unless the contrary be expressed in the deed. If the matter stood there the case would seem to be very plain. But it is said that by the 19th section of the Act of 1867 a limitation is added to the words "unless the contrary be expressed" in the previous statute. The section is in these terms:—"Nothing in this Act contained shall be construed as innovating, revoking, or restricting any express powers or directions given to trustees acting under any trust-deed, or shall affect the decisions of any question which may at the passing of this Act be the subject of a depending action, and none of the powers and incidents by this Act conferred or annexed to the office of trustee shall take effect or be exercised if it is declared in the trust-deeds that they shall not take effect; and when there is no such declaration, then if any variations or limitations of any of the powers or incidents by the Act conferred or annexed are contained in such trust-deed, such powers or incidents shall take effect or be exercised only subject to such variations or limitations."

Now, I observe, first, that this enactment refers entirely to the powers conferred by the Act of 1867 itself; therefore it does not, directly at least, repeal or alter the powers given by the Act of 1861, but, even supposing it were intended to modify the provisions of that statute, I should still hold without any doubt that there is nothing in the clause applicable to the present case which can restrict the right of the trustees to resign. The only part of the section which could possibly be thought to have that effect are the last words. But

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deed or local Act of Parliament, under which gratuitous trustees are nominated, shall be held to include the following provisions unless the contrary is expressed; that is to say, power to any trustee so nominated to resign the office of trustee; . . ."

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the clause in the contract contains no variations or limitations of powers conferred either by the Act of 1867 or the Act of 1861. There is a limited power of resignation given. There is no prohibition against resigning or against resigning in any particular way. There is no prohibition at all, nothing but power or allowance. The truster left it to the common law to prevent resigning in any other way, except in the circumstances in which it was expressly permitted. But the common law being altered no longer prevents the resignation of the trustees under all circumstances. Any hypothetical inference as to the intentions of the truster can never prevent the application of the statute. It is clearly a case in which the statute was intended to apply.

2. It is said that the only authority which the trustees can have for presenting this petition is the 10th section of the Act of 1867. That appears to me to be a mistake. The petition is perfectly competent under the Act of 1861. That statute prescribes no particular form, but gives the right to resign in very general terms. Power to any trustee means power to every trustee, and, consequently, to the whole. If that be so, in what form ought a body of trustees, who all want to resign, to proceed? It would be extremely improper and inconsistent with their duty if they were *de plano* to execute a deed of resignation and hand it to the beneficiaries, leaving the trust without administration. If the beneficiaries are able to act, and are reasonable, there can be no difficulty in nominating new trustees. But supposing they are not, there must be some mode of proceeding, and one consistent with leaving some person to administer the trust. What better course could be followed than to present a petition for the appointment of a judicial factor or of new trustees as a preliminary step?

In my opinion the petitioners require no aid from the 10th section, and, indeed, it was not intended to apply to a case of this kind. It is a prohibitory provision, not an empowering one. The powers are given in the preceding clauses. But a sole acting trustee may not so resign. That section is not applicable, and is not required.

It must be kept in view that the statutory right of resigning was created by the Act of 1861, not by that of 1867. The latter only introduces alterations or conditions, which are imposed on parties situated in a particular way, and it is not to be read as applicable to others.

I think this petition is a proper and competent step, and the best mode of proceeding which could have been adopted consistently with keeping up a trust administration.

LORD DEAS.—I am very clear that there is nothing in the first objection. The fact that a limited power of resignation was conferred by the trust-deed could not possibly prevent the application of the subsequent enactment which conferred an unlimited power of resignation.

As to the second objection, if the matter had stood on the Act of 1861 I confess I should have thought it very doubtful. But whatever difficulty might have arisen under the Act of 1861, I think that difficulty is removed by the subsequent statute. And taking the one as supplementary to the other, I have no hesitation in concurring with the Lord Ordinary.

LORD ARDMILLAN and LORD MURE concurred with the Lord President.

THE COURT altered the Lord Ordinary's interlocutor by inserting the words "and decern" after the words before extract, and *quoad*

ultra adhered, and allowed additional expenses to the petitioners out of the trust-estate. No. 24.

Nov. 4, 1874. Maxwell's Trustees v. Maxwell.

MACKENZIE & BLACK, W.S.—J. C. & A. STEUART, W.S.—Agents.

GEORGE SIMPSON AND OTHERS, Complainers.—*M'Kechnie.* No. 25.
GEORGE TAYLOR, Respondent.—*Asher.*

Nov. 4, 1874. Simpson v. Taylor.

Bill—Suspension.—In a note of suspension of a charge on a bill for £100 it was averred that when the bill became due the debtor had paid £30, and granted a bill for £70; that the second bill had been fraudulently altered to £75 by the respondent in order to conceal that it was a partial renewal of the first; that the complainer had paid the £75 to avoid litigation; and that the charger was now fraudulently seeking to enforce payment of the first bill. The £75 bill was produced, and was *ex facie* altered. *Held* (*rev.* judgment of Lord Ormidale) that the complainer was entitled to have the note passed on caution.

Bill-Chamber. 1ST DIVISION. Ld. Ormidale. M.

THIS was a suspension brought by George Simpson, George Simpson junior, and George Wood, of a charge on a bill for £100 drawn by one M'William upon and accepted by the complainers. The bill was given to M'William as the price of cattle sold by him to the complainer, George Simpson senior, and was endorsed by him to the charger and respondent, George Taylor.

The substance of the complainers' averments was as follows:—When the bill was about to fall due they arranged with M'William that they should give him a new bill for £70, and pay him £30 in cash, with £2 of discount. This was done, but the £100 bill was not delivered up to them. The respondent and M'William acting in concert altered the £70 bill to £75, and also altered its date, for the purpose of making it appear that it was not a partial renewal of the bill for £100 but for a different debt. The complainers paid the £75 bill to avoid litigation. M'William had left the country.

The respondent, on the other hand, denied the alleged transaction for renewing the £100 bill, and stated that the £75 bill was quite a separate transaction.

The £75 bill was *ex facie* vitiated both in the date and the sum.

The Lord Ordinary (Ormidale) refused the note.

The complainers reclaimed.

The Lord Probationer (Curriehill) gave his opinion that the note should be passed on caution.

At advising,—

LORD PRESIDENT.—We have had the benefit of the opinion of the Lord Probationer in this case, and I concur with his Lordship in thinking that the note should be passed on caution.

It is not disputed that the bill was granted for value as the price of cattle purchased in January 1874, and it was endorsed by the seller of the cattle to the respondent. It is admitted by the respondent that he wrote the body of the bill, and therefore he had probably some acquaintance with the transaction. That would not be of importance in the ordinary case of a bill granted for value. But the allegation of the complainer is that, when the bill was about to fall due a payment of £30 in cash was made, and a bill for £70 substituted for the £100 bill; but that, notwithstanding this arrangement, the £100 bill was not delivered up, and, moreover, that the £70 bill was fraudulently vitiated, both in the date and the sum. If that stood on bare averment I do not know that

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much could have been made of it. But it is of considerable importance that on the face of the second bill it is obviously vitiated, both in the date and the sum. This bill was originally nothing but the date and the sum. The body was afterwards filled in. But these are the very things that are vitiated. The respondent does not admit the vitiation. He maintains on record that the bill was originally for £75, and bore the date which it now bears. It is difficult to believe that, and it is a circumstance of the greatest suspicion that the vitiation was made and is now denied. It is an awkward circumstance, as regards the complainer, that when the £75 bill became due he paid it. If he had brought a suspension of that bill the case would have been much easier than it is. Still I think we are justified in passing this note for the purpose of investigating the facts.

LORDS DEAS, ARDMILLAN, and MURE concurred.

THE note was passed on caution.

THOMAS CARMICHAEL, S.S.C.—ALEXANDER MORISON, S.S.C.—Agents.

No. 26.
Nov. 9, 1874.
Frood v. Earl of Stair, &c.

REV. BRUCE FROOD, Minister of Glenluce, Pursuer.—*Brown.*
EARL OF STAIR AND OTHERS, Defenders.—*D.-F. Clark—Blair.*

Teinds—Augmentation—Decimæ inclusæ.—In a process of augmentation wherein the heritors opposed the augmentation, on the ground that the teinds were exhausted, process *sisted* to enable the minister to bring a declarator to try the validity of a *decimæ inclusæ* right founded on by the heritors, it not being clear upon the face of the documents produced whether the right was well founded or not.

Observed that the Court will adopt the same procedure, as a general rule, in cases where the existence of teind, available for augmentation, is denied by the heritors upon grounds which require investigation.

TEIND COURT.
Teind Clerk.

THIS was a summons of augmentation, modification, and locality, at the instance of the minister of Glenluce against the heritors.

The Earl of Stair and other heritors opposed any augmentation being granted, on the ground that the teinds were exhausted.

The teinds had in fact been dealt with as exhausted, and in 1812 the stipend was augmented to £150 under the Small Stipends Acts.

The Court, on 23d February 1874, appointed the pursuer to condescend upon the free teind which he alleged to exist in the parish.

The minister lodged a condescendence, in which he averred that the teinds of certain lands belonging to the Earl of Stair, Sir John C. D. Hay, and Mr Young, fell to be localled upon for stipend.

The proprietors of these lands lodged answers, in which they averred that they held the lands *cum decimis inclusis et nunquam antea separatis*, and produced a charter, dated 17th April 1572, bearing to be granted by the commendator of Glenluce in favour of Gilbert, Earl of Cassillis, of certain lands, including those condescended on by the minister, *cum decimis garbalibus earundem inclusis antea nunquam separatis*, and a crown-charter of confirmation with a similar clause, dated 12th March 1573. They also averred that the *decimæ inclusæ* right had been given effect to in the last process of locality in 1811.

At advising,—

LORD PRESIDENT.—When the case of the minister for an augmentation was stated to us in February last we appointed him to condescend on the free

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teind which he alleged to exist in the parish. We have now before us the condescendence for the minister and answers for the heritors. The heritors, Lord Stair and Sir John Hay, state that they hold their lands *cum decimis inclusis et nunquam antea separatis*, and therefore are not liable in stipend. No titles have been lodged earlier than a charter dated 1572, which bears to have been granted by the commendator of Glenluce. We could not affirm the validity of this *decimæ inclusæ* right without some farther historical information on the subject. But this charter undoubtedly bears *prima facie* that the lands and teinds are held together, and had never been separated.

In these circumstances the question occurs, what is the proper procedure to adopt? I think all your Lordships upon the last teind day were of opinion that it was desirable that we should consider this matter, with a view, if possible, to laying down some general rule for our future guidance in such cases. In the case of Banchory Devenick[1] the Court adopted a course, which none of us would now, I think, be inclined to repeat. An augmentation was granted, and a remit made to the Lord Ordinary to prepare a locality, but under the reservation that the modification should depend on its being shewn to the Lord Ordinary that there existed a fund for the purpose. The subsequent stages of the Banchory Devenick case shew that a good deal of difficulty was introduced into the case in consequence of the terms of the interlocutor granting augmentation.

Probably the best guide is to be found in two cases reported in the 5th volume of Macpherson. The first is the case of Orr v. Earl of Glasgow,[2] in which an augmentation was opposed by the heritors on the ground that the teinds were valued and exhausted. The process was sisted to enable the minister to bring an action to try the validity of the decree of valuation founded on by the heritors. Lord President Colonsay stated very distinctly the grounds of expediency for adopting this course. Although I observe that my concurrence was given with some reluctance, I nevertheless did concur; and I have since seen reason to think that the concurrence was right, and the reluctance less well founded. The same course was repeated, as a note to the report bears[3] on 16th January 1867 in an application for augmentation by the minister of Stracathro and Dunlappie.

I should be disposed to say that this was the proper general rule, especially when the state of possession is in favour of the heritors. I think there have been other cases in which we have indicated the same opinion, but which are not reported, in consequence, I suppose, of the reporters considering that the rule was settled by the case of Orr v. Earl of Glasgow.

It must not, however, be supposed that in every case in which heritors state objections to an augmentation founded on valuations or *decimæ inclusæ* rights, the process must be stopped, and the minister compelled to raise the question by a declarator. A decree of valuation or a charter *cum decimis inclusis* may be open to such obvious objections on the face of it that it would not be right to stop the augmentation. A good example is to be found in the case of the Minister of Yester v. Marquis of Tweeddale.[4] The Marquis lodged a charter, bearing to be *cum decimis inclusis*, but the Court disregarded the objection, for

[1] July 1, 1863, 1 Macph. 1014, 35 Scot. Jur. 586.
[2] Dec. 19, 1866, 5 Macph. 195, 39 Scot. Jur. 95.
[3] 5 Macph. 197, 39 Scot. Jur. 96.
[4] March 13, 1867, 5 Macph. 592, 39 Scot. Jur. 298.

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this good reason, that the charter, though it contained the words *cum decimis inclusis*, wanted the equally essential words *et nunquam antea separatis*. In a similar case we should follow the same course. But it is a different thing to disregard an objection, and to proceed to adjudicate upon it in this Court. There may be some doubt whether we have jurisdiction to try such questions, and at all events our judgment would be very unsatisfactory, for it would not be binding on the titular or the other heritors. The plain rule is that when there is a case to try of this description the process of augmentation should be sisted to give the minister an opportunity of trying the question in the ordinary way by declarator in the Court of Session.

In this case, as I said before, the right of the heritors is by no means clear on the face of the charter which they have lodged. It is neither clear that they have a good right, nor clear that they have not. It is probable that very considerable historical investigation may be required before the question is determined.

LORDS DEAS, ARDMILLAN, MURE, and CRAIGHILL concurred.

THIS interlocutor was pronounced :—"Having considered the record, condescendence, and answers for the parties, sist procedure to give the minister an opportunity to bring a process of declarator to try the question between him and the respondents."

JAMES GOW, S.S.C.—HUNTER, BLAIR, & COWAN, W.S.—Agents.

No. 27.
Nov. 10, 1874.
Buchanan v. Stewart.

JAMES BUCHANAN AND OTHERS (Trustees of the Fourth Provident Property Investment Company), Pursuers.—*D.-F. Clark—Balfour.*
WILLIAM STEWART (Wilkie's Trustee), Defender.—*Scott.*

Recompense—Meliorations—Bona Fides—Bankrupt—Trustee—Heritable Creditor.—Held that a trustee on a sequestrated estate, who had, at his own hand, completed certain unfinished buildings belonging to the bankrupt, and retained possession of the same for two years, was not entitled to recompense from a creditor holding a heritable security over the buildings, in respect that it could not be shewn in the circumstances that the creditor had been *lucratus*, or that the trustee had not made the expenditure with a view to increase the reversion.

2D DIVISION.
Lord Gifford.
I.

JAMES WILKIE, late builder in Leith, obtained advances from a building society named the "Fourth Provident Property Investment Company," in order to complete certain houses which he was erecting in Leith. In July 1868 he granted to the company a disposition of the subjects *ex facie* absolute, but really in security of the advances made to him. In December 1868 Wilkie's estates were sequestrated, and Mr William Stewart elected trustee thereon. At the date of the sequestration Wilkie had erected the buildings, but not completed them. The trustee entered into possession of the subjects, finished the houses, and drew the rents.

The present action was raised on 7th July 1870 by the trustees of the Fourth Provident Property Investment Company against Wilkie and Stewart. The conclusions of the summons were for declarator, "that the Fourth Provident Property Investment Company, and the pursuers as trustees foresaid, were creditors of the said James Wilkie at the date of his sequestration on 18th December 1868, and still are such creditors, in respect of advances in loan made by the said company to the said James Wilkie, as a member or shareholder of the said company, and lat-

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terly in respect of interest and penalties, and that the said company and the pursuers, as creditors of the said James Wilkie, and feudally vested in All and Whole" the subjects mentioned above, "were and are entitled to sell the said subjects, and out of the price which may be realised by such sale to repay the amount of the said advances, amounting to the sum of £685, 11s. 9d. as at 18th December 1868," with interest and penalties, for decree of removal from the said subjects against Stewart, and for count and reckoning against Stewart as trustee, and individually, in respect of his intromissions with the rents and profits.

Stewart defended the action, and stated a variety of defences.

He claimed, in settling with the pursuers, to be credited with a sum of about £300 expended by himself on the completion of the buildings, and also with a sum of £55 incurred by him in unsuccessful attempts to sell the property; and pleaded that the pursuers were not entitled to remove him without payment of these sums.

Mr Stewart's averments in regard to the completion of the buildings were as follows:—(Stat. 8.) "At the second statutory meeting of the creditors under the sequestration, held on 1st February 1869, the trustee was authorised by the meeting to get the pursuers to advance the funds still necessary for the completion of the three blocks on the security of the property itself, so as to render the property tenantable and saleable for the benefit of all concerned, and specially of the pursuers, who were the holders of the security over it." (Stat. 9.) "The trustee accordingly, in or about the beginning of February 1869, applied to Mr John Robertson, S.S.C., law-agent, and to Mr Cuthbert, manager of the Fourth Provident Investment Company, for said advance. These parties, with whom the trustee had all along dealt, as acting for and representing the pursuers, and who did act for and represent the pursuers in regard to said subjects, represented to the trustee that there would be no difficulty in obtaining an advance from the pursuers to the extent of £200, and promised, and gave the trustee distinctly to understand, that on his proceeding to complete the said blocks of buildings the said sum would be paid and advanced by the company; and further, that any additional sum required for completing the pavement would be paid out of the rents of the subjects. These representations and promises and arrangement were made in or about the beginning of February 1869." (Stat. 10.) "The trustee accordingly, on the faith of this promise and arrangement being carried out by the pursuers, at once proceeded with the completion of the subjects, and incurred accounts to the various tradesmen employed by him, amounting, exclusive of interest, to £301, 8s. 7d., by which additional saleable value was given to said subjects to a much larger extent. The pursuers, and their agent and manager foresaid, were aware of, and acquiesced in, these proceedings of the trustee, and also of the footing on which they were carried on, and it was only after the work was nearly completed, and the said accounts had been incurred, that the said manager wrote the trustee, on 24th April 1869, that the company declined to make the advance. This defender has in consequence been under the necessity of paying the said accounts himself, and he has required the pursuers to repay to him said accounts in terms of the arrangement, and also in respect of the additional value put upon the property, before he gives up possession of the subjects; but the pursuers insist on entering into possession of the property and drawing the rents, and selling, without recognising said claim on the part of the trustee, or paying him any portion of the sums so advanced by him."

Some correspondence was produced between Mr Stewart and those

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acting for the Fourth Provident Investment Company, which, Mr Stewart averred, was supplemented by personal interviews. The correspondence was not very distinct, and did not shew any authority from the company to complete the buildings.

After lengthened procedure, in the course of which the Court repelled the defences, in so far as directed against the validity of the pursuers' title or their right to sell, and remitted to Mr F. H. Carter, C.A., to inquire and report as to the amount of rents uplifted by the trustee, and the amount expended by him in completing the buildings, and in endeavouring to sell the subjects, the case was put out for debate to dispose of the remaining questions.

Argued for Stewart;—A relevant case of recompense had been stated. The law was thus expressed by Mr Bell, substantially in accordance with Stair and Erskine,[1]—"Where one has gained by the lawful act of another, done without any intention of donation, he is bound to recompense or indemnify that other to the extent of the gain." There was no question that it was a lawful act for the trustee to finish the buildings, and as little question that this was done without any intention of donation, and the defender undertook to prove that the pursuers had gained by his expenditure. He was at least entitled to a proof of his averments.

Argued for the pursuers;—The defender in effect sought to prove a loan against the company by parole evidence. The only cases in which the principle of recompense was recognised were—(1) the case of a *negotiorum gestor*, and (2) the case of a *bona fide* builder on another person's ground. *Negotiorum gestio* was legally impossible where the principal was upon the spot; and clearly this was not a case of a person building on another's ground in the belief that it was his own, for the trustee knew precisely what his rights and powers were under the bankruptcy statute. It was decided in the case of The Heirs of Selby v. Jollie,[2] that a person having a right of retention over a subject in security of debts owing to him by the proprietor was not liable for the claims of tradesmen for meliorations made upon it on the order of the proprietor.[3] The defender's averments, if proved, did not put his case higher than that of the tradesmen in that case, and therefore he should not be allowed a proof.

At advising,—

Lord Justice-Clerk.—We have had a long argument on the question whether Mr Stewart, the trustee on Wilkie's sequestrated estate, is entitled to allowance for sums expended in completing buildings which belonged to the bankrupt. Wilkie had obtained advances from an investment company called the "Fourth Provident Property Investment Company" for constructing these houses, over which the company held a security. He had previously obtained an advance from another company, the "Third Provident Property Investment Company," who held a preferable security. Wilkie had erected the buildings, but not finished them, when he became bankrupt. The debt of the Third Company was sufficiently secured, but the Fourth Company were in the position of postponed creditors. The trustee entered into possession of the subjects; and the question occurred, whether he was to finish the buildings, or sell them as they

[1] Stair, i. 8, 6; Erskine, iii. 1, 11; Bell's Pr. sec. 538; Duchess of Lauderdale v. Steill, 1687, 2 Brown's Supp. 105.

[2] June 5, 1795, M. 13,438.

[3] See also More's Notes to Stair, pp. 54, 55, and cases there cited.

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stood. The creditors declined to furnish funds. The trustee then applied to the Fourth Company to advance money to complete the buildings. They did not give any distinct response. The result was that, without authority from the creditors, and certainly without authority from the Fourth Company, the trustee finished the buildings himself, in the expectation, no doubt, that the subsequent sale of the buildings would remove all difficulties by enabling all parties to be paid in full. The market, however, went down, and the present action was brought by the Fourth Company. We thought that by authorising a sale the dispute might be settled by the creation of funds sufficient to pay every one. This hope has been disappointed, and the only result is that the case has been protracted for two years. The only question that remains is whether Mr Stewart in settling with the Fourth Company is entitled to take credit for the sums expended by him in completing the buildings.

The case has been very well argued for him, but I am of opinion that he has failed to make out an essential element in his case. There may be a good deal of equity in his claim. I am far from saying that there are not cases where a party having, on a mistaken view of his title, improved subjects to the advantage of the real owner, the latter is bound to make restitution for the beneficial expenditure. Accordingly, if it were clear that the Fourth Company took benefit by Mr Stewart's expenditure, I should be inclined to consider his claim with more favour. But the foundation is wanting. There is no evidence that the Fourth Company have gained one farthing. There is no evidence that if they had entered into possession, which they were not allowed to do, they would not have paid themselves in full. The trustee chose to remain in possession, and excluded them. It is hopeless now to ascertain what could have been obtained for the buildings had they been sold at once. On that ground I am prepared to negative the claim by Mr Stewart. Payment to him is no condition of the right of the Fourth Company to get the subjects. I would reserve Mr Stewart's claim entire in regard to any balance of price which may arise from the sale of the subjects.

Lord Neaves.—I have arrived at the conclusion indicated by your Lordship. The doctrine of recompense is of great importance, and our authorities in regard to it are not altogether in a satisfactory state. The claim to recompense is an equitable claim, and our law is favourable to equitable claims. But the doctrine is overstated by Stair when he gives the benefit of the law of recompense to one who *in mala fide* builds on another's ground. This has not been ratified by later decisions. The sound rule is, that where a party, in error but *in bona fide*, has expended money, and another steps in and takes the benefit, equity requires, not that he shall be reimbursed, but that the other shall pay him *in quantum lucratus*. The plea of *bona fides*, it may be remarked, necessarily implies a bad title, for with a good title the question could not arise.

When we apply the law to individual cases great difficulty is often found. In the present case I do not see what the error was on the part of Mr Stewart. He knew what were his powers under the Bankruptcy Act, strong but limited. He knew that as trustee he was entitled to sell the property if he chose, but under this important limitation, that he could not sell it for less than the amount of the heritable creditors' debt. There certainly was a want of peremptoriness on the part of the Fourth Company in negativing Mr Stewart's pro-

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posal; but, on the other hand, there was laxity on his part in not getting explicit directions as to what he was to do.

In regard to *bona fides* and recompense there is always the question whether it is possible that the person claiming recompense has been acting *in suo*, and not either in error or *in bona fide*. If he has a reversionary interest, it must be made very clear that he has not been acting with a view to increasing that reversion. It is not unreasonable to infer that the trustee here entered into a speculation in the hope of increasing the reversion that he thought would accrue to his constituents, and thus indirectly of benefiting himself. It is not clear that he trusted to be repaid by the Fourth Company out of the first end of the price, or whether the subjects were sold or not. If the price is sufficient, he may yet get back his money, but I think it impossible for him to maintain that it is a condition precedent to the company getting the subjects that they should pay him for the improvements which he says he has made.

LORD ORMIDALE.—I concur. In regard to the doctrine of recompense, as stated by Lord Stair, the Court must now, after the case of Barbour v. Halliday,[1] hold it as too broadly stated, as applied to meliorations by a *mala fide* possessor.

LORD GIFFORD had not heard the debate in the Inner-House.

THIS interlocutor was pronounced:—" . . . Find that the pursuers, as trustees of the Fourth Provident Society, are not bound, in administering and realising their security, to pay the amount expended by the defender William Stewart, as trustee on Wilkie's sequestrated estate, in completing the buildings libelled, reserving the effect of any claim on his part for repayment thereof against the price of the said subjects when sold, and against the other creditors and the estate of the bankrupt Wilkie: Farther decern against the said William Stewart, defender, in terms of the conclusions for removing and for payment of the sum of £90, 15s 11½d., being the balance of rents received by him, as reported by the accountant, Mr Carter; reserve any question in regard to the expense of the attempted sales of the property until the same shall come to be sold: Find the pursuers entitled to expenses," &c

J. & R. A. ROBERTSON, S.S.C.—JAMES BARTON, S.S.C.—Agents.

No. 28.
Nov. 12, 1874.
Russell v. Russell.
1ST DIVISION.
Ld. Craighill.
M.

MRS SARAH RUSSELL AND HUSBAND, Petitioners.—*R. V. Campbell.*
THOMAS RUSSELL AND ANOTHER, Respondents.—*MacLean.*

Process—Reclaiming Note—Court of Session Act, 1868—31 *and* 32 *Vict., c.* 100, *sec.* 28.—*Held* that when the last day for lodging a reclaiming note under the Court of Session Act of 1868 fell upon a Sunday, it was timeously lodged upon the Monday.

MORTON, NEILSON, & SMART, W.S.—J. & R. D. ROSS, W.S.—Agents.

[1] July 3, 1840, 2 D. 1279, 12 Scot. Jur. 602.

No. 29.

Nov. 13, 1874.
Cunningham
v. Lee.

PETER CUNNINGHAM, Appellant.—*Asher—Mackintosh.*
J. B. W. LEE, Respondent.—*Sol.-Gen. Watson—Campbell Smith.*
ROBERT WEIR (Kirk's Trustee), Compearer.—*Guthrie Smith—H. J. Moncreiff.*

Agent and Principal.—A law-agent bought shares in his own name on the employment of a person who neither paid for the shares nor would give instructions for reselling them on the settling day. The agent, after giving notice that he would sell the shares, carried them over in his own name through his London brokers, and sometime afterwards sold them without loss. He then claimed the difference between the price at which he had purchased the shares for his principal and the market price on the settling day. The claim was disallowed, on the ground that the claimant could not, while acting as agent for the owner of the shares, become the purchaser thereof, and that no loss had accrued upon the transaction.

1st DIVISION.
Lord Young.
M.

IN the sequestration of James Kirk, grocer, Edinburgh, Mr J. B. W. Lee, S.S.C., lodged a claim for £1632, 5s. as the balance of certain transactions in buying and selling stocks. The trustee admitted the claim to the extent of £1100, to which amount Lee had consented to restrict his claim.

One of the creditors, Peter Cunningham, appealed against this deliverance.

The Lord Ordinary allowed a proof, from which the following facts appeared:—Mr Lee, who had a long course of dealing in stocks and shares with the bankrupt and other persons for whom he bought shares in his own name through his London brokers, and having authority from Kirk to buy for him, on 29th October 1873, sent a letter to Mr Kirk intimating that he had bought in London, for Mr Kirk, £17,000 North British at £67, 16s. 3d., £11,528, 2s. 6d. for settlement in London on 14th November current.

On 12th November 1873 Mr Lee wrote to Mr Kirk the following letters:—"Dear Sir,—My London brokers, through whom I purchased your £17,000 British, £2000 Caledonian, 100 Eries, and 50 Erie preferences, for settlement this account, require me to have written instructions before they sell for the present account and purchase for next account. You failed to send me these yesterday, and unless I can telegraph to-day before 12 o'clock they may be sold out. Please to give the bearer written instructions, and call for me before 12 o'clock without fail.—Yours, &c." "Dear Sir,—After you left to-day at about 11 o'clock, I waited anxiously for your promised return before 12 o'clock, so that I might telegraph instructions as to the stock which I purchased for you in London, for settlement on 14th current. As you neither furnished me with the name into which you wished the stock transferred, nor gave me instructions within business hours to-day, the stock was sold in London, and is closed in accordance with the rules of the London Stock Exchange in such cases. The £17,000 North British was sold at 58¾ per share, the £2000 Caledonian," &c. . . . "I send you annexed an account-current between us to this date, shewing a balance against you of £1619, 9s. 7d., which please settle to-morrow, as I must remit it to London to-morrow afternoon. I purchased stocks to the same amount for the next account, but as I had not your instructions, I cannot hold that I purchased them on your account. If, however, you settle up the balance due to-morrow, and give me written instructions, I will invoice a similar amount of stock to you for the new account at the new prices. Let me hear from you to-morrow morning.—Yours, &c."

Mr Lee deponed—"My transactions with M'Anally and Inglis" (his

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London brokers) "were conducted chiefly by telegraph. My bargain with them was, that if I did not telegraph to the contrary, they were to carry over for me, and in this case the stock was carried over on 12th November, according to that standing arrangement, I not having telegraphed to the contrary. Besides sending Kirk a sold note, I wrote him on the 12th that the stock was sold in London and closed. The account between him and me was thus entirely at an end, and on that footing I proceeded to deal with the stock, selling it on and after 21st November. The expense of carrying over was above £80, and that was paid by me. The prices rose after the middle of November, and the loss that would have taken place if the stock had been sold out on 14th November was somewhat diminished. If the stock had continued to fall, the loss would have fallen on me. I was liable to the London brokers. My belief was, that from and after 12th November I ceased to have any contract with Kirk. I was willing, if he paid me the differences, and relieved me of my liability, to hold the stock for him. I wrote him repeatedly to that effect, but the offer was not accepted."

Mr Lindsay, an accountant, who examined Mr Lee's books, deponed—"The price paid by Mr Lee for the £17,000 North British stock bought by him for the bankrupt on 28th October was £11,528, 2s. 6d. The amount realised by Mr Lee for the first £17,000 North British stock sold by him after 24th November was £11,482, 10s., shewing a loss of £45, 12s. 6d. The sum realised by him for the first £17,000 sold after 28th November was £12,215, shewing a profit of £686, 17s. 6d. on the price paid on 28th October."

On 27th November Kirk was sequestrated. Lee claimed the balance which would have been due to him if he had sold the shares on the settling day.

The Lord Ordinary, after the proof, pronounced an interlocutor disposing of other questions, and with reference to Lee's claim "recalls the deliverance of the trustee on the claim of J. B. W. Lee: Finds that the said J. B. W. Lee is not entitled to a ranking in the sequestration to any extent, and remits to the trustee to reject the claim *in toto*," &c.*

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* "NOTE.—I do not think this is a legitimate claim to any extent. Mr Lee's position with reference to the transactions referred to was peculiar. He did not act as a broker, but as a sort of agent, who, while speculating in the share market on his own account through the instrumentality of a broker in London whom he employed, associated others (his clients or customers) in his speculations to such an extent as they desired or agreed to. The purchases and sales were in his own name, and were made for him by the London broker, his customers or clients being interested through him to the extent agreed on. In October 1873 he was speculating in the purchase of North British Railway stock, and the bankrupt agreed with him to join to the extent of £17,000 of that stock, and a purchase of that amount was on 28th October notified by him to the bankrupt as made on his account, for settlement on 14th November. The account of Lee's purchases, and the extent to which he was speculating for himself, or people other than the bankrupt, does not appear. The market fell, and so the particular speculation was for the time unfortunate. But Lee's broker, in pursuance of general instructions to that effect, on 12th November (called carry-over day), carried over, by an arrangement familiar on the Stock Exchange, all Lee's purchases, including that made on account of the bankrupt, till next settling day, which was on 28th November. On the same day (12th November) Lee applied to the bankrupt to provide him with the means of meeting the loss on his purchase, or arrange for carrying over; and receiving no reply, intimated to him that he was held liable for the loss. This loss is the subject of the claim in the sequestration. But, as already stated, the purchase

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Mr Lee reclaimed, and argued;—Lee was the seller and Kirk the buyer. When Kirk refused to implement his bargain Lee was entitled to hold him liable for the price of the stocks as at the settling day. Lee took the whole risk of the stock, and was therefore entitled to any profit which might arise from the stock rising in the market. The transaction was closed on the 12th of November when the loss was ascertained. He had a right to sell out, and the bankrupt had no interest to inquire whether he actually sold out or kept the stock in his own name.

The respondent answered;—There was no sale by Lee on the settling day. A carrying over contract is not a sale, because the purchaser and the seller are the same. Lee had not proved that he had sustained a loss. He was acting as the broker of Kirk, and was bound to communicate to him any profit he might make.[1]

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being in Lee's name, was in fact carried over by his broker, acting on standing instructions. In truth, Lee acted exactly as if the purchase had been, in respect of interest, as it was ostensibly, his own, and carried it over with his other purchases till December, when he finally sold out so far as the bankrupt's purchase (or interest in Lee's purchases) extended, not only without loss, but with a gain of about £400. There were also speculations in other stocks or shares, but these standing in the same position as that in the North British Railway stock, to which I have adverted, were not made the subject of separate argument, and need not be particularly noticed.

"The claim is certainly of an unfavourable character. The transactions were in reality mere gambling for differences, according to the rise or fall of the share market; and I venture to doubt the propriety of this Court aiding a claim in bankruptcy founded on such transactions, and for that purpose considering what would have been the rights and duties of the parties respectively had the purchases been real. Had the bankrupt employed Lee to purchase on his account £17,000 of North British Railway stock for delivery on 14th November, Lee would no doubt have been entitled to demand the price, in return for the stock purchased by him on such employment. But the reality being mere speculation, with no intention of receiving any stock, but only of paying or receiving the amount of rise or fall, and Lee having himself carried on the speculation till he terminated it fortunately with a gain realised within a few weeks, I cannot allow him a ranking for the loss which would have resulted had it been terminated on 12th or 13th November. It is true that his gain was a fortunate accident, but still it puts him in this position, that he is seeking, not to save himself from loss, but to make a still further gain to the extent of the ranking which he demands. Had he taken up the stock on 14th November, it is not clear that there would have been any loss to the sequestrated estate, for the stock rose in the market. This was the legitimate course if reality of transaction be assumed. Lee very naturally shrank from it as involving too much risk, and preferred to carry over, and so carry on the speculation on his own account. But having taken this course, and made, and not lost, money by it, I am unable to think that he is in a position to demand a ranking on the view that it would have been a losing speculation had it been closed on 12th November, and that the eventual gain is a separate matter, to the whole benefit of which he is entitled, *plus* a dividend on the theoretical loss as at 12th November. I quite understand the argument on which the claim is maintained, but it has not overcome my repugnance to follow it to the conclusion contended for. The argument is not illogical, but is, in my opinion, outweighed by the considerations on the other side to which I have adverted.

"I therefore reject this claim."

[1] Paterson on the Stock Exchange (1870), 35; Cox on Joint Stock Companies (1870), pp. 56 and 57; Gourlay's Trs. v. Kerr, Feb. 20, 1856, 18 D. 619, 28 Scot. Jur. 260,—Dec. 6, 1856, 19 D. 135, 29 Scot. Jur. 64,—June 6, 1857, 19 D. 789, 29 Scot. Jur. 365; Gillett v. Peppercorne, July 25, 1840, 3 Beavan, p. 78; Rothschild v. Brookman, 1831, 5 Bligh's New Reports, p. 165; Brookman v. Roths-

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LORD PRESIDENT.—The question arises out of the sequestration of James Kirk, grocer and wine merchant, Edinburgh, and a claim on the sequestrated estate made by the reclaimer Lee for a balance of upwards of £1600, on an account current between him and Kirk. The account contains a variety of transactions in stocks and shares, for Mr Lee, who is a solicitor in Edinburgh, seems to have done a good deal in the way of Stock Exchange business. In 1873 he was empowered by Kirk to carry through a transaction on his behalf, and out of that transaction the present claim has arisen. The particular shares or stocks in question were bought by Lee for Kirk on 29th October 1873. Lee announced this purchase to Kirk in the following terms:—

"Dear Sir,—I enclose my account current with you up to this date, shewing a balance in your favour, after you deliver £10,000 British, of £6653, 12s. 11d.

"I yesterday purchased for you in London £17,000 North British, at 67·16/2, ... £11,528 2 6

Commission on £7000 at 1/16, . . . 4 7 6

2000 Caledonians at 96·8/9, ... 1928 15 0

No commission charged.

100 Eries at 39¼ and 1/ cont, ... 888 2 6

50 Erie Preferences at 56 and 1/5, say 56 dollars and 1/3 con., ... 632 2 6

£14,982 10 0

for settlement in London on 14th November current, for which you will hold this to be the contract, as also the contract for the sales made yesterday for you, as stated in the account,—Yours," &c.

This was accordingly taken as a contract between Lee and Kirk, and thus Lee bought for Kirk these stocks for settlement on the 14th November following. In short, this was what is called a time bargain, and necessarily a speculative bargain. The Lord Ordinary suggests whether this was not a gaming and wagering transaction within the meaning of the Act 8 and 9 Vict. c. 100. But it is settled by the decision in the case of Foulds v. Thomson, June 10, 1857 (19 D. 803, also reported in 29 Scot. Jur. 372), that a transaction of this sort is neither gaming nor wagering in terms of the statute, nor at common law. Therefore Lee's claim cannot be objected to on these grounds. But there were many other circumstances occurring after this which it is necessary to examine in order to see exactly what Mr Lee did.

On the 12th of November he wrote to Kirk thus:—"Dear Sir,—My London brokers, through whom I purchased your £17,000 British, £2000 Caledonian, 100 Eries, and 50 Erie Preferences, for settlement this account, require me to have written instructions before they sell for the present account, and purchase for next account. You failed to send me these yesterday, and unless I can telegraph to-day before 12 o'clock they may be sold out. Please to give the bearer written instructions, and call for me before 12 o'clock without fail. —Yours," &c.

From this it appears that Kirk had conceived the intention, or what Lee understood to be the intention, not to take delivery of the shares on the settling

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child, July 16, 1829, 3 Simon, 153; Booth v. Fielding and Parkinson, June 21, 1866, 1 Weekly Notes, p. 245.

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day, the 14th of November, but to carry over till next settling day, and so Lee desired to have written instructions to do so. Kirk, however, took no notice of Lee's request. In this he acted very unreasonably, and placed Lee in a position of considerable embarrassment. The question is, what in these circumstances Lee did, and what he ought to have done? There was a great deal of argument upon the kind of relation which existed between Lee and Kirk. On one side it is maintained that he acted as a broker, and on the other that he acted as an agent. I do not think that a decision of this point is absolutely necessary to the settlement of the question before us. But the relation between them was undoubtedly that of principal and agent, and I should be inclined to say that Lee occupied the position of a factor rather than of a broker. Certain distinctions between the offices of broker and factor lead me to this conclusion. Thus a broker buys and sells, not in his own name, but in the name of his principal, whereas a factor buys in his own name. Again, a broker has no possession of the subject, no control over it, no power of disposal. The factor has such powers and a consequent lien over the subjects. In these respects Lee was rather a factor than a broker, and it is not necessary more precisely to determine the relation between the two. It is sufficient that Lee was agent.

Now, as already said, Lee was left without instructions. He says that he sold on 12th November, and that is the only matter in dispute on record. The appellant says in the 3d article of his condescendence—"Between 28th October and 12th November 1873 these shares fell considerably in value. On the latter date Mr Lee made entries in the bankrupt's account as if the shares had been then sold on his behalf, and this brought out a deficit on the account corresponding to the fall in the value of the shares. It is for this deficit that he claimed as a creditor in the sequestration. But, in point of fact, the shares were not sold by Mr Lee on 12th November, as indicated in the account produced with his claims. They were retained by him for some weeks till they rose to the price at which they had been purchased, when they were realised without any loss resulting on them at all."

This is a matter of fact which has been cleared up completely by the proof, both parole and written. On 12th November Lee certainly did write to Kirk that in consequence of having received no instructions the stocks had been sold and the account closed. But it is obvious that neither were the stocks sold nor the account closed, for some days after Lee offered to Kirk or his agents to carry over the shares after all to next settling day. That offer was not accepted, and Lee says he again sold the shares and so closed the account. But what Lee calls a sale is a very different thing. What he actually did was in effect to take the shares and the speculation himself, and to claim the loss as upon a sale on settling day. This was not a sale, but a speculation on his own account, in the hope that the shares would rise before another settling day. It is unnecessary to go into the technical details of this matter, but the result is, that instead of selling the stocks, Lee took them himself, and from that time the shares in the broker's books stood in his name as owner. Was he entitled to do this?

In circumstances of this sort, when a principal will not advance funds or give instructions, either a broker or a factor is entitled to sell, to take the price he receives in order to cover his loss, and to charge his principal for any balance which may remain. But, instead of selling, is the agent, be he broker or factor, entitled to appropriate the subjects to himself? That, also, is very well settled. No agent can buy the property of his principal in any case, except when he is

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specially authorised to do so. But here there was no authority or consent. Lee obviously took the course which he did in the belief he was entitled to do so. He seems to have acted in perfect good faith, and with great forbearance towards Kirk. But still, upon the question whether he was entitled to do what he did, I am of opinion that he was not. His actings were quite against the settled rule of law.

On that ground Lee's claim falls to be rejected, and it is a matter of indifference what became of the shares after he took them. For he cannot say that £1600 are due to him on the sale of shares which he did not sell, but retained. It is, however, satisfactory to know that the loss which he sustained was ultimately very small or nothing at all.

I am therefore of opinion that we should adhere to the interlocutor of the Lord Ordinary.

LORD DEAS.—I do not think it is necessary to determine in what precise capacity Mr Lee was acting. He designs himself a Solicitor before the Supreme Courts. He also describes himself as a broker. It is not easy to understand what that implies. He was not a member of the Stock Exchange, or of any other body except the Society of Solicitors. If he was acting as a broker his position would be all the more unfavourable. He was, at all events, acting as an agent, and that is the view I am disposed to take of his position. Now, when an agent is empowered to buy in his own name for behoof of his client, the client is bound to relieve him when the settling day comes. If the client fails or refuses to relieve him of the price, or if, as in this case, the client will neither say nor do anything at all, I think the agent (not being a stockbroker, whose position may be different) might fairly be entitled to say,—"I am liable for the price, and if not timeously relieved I will retain the shares for my own behoof, and take the chance of profit or loss." I am not satisfied that this would be buying from his client. Even an understanding to the effect I have suggested might have been plausibly urged. But the misfortune is, that Mr Lee neither took this course, nor did he sell out as he might have done and debit his client with the loss. What he did was to carry over the shares in his own name, and sell them afterwards at a profit which he proposes to keep, and at same time to charge his client with a sum equal to the loss which would have been incurred if the shares had been sold on the settling day. I am clearly of opinion that Mr Lee is not entitled to do that.

LORD ARDMILLAN.—The question raised in the appeal by the reclaimer, Mr Lee, is of some importance to the parties in point of amount, and of great importance to the law in principle. It is not necessary to repeat the explanation of the facts out of which the legal question has arisen. Your Lordship has sufficiently explained them. On these facts the Lord Ordinary has decided that Mr Lee is not entitled to be ranked as a creditor in the sequestration of Kirk; and he has accordingly remitted to the trustee to reject Mr Lee's claim. I am of opinion that the decision of the Lord Ordinary is right.

I do not think it important to consider whether Mr Lee acted as a broker or only as an agent or a factor. It appears from the record that Mr Lee considered himself to be acting as a broker, and he alleges that he was employed by Kirk to act for him in the capacity of a broker. He also alleges that the business which he so transacted for Kirk was to be conducted, and was conducted, in

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accordance with the rules of the London Stock Exchange. But whether it may be considered that he acted as a broker or not, he certainly acted as agent; and it is clear beyond dispute that the transactions on the London Stock Exchange, out of which this dispute has arisen, were parts of a more extensive speculation by Mr Lee, and were conducted by Mr Lee through the medium of London stockbrokers, employed and directed by him, and not employed by, or in any way brought in contact with Mr Kirk. Lee, as acting for Kirk, had purchased North British stock for Kirk, not as an investment, but as a speculation, and when the time for taking up and paying for the stock arrived Kirk did not send the money or give instructions, and the London brokers, acting under the direction of Lee, proceeded to dispose of the stock by his orders, and for his benefit. I do not doubt that Lee, on Kirk's failure to remit the funds, was entitled to dispose of the stock in the market. He was entitled to sell the stock to another. Kirk had used him ill in not providing him with funds, or giving him instructions; and a sale by Lee for his protection, if made *bona fide* to a third party, would not have been otherwise than lawful. But there was no sale to a third party. In point of fact, Mr Lee became himself the purchaser of the stock, and after a stock-jobbing procedure, called carrying over, had been completed in regard to this stock and other stocks held by Lee, a sale ultimately took place, I think, in December, the result of which was not a loss, but a gain to Mr Lee of about £400. The claim now made is for the loss which would have resulted from an actual sale on the 12th or 13th of November, the price of that time having been low. The sum claimed is £1623, 5s.

In any view of the case I could not sustain this claim. At the close of the whole transaction there was no loss. Mr Lee is not seeking reimbursement of a loss; but, having ultimately been a gainer, he is suing for payment of a sum which would have been lost if the transaction had terminated by sale on Kirk's failure to remit funds on the 12th or 13th of November. That Lee was the purchaser of the shares at that time, and the holder of the shares after that time, is clear, and he having so purchased and so held the shares, I am disposed to agree with the Lord Ordinary in thinking that he is not entitled to demand from Kirk, or his estate, the sum here claimed, which is a theoretical or hypothetical loss as on 12th November. He cannot recover the loss which he avoided, and at the same time keep the gain which he made.

But, separately, and on a broader ground, I fully concur with your Lordship in opinion that Mr Lee being agent for Kirk,—agent in this speculative transaction,—could not lawfully purchase for himself the stock which he sold as agent for Kirk. He represented Kirk, and as Kirk's agent he sold to himself the stock which he held for Kirk. My mind is not disturbed by the Dean of Faculty's ingenious introduction of the "jobbers" on the London Exchange. We have nothing to do with them. They are the mere instruments by which the machinery of stock-jobbing speculation is worked. I am clearly of opinion that he was not entitled so to act as to transfer the shares to himself. It is well settled, both in England and in Scotland, that an agent cannot purchase what he is employed to sell, nor sell what he is employed to purchase. If directed and empowered to sell for his client, he cannot be himself the purchaser. If directed and empowered to purchase for his client he cannot purchase from himself. On this point it were easy to quote authorities in support of a principle which must commend itself to our minds. One of the most striking cases is that of Brookman v. Rothschild, 5 Bligh's Reports, new series, p. 165, where the rule was enforced

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notwithstanding the good faith of the proceeding. I may also mention the case of Gillett v. Peppercorne, decided by Lord Langdale, 3 Beavan, 78, and the case of Crowe v. Ballard, 3 Bro., Ch. C., p. 119. See also Sugden on Vendor and Purchaser, vol. 2, p. 887; Addison on Contracts, p. 72.

If, therefore, Lee, being employed to sell certain shares, had purchased these shares for himself, I should have had no doubt that he acted unlawfully, whether he be considered as an agent or as a stockbroker.

But if, being agent, he sold as a step in the process of carrying over and thus continuing the speculation, I think he cannot be permitted to separate the carrying over into two parts, the one being a sale by himself as agent to some jobber for himself as an individual, and the next a retransmission or recovery of the shares back from the jobber to himself, to be held on by him to his own ultimate gain, and then to take the date of the sale to himself and sue his employer as for a loss at that date. Such a proceeding by an agent, whether stockbroker or not, was, in my opinion, illegal. It necessarily involved the purchase by himself from his client,—or rather by himself as an individual from himself as an agent,—a purchase which terminated in a resulting gain to himself. Such a transaction is, in my view, contrary to law.

On this separate ground, even more clearly than on the ground stated by the Lord Ordinary, I am of opinion that Mr Lee's claim has been rightly rejected.

When I say that Mr Lee's conduct in this transaction was illegal, I do not mean to impute or suggest any fraud or intentional unfairness on his part. But in these transactions on the Stock Exchange, where such speculation on time bargains, though not gaming and wagering within the meaning of the statute, do certainly tend to gambling, it is essential to protect, and to enforce firmly, the rules of law and equity which regulate the relations between principal and agent. I feel, therefore, no hesitation in rejecting this claim.

LORD MURE concurred.

THE COURT adhered.

MORTON, NEILSON, & SMART, W.S.—J. B. W. LEE, S.S.C.—DAVID HUNTER, S.S.C.—Agents.

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Berwick, &c.

DAVID BERWICK AND OTHERS, Petitioners.—*T. B. Johnston.*

Trust—Powers of Trustees—Nobile Officium.—Held that a petition (not under the Trust Acts) by testamentary trustees for powers not given by the trust-deed was incompetent.

Tutors-Nominate.—Observed that, in the case of tutors-nominate, the Court have occasionally granted powers which they would not give to trustees.

1ST DIVISION.
Ld. Curriehill.

THIS was a petition by David Berwick, David Edie, and Walter Walker, original and assumed trustees of the deceased Walter Walker of Kingask, near Cupar-Fife. The petition stated that the late Walter Walker conveyed all his heritable and moveable property to the petitioner, David Berwick, and other trustees.

The purposes of the trust were, *inter alia*,—(1) Payment of debts. (2) Payment of the free yearly proceeds, after meeting the said debts and obligations, to the truster's wife. (6) The trustees were empowered in certain circumstances to sell and dispose of the truster's lands and estate of Kingask, and in the event of such sale to pay to the truster's eldest son, or invest for his behoof, the sum of £2000 sterling. (7) In the event of such sale the trustees were directed to retain and invest the residue, and

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after the death of the truster's widow to divide the residue equally among his whole children then in life, share and share alike, the lawful issue of any dying before the said event succeeding to their parents' share equally.

8. In the event of it appearing to the trustees that the lands and estate of Kingask ought not to be sold, and that the truster's debts, obligations, and burdens can be adequately met without selling the said estate, the trustees were directed to convey the said estate to the truster's eldest son, and his heirs and assignees, either on the youngest child arriving at the age of twenty-one years, or on the death or second marriage of the truster's wife, or at any other period that the trustees might consider expedient.

By the trust-disposition and settlement the trustees were nominated and appointed executors to the truster, and also tutors and curators to such of his children as should be in pupillarity or minority.

The petitioner, Mr Berwick, was left sole surviving and acting trustee, and on 10th January 1873 he assumed the petitioners, Mr Edie and Mr Walter Walker, to be trustees along with him.

At the time of his death the truster was, and had been for some years, in the natural possession and occupation of the lands of Kingask, which constituted his whole heritable estate. These were in his lifetime entered in the county valuation-roll as of the annual value of £425. His personal estate was insufficient to meet his debts and obligations, and the lands of Kingask were heavily burdened.

By letters dated 10th and 14th June 1865 Mr Walker's trustees let the farm and lands of Kingask to Mr Thomas D. Cunningham, Newbigging of Blebo, for nineteen years from Martinmas 1865, at the rent of £550 per annum for the first six years of the lease, and £600 per annum for the remaining period.

The petitioners stated,—"Mr Cunningham has informed the petitioners that it is impossible for him to pay the increased rent of £600, or any longer to carry on the farm at the present rent; that he has invested his whole means in stocking the farm; that a very considerable portion of the money so invested has already been lost; and that, as he is losing money every year, he will very shortly be left without any means at all, unless he is allowed to leave the farm, or his rent be very considerably reduced. This, he says, arises from two causes: mainly because, first, he had over-estimated the agricultural value of the land, and, second, that farm-servants' wages and other expenses of labour have since the time of his offer been very greatly increased. The reduction of rent indicated by Mr Cunningham is £100 per annum under the maximum rent of £600.

"The petitioners differ from Mr Cunningham as to the annual value of the land, but otherwise they believe his statements to be true. They find it utterly impossible to grant him the reduction of rent which he requires. The free revenue of the trust-estate, after paying interest on debt, annuity, and public and parochial burdens, does not exceed £150 per annum, out of which the trustees have to support and educate five children, so that the reduction of rent proposed by Mr Cunningham would virtually leave these children without sufficient means of subsistence. The petitioners believe that, either by taking the farm into their own hands, or by selling it, they will be able at least to maintain, probably considerably to increase, the income of the trust, and they have therefore resolved, subject to the approval of the Court, to allow Mr Cunningham to leave the farm at Martinmas 1875.

"The petitioners have no power under the trust-deed to accept renunciation of leases, and they deem the present application to be therefore necessary."

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The prayer of the petition was "to authorise and empower the petitioners to accept from the said Thomas D. Cunningham, a renunciation of his lease of the farm and lands of Kingask belonging to the petitioners as trustees foresaid as at the term of Martinmas 1875 as if it had come to its natural termination, and to allow the said Thomas D. Cunningham to flit and remove from the said farm at the said term, he always paying or finding security for payment of the whole rents due for the possession up to said term, and adjusting with the petitioners the course of cropping for crop and year 1875."

Lord Curriehill reported the case to the Court, and referred to the cases Kinloch and Others, Dec. 7, 1859, 22 D. 174 (32 Scot. Jur. 73), and Turner, March 1, 1862, 24 D. 694 (34 Scot. Jur. 347).

Lord President.—I think it important to notice that this is not an application by tutors-nominate, but by trustees. One of the petitioners is tutor-nominate, but it is in his capacity as trustee that he presents this application along with the other trustees. In the case of tutors-nominate the Court have occasionally granted higher powers than they would give to trustees. Neither is this a case under the Trust Acts. The powers of trustees are defined by the trust-deed, and the Court will give no higher power. The trustees are not entitled to come to the Court for advice. If they have not the power given them by the deed it is not competent for us to give it them. I think, therefore, that the petition should be dismissed as incompetent.

Lord Deas.—The petitioners are the accepting and acting trustees under the *mortis causa* deed of settlement of the late Walter Walker, of Kingask. The trust-estate consists substantially of the lands or farm of Kingask, which the trustees acting for the time being let in 1865 to the present tenant, Mr Cunningham for nineteen years at a rent of £550 per annum for the first six years, and £600 per annum thereafter. They state that Mr Cunningham represents himself as totally unable to pay the rent of £600; that he is yearly losing the only means he has, and unless he either gets a reduction of £100 a-year, or is allowed to renounce the lease, he will shortly be unable to pay any rent at all. The petitioners state that they believe this to be true, but that they consider the lands worth the full rent, which might be got from a tenant of greater capital and skill, and alternatively, that they could sell the lands at a price which would considerably increase the income of the trust, which is all required for the trust-purposes. In these circumstances, they ask the authority of the Court to accept a renunciation of the lease. I see no reason whatever to doubt that the petitioners take a judicious view of what is for the interests of the trust-estate. But it is for them to exercise their own discretion in that matter. If they do so rightly they will be safe. But it is a pure question of management, in which we cannot aid them, and I think we must refuse the petition as incompetent.

Lord Ardmillan and Lord Mure concurred.

Lord Curriehill pronounced the following interlocutor:—"The Lord Ordinary having considered the petition, and heard counsel for the petitioners, and thereafter reported the same to the Lords of the First Division, as advised by their Lordships, finds the petition incompetent, dismisses the same, and decerns."

Frasers, Stodart, & Mackenzie, W.S., Agents.

MRS SARAH RUSSELL AND HUSBAND, Petitioners.—*R. V. Campbell.*
THOMAS RUSSELL AND ANOTHER, Respondents.—*D.-F. Clark—MacLean.*

No. 31.
Nov. 14, 1874.
Russell v. Russell.

Partnership—Judicial Factor.—A woman, who was a partner in a business, married, and so ceased to be a partner. She then presented an application to the Court to appoint a judicial factor, with power to wind up the copartnery. *Held* that the dissolution of the partnership was not a sufficient reason for the appointment of a factor.

Process—Judicial Factor—Special Powers.—*Observed* that it is not the practice of the Court to grant special powers under the petition for appointment of a judicial factor.

1ST DIVISION. Ld. Craighill. M.

THIS was a petition at the instance of Mrs Sarah Russell, with concurrence of her husband, for the sequestration of the estates of a wine and spirit business, in which the petitioner had up to the date of her marriage in 1873 been a partner along with her sister Margaret Russell, and her brother Thomas Russell, and for the appointment of a judicial factor, with power to wind up the copartnery.

The petitioners averred that "since her marriage the petitioner Mrs Russell has repeatedly made application to the said Thomas Russell, respondent, for a statement of his intromissions and division of the profits arising out of the said business, and the parties have had several meetings to endeavour to adjust matters, but latterly Thomas Russell has refused either to give the petitioners access to the business-books of the partnership, or to supply them with a statement of accounts. The petitioners thereupon requested that the business should be wound up, and that their interest therein should be paid out; but the said Thomas Russell, respondent, refuses to make any payment whatever to the petitioners, either in name of profit arising out of the business, or on account of the petitioner Mrs Russell's share of the goodwill and stock of the copartnery. The petitioners have thus had no share whatever in the business since their marriage, and the business is being carried on by the respondents without regard to the petitioners' rights and interests."

Thomas Russell and Margaret Russell lodged answers, in which they stated that they were willing to hold count and reckoning with the petitioners, and that there was no necessity for judicial management.

The Lord Ordinary pronounced this interlocutor:—"Sequestrates the estates of the copartnery carried on in the name of Thomas Russell, wine and spirit merchant, No. 18 Adelphi Street, Glasgow, and nominates and appoints George Macfarlane, chartered accountant, Glasgow, to be judicial factor on the estates of the said copartnery, with the powers specially prayed for, and with the usual powers, he always finding caution before extract, and decerns."

The respondents reclaimed.[1]

LORD PRESIDENT.—The partnership here was dissolved in 1873 by the marriage of one of the partners. There is no doubt what are the rights of the parties, and if they are not acknowledged they can be given effect to by an ordinary action. Since the dissolution of the partnership the business has been carried on by Thomas Russell and his unmarried sister. The married sister says that she is entitled to have the whole business sold and wound up. But

[1] Young v. Collins, March 14, 1853, 1 Macq. 385, 15 D. 35, 25 Scot. Jur. 329; M'Kersies v. Mitchell, June 25, 1872, 10 Macph. 861, 44 Scot. Jur. 487; Grieve v. Cunningham, Dec. 17, 1869, 8 Macph. 317, 42 Scot. Jur. 140.

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what is asked is that a judicial factor should be appointed who will take charge of the business, and oust Thomas Russell and his sister. The effect would be to put an end to the business. Now, this is not a course which the Court sanctions, unless under very special circumstances.

The dissolution of a business by the marriage of a female partner has the same effect as if it had been dissolved by the death of a partner. The female partner drops out of the firm just as if she were dead, because she is incapacitated from continuing. She cannot continue in the business without her husband, and she cannot bring him in. The law on this point is well stated in the case of Young v. Collins, February 17, 1852 (14 D. 540, 1 Macq. 385). The Second Division thought that there were specialties which prevented the application of the general rule. The House of Lords affirmed the general rule that when a partnership comes to an end by the death of a partner, the surviving partners are entitled to wind up the business. I am therefore clearly of opinion that we should refuse the petition.

It is right to observe that I could not under any circumstances have agreed to allow the interlocutor of the Lord Ordinary to stand. It is not our practice to grant special powers under an application for the appointment of a judicial factor. If the factor, after inquiry, comes to be of opinion that special powers are required, he must come and apply to the Court in a separate petition.

Lord Deas.—I concur with your Lordship that special powers ought not to be granted at the time of appointing a judicial factor, and that it is not the practice to do so. It is not till the factor has entered upon the management that he can judge whether he requires special powers, and it then becomes his duty to take the responsibility of making whatever application he thinks necessary.

On the merits of this petition I am entirely of the opinion expressed by your Lordship. The fact that the dissolution of the partnership took place by the marriage of one of the partners rather tells against the application than otherwise. The lady dissolved the partnership by her own voluntary act. She might have called the other partners to account at any time, and there is nothing to prevent her doing so now. But there is nothing stated to justify our superseding the partners, at present carrying on the business, by appointing a judicial factor.

Lord Ardmillan and Lord Mure concurred.

The Court pronounced this interlocutor:—"Recall the said interlocutor; refuse the petition, and decern: Find the petitioners liable in expenses," &c.

Morton, Neilson, & Smart, W.S.—J. & R. D. Ross, W.S.—Agents.

No. 32.
Nov. 14, 1874.
Steuart v. Peddie.

Andrew Steuart, Pursuer.—*R. V. Campbell.*
John Peddie Senr., Defender.—*Asher.*
Mrs Jane Thomson or Peddie, Defender.
John Peddie Junr., Defender.

Lease—Hypothec—Intromitter, Liability of.—The tenant of a farm died in January, leaving a pupil son, who was entitled to take up the lease, and a widow who procured herself decerned executrix-dative to her husband, and carried on the farm for behoof of her son. With the advice of P, her father-in-law, th

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widow sold the whole crop and stock, except the turnips in the ground, by the end of October, partly by herself, and partly through P in her name, who received the price of part of the crop and handed it to her. A few days before the crop was removed P received a letter from the landlord's factor asking whether he was to hold him responsible for the rent, to which no answer was given. *Held* that by his conduct in regard to the subjects of the landlord's hypothec, P had rendered himself, jointly and severally with the widow, liable for the whole year's rent (*diss.* Lord Gifford, who held that in the absence of proof of any fraudulent conspiracy to defeat the landlord's right, the liability of P was limited to the extent of his actual intromissions).

2D DIVISION. Lord Young. R.

THIS was an action raised on 18th March 1874 by Mr Steuart of Auchlunkhart against John Peddie senr., farmer, Brawlands, John Peddie junr., and his tutors and curators, if he any had, and Mrs Jane Thomson or Peddie, being respectively the father, the son and heir, and the widow of Alexander Peddie, late tenant of the farm of Delmore belonging to the pursuer, concluding against the defenders for payment of the rent of the farm of Delmore for crop and year 1873.

The farm of Delmore was let by the pursuer for nineteen years from Martinmas 1870 to Alexander Peddie, at a yearly rent (chiefly grain), which amounted, at the fiars prices for 1873, to about £130, payable at Martinmas and Whitsunday after the separation of the crop. Alexander Peddie died intestate in January 1873, leaving a son, the defender, John Peddie junr., a boy of seven or eight years of age. In May 1873 his widow was decerned executrix-dative to her husband.

The ground of action set forth against Mr Peddie senr. and Mrs Peddie was that they had possessed and managed the farm from Whitsunday 1873, and disposed of the crop of that year and other effects subject to the landlord's hypothec.

Defences were lodged for John Peddie senr. and joint defences for Mrs Peddie and the pupil.

A proof was led, which established the following facts:—After the death of Alexander Peddie, whose affairs were embarrassed, Mrs Peddie took upon herself the management of the farm for her pupil son, and sowed and reaped the crop of 1873.

On 27th October 1874 Mr Charles Kelman, Mr Steuart's factor, having learned that Mr Peddie senior, who was a large creditor on his son's estate, was taking an active part in the management of the farm of Delmore, wrote the following letter to him:—"Keith, 27th October 1873.—Dear Sir,—Mr Steuart has observed of late the shameful treatment of the farm of Delmore, at which he is very much displeased. He requests me to inquire, in the first place, whether I may depend on you for payment of the *ordinary* on or within a day or two after the 11th Novr. . . . . CHARLES KELMAN." To this letter Mr Peddie returned no answer. By this time he had sold, for the widow and in her name, a great part of the crop, which, however, had not been delivered to the purchasers, nor the price paid. Upon receipt of the factor's letter Mr Peddie had a number of carts brought to the farm, and the whole crop was removed from the farm on 31st October 1873. In the early part of November he received the price of the crop, which had been sold by him, amounting, according to his own evidence, to £89, and handed it to the widow. In addition to this, Mrs Peddie herself sold crop to the value of £24. The stock upon the farm was also sold about the same time.

Mr Peddie stated in his evidence;—"I knew that sales of stock were made from the farm about the same time that the sales of crop were made. When pressing bills came in the widow came to me about them, and I said the best way would be to go to market with the stock and pay

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off these pressing bills, which she did." There was no evidence that he took any active part in the sale of the stock. He further deponed that he advised the widow to leave the turnips upon the farm, which, with the dung and the machinery of the threshing mill, and certain sums claimed for meliorations by the tenant's representatives, he thought would be sufficient to pay the rent. "Examined by the Court.—(Q.) You advised the widow about selling the crop and selling the stock? (A.) Yes. (Q.) And you helped her to the extent you have mentioned in selling the crop? (A.) Yes. (Q.) You advised her to leave the turnips and the dung upon the farm, because you thought that would be necessary, in addition to the value of the improvements of the buildings, to meet the landlord's claim for rent? (A.) Yes, and the machinery of the threshing mill. (Q.) That was your reason for giving that advice, and her reason for acting on it? (A.) Yes. (Q.) Then both of you considered how much it would be necessary to leave in order to meet the landlord's claim? (A.) Yes. (Q.) You considered and arranged that between you? (A.) Yes. (Q.) If you had considered it necessary to leave more crops than the turnips to meet the landlord's claims would you have done it? (A.) Yes. (Q.) How did you intend any deficiency to be met if there turned out to be a deficiency? (A.) We never thought of that; I thought there would be more than enough. (Q.) But thinking of it now, how do you think it is to be met? Who is to pay it? (A.) I don't know."

The widow left the farm on 1st November, and on the same day Mr Kelman visited the farm, and found nothing but a few turkeys, which were gone when he returned a few days after. About nine acres of turnips were left in the ground, but no fodder was left on the farm.

No sequestration was taken out by the landlord, but on 26th January 1874 the deceased Alexander Peddie's estate was sequestrated under the Bankruptcy Act.

The Lord Ordinary, on 25th June 1874, pronounced the following interlocutor:—"Decerns against the defenders, John Peddie, farmer, Brawlands, and Mrs Jane Thomson or Peddie, conjunctly and severally, in terms of the conclusions of the summons, and finds them liable in expenses: Assoilzies the defender, John Peddie, son and heir of the deceased Alexander Peddie, from the said conclusions." *

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* "OPINION.—It is, in my opinion, satisfactorily established that upon the death, in January 1873, of Alexander Peddie, the tenant under the lease of the farm of Delmore, the possession of the farm was continued by his widow (the defender, Mrs Jane Peddie) till October 1873, when she removed. The infant defender (John Peddie, son of the deceased Alexander) was entitled to the current lease as heir, but, being an infant, was incapable of acting. In continuing the possession of the farm, the widow acted on the advice and with the assistance of the father of her deceased husband, the defender, John Peddie (Brawlands). On his advice, and with his active assistance, the crop of 1873 was sown, reaped, sold, and delivered to the purchasers. Considering the infancy of the heir, their conduct was quite proper, provided they were ready and willing to pay the rent for the crop which they so sowed, reaped, sold, and removed. In my opinion, their conduct subjected them in liability to the landlord therefor. I cannot distinguish between them, for, while neither had a title to the lease, both actively intromitted with the land and its produce on the title of the infant heir, to whom no legal or available obligation attached in consequence of their conduct. Having regard to the reality of the thing, I attach no importance to the circumstance that the intromissions were in the name of the widow, and regard both defenders as real intromitters with the land and its produce for the year and crop the rent of which is demanded.

"With respect to the turnip crop left on the ground, and the manure, thresh-

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Mr and Mrs Peddie reclaimed, but the latter withdrew her reclaiming note.

Argued for Mr Peddie senior;—Mr Peddie's liability was rested on two grounds, viz.,—(1) Active interference on his part in removing the crop; and (2) advice given by him. (1) His conduct could only involve liability if he was aiding in an illicit act. He was giving his assistance in an act of administration, which was legal on the part of the widow, as executrix of her husband, and as acting for her son. He was acting merely as her hand. There was no suggestion that he appropriated any part of the price received by him. (2) The advice given by him did not infer liability. It could not seriously be contended that any man who gave a tenant advice as to the management of his farm rendered himself liable for the rent.

Further, in any view Mr Peddie's liability could not be extended beyond the amount of his intromissions. The opposite view would lead to the result that any man who intromitted with a bushel of grain subject to the landlord's hypothec rendered himself liable for the whole year's rent.

Argued for the pursuer;—Intromission with hypothecated subjects involved liability for the rents.[1] There was sufficient evidence of a joint arrangement between Mr Peddie and the widow to displenish the farm. They were *versantes in illicito*, and each must be liable for the full rent.

At advising,—

LORD ORMIDALE.—The present action was brought by Mr Steuart, the landlord, against the defenders, for payment of the rent for crop and year 1873, and the ground it is laid upon, or at any rate the ground of liability ultimately relied on as against the widow and her father-in-law, the reclaimer, John Peddie, is that, by their wrongous conduct in regard to the subject of his hypothec, they have rendered themselves liable to him for the rent. The Lord Ordinary has given effect to this contention as against the widow, and her father-in-law, Mr Peddie. The widow has acquiesced in the Lord Ordinary's judgment, and withdrawn a reclaiming note which she had at first presented against it. Mr Peddie, her father-in-law, has reclaimed, and we have had a full and anxious discussion upon his reclaiming note. We have now to say whether the interlocutor of the Lord Ordinary ought to be adhered to or altered, and this question depends on the view that is taken of the proof and of the facts established by it.

The widow, who has been examined as a witness, makes the following statement:—"Cross-examined by pursuer's counsel.—He (Mr Peddie senior) and I arranged that the white crop of 1873 was to be sold, and the stock. I left the farm on 1st November. (Q.) What put it into your head to sell off all the

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ing mill, and ameliorations, I am of opinion that no answer is thus afforded to the action. The landlord is entitled to payment of his rent from the intromitters with the land and its produce, and is not bound to take it in turnips, dung, &c. *Bona fide* purchasers for value are protected by the recent Act against the liability which formerly attached to them as intromitters with crop or stock, but the protection does not extend to such intromitters as the defenders.

"The infant heir has been assoilzied, for, I think, obvious reasons.

"I ought, perhaps, to observe, though it is obvious, that, as executrix, the widow had no concern with the farm or with the crop of 1873, and that the decree is not against her in the capacity of executrix."

[1] Erskine, ii. 6, 59; Hunter on Landlord and Tenant, ii. 373; Bell on Leases, p. 29; Lord Salton v. Club, June 25, 1704, M. 1821 and 6224; Dun v. Dun, March 31, 1624, M. 6217.

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stock and crop within four or five days? (A.) I was advised by my friends to sell it off. (Q.) Was it not because you were afraid that if you did not the landlord would sequestrate for the rent? (A.) No; I was not afraid of the landlord, but I thought it would be better to sell off the crop than leave it on the ground, as a neighbouring farmer had done, and it was all destroyed with vermin. (Q.) Were you not shewn a letter from Mr Kelman to your father-in-law a day or two before all these things were sold, asking whether the rent would be duly paid at Martinmas? (A.) Yes. (Q.) Had that letter anything to do with your selling off the crop in that way? (A.) I don't recollect."

That letter is of great importance. Mr Kelman, the landlord's factor, by whom it was written, had apparently heard that Peddie was interfering a good deal with the management of the farm, and he puts him on his guard, asking him whether he is to hold him responsible for the rent. That letter was written on 27th October 1873, and we must infer that it was received either on that day or the following. Peddie ought to have answered that letter one way or other, but he never answered it at all. The crop was of course under hypothec to the landlord for the year's rent. The stock was also hypothecated, although so far as it was left by the deceased tenant it belonged in property to his widow and son. Now, in place of taking a hint from Mr Kelman's letter that it was his duty to have regard to the landlord's rent, what does Peddie do? The delivery or removal of the crop had not yet taken place. But, in total disregard of the landlord's rights, in two or three days after receipt of Mr Kelman's letter delivery and removal of the crop was made to the various parties to whom it had been sold. That was done in a very hurried manner, for there were twenty carts on the farm on the same day, viz. the 31st October, for the purpose. A few days after, still without answering Mr Kelman's letter, Peddie obtained payment of a considerable part of the price of the crop, and, without making any provision for the landlord's rent, handed over the money he so received to the widow. The result is that the landlord has not down to the present moment been paid a farthing of the rent for the year 1873, and has, at the same time, been deprived of all recourse for payment upon the crop and stock.

As regards Mr Peddie it appears to me that his conduct in reference to the crop is sufficient to subject him in liability. It is clear from the proof that he actively assisted the widow in getting the crop sold and removed from the farm, and disposing of the price thereof to the prejudice of the landlord. A passage in Peddie's own testimony is very instructive on this point. When asked how he intended to meet the landlord's claims, if there turned out any deficiency of things left on the farm, he says,—"We never thought of that. I thought there would be more than enough. (Q.) But thinking of it now, how do you think it is to be met? Who is to pay it? (A.) I don't know." Mr Kelman again states that when he went to the farm on 1st November 1873 there was nothing on it but some turkeys, and in a few days after he found the turkeys gone.

The question here arises, assuming that Peddie is answerable for the landlord's rent to the extent at least of the value of the crop which he actively assisted in disposing of and getting removed from the farm, how far will that go? Whether only to the extent to which it is proved that he intermeddled, or for the full rent? Here it is important to keep in view his own statement. From that it appears that he actually sold crop to the extent of about £89, and that the widow sold about £24 more. According also to his own testimony, the

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whole matter was arranged between him and the widow. Both of these parties are therefore liable jointly and severally to the extent of £114 at least, leaving only about £16 to make up the whole rent. But I do not think on the proof it must be held that £114 was the full price which either was or might have been got for the crop. The sale was evidently a very hurried matter, and it may not unfairly be assumed that, if it had been more regularly, openly, and deliberately gone about, larger prices would have been obtained. Besides, it must be borne in mind that the defenders were wrongdoers. I do not think therefore that we can take their own statement of the value of the crop sold and realised by them, especially if there is other evidence that the crop was more valuable. We have that in Mr Kelman's evidence:—"(Q.) Was there plenty of stock and crop on the farm before the removing to pay the rent? (A.) There was plenty of crop at any rate." There are thus grounds, I think, for entitling the Court to infer that the crop alone, independently of the stock, was sufficient to meet the whole rent. And if so, that is, without going further, sufficient to support the Lord Ordinary's interlocutor.

But I am not satisfied that Peddie should not be made answerable, if that were necessary, for the stock also. The widow in her evidence draws no distinction, in this respect, between the crop and stock. She says,—"He (Peddie) and I arranged that the white crop of 1873 was to be sold, and the stock." The assistance of Peddie is also stated by her to have been just the same with regard to the stock as with regard to the crop. But Peddie has given no account of the stock. If it were necessary, therefore, to eke out his liability by shewing that besides crop he also aided in disposing of and realising the stock, I think this has been sufficiently done.

For the reasons now stated, I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

LORD GIFFORD.—I differ from Lord Ormidale only as to the extent of the liability of the defender, John Peddie.

It has been established that the defender, John Peddie senior, sold the crop to the extent of about £89, got the price, and knowing that the landlord's rent was unpaid, and having the agent's letter in his pocket, he nevertheless handed the money to the widow, who applied the money to her own purposes, leaving the landlord unpaid. This undoubtedly makes Mr Peddie liable to the extent of his intromission. The price he received was a *surrogatum* for the crop, which was subject to the landlord's hypothec.

But I am not inclined to make Mr Peddie liable for sums which he did not receive, or for crop or stock with which he did not actually intermeddle. I think there is a most material difference between active intromission and mere advice. The pursuer's case really comes to this, that in respect of the advice given by Mr Peddie there is imposed upon him a penal liability for the whole rent. If there had been a fraudulent conspiracy to defraud the landlord's right in which he had joined he would justly have been made liable for the whole rent. But the Lord Ordinary does not base his judgment upon fraud, and I do not understand that any plea of fraud is maintained by the pursuer. No such case has been made out. The question is whether Mr Peddie is liable for the value of the crop and stock which he did not sell, but which was sold by the widow, who had a title as executrix to sell the stock at least. If it had been made out that he sold the crop at an

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undervalue in order to defeat the landlord's hypothec, the case would have assumed a different aspect. But that has not been attempted to be proved, nor is there any evidence or any suggestion that the defender, John Peddie, ever received more than the £89. Supposing that after having got the £89, which he received as the price of the corn sold by him, he had said in answer to the landlord's letter "There is all I have got," and had paid it over to the landlord and interfered no further, could he have been made liable for any more? No one has been brought to say that he sold any part of the stock or any other crop than that which produced the £89. Taking, then, his evidence as true, and his acting to have been *in bona fide*, are there any grounds for making him liable for more than he got? It is not a case of vitious intromission. It is intromission with goods subject to hypothec, which is no doubt a ground of liability, but only to the extent of the intromission. Formerly, purchasers of hypothecated crop were liable to the landlord to the extent of their intromissions. Now they are protected by statute if they are *in bona fide*. The statute does not apply to Mr Peddie, because he is not a purchaser. But could it be said that if he had sold a single cartload he would have been liable for the whole rent? I think not, assuming that there was no fraud; for if fraud were proved the landlord would not be put to prove too nicely the extent of intromission. I think, therefore, so far as the crop is concerned, £89 is the measure of the defender's liability.

If it is necessary to bring in the stock to increase Mr Peddie's liability I have still more difficulty. I do not think that he actively interfered in regard to the stock. The stock was the widow's property, or at least she had the full control over it, as executrix of her husband, and, as such, she herself disposed of it, no doubt after advising with her father-in-law. All that the widow says is,—"He and I arranged that the white crop of 1873 was to be sold, and the stock." "Arranged" is a very vague expression, and is quite consistent with Mr Peddie's own statement, and does not necessarily infer any legal liability. I admit that Mr Peddie's conduct probably caused loss to the landlord, but I have difficulty in holding him liable beyond the extent of his actual intromission.

Lord Neaves.—This is a case of nicety and importance. The defender says, "I was never anything but an adviser. I am no more liable than a man who gives an opinion of counsel, or a servant who carries out his master's orders,"—and this was argued as applicable both as to the stock and crop. Both of your Lordships are of opinion that this defence will not stand in regard to the crop sold by the defender. The question is, whether, as it cannot stand as to the crop, it can be sustained as regards the stock.

I have come to be clearly of opinion that in the whole circumstances the defender is liable for the full rent. He was not a mere third party, taking no part but expressing an opinion. Nor was he a person merely doing what he was bid. He was an adviser; but he was also an active assistant and promoter of the proceedings which he advised, certainly most active as regards the crop. He sold the crop, and took the price away from the landlord. There he was doing wrong, for the landlord, in virtue of his hypothec, is a *quasi*-proprietor of the crop. He was most active in accomplishing that result for the widow, who would probably never have thought of it had it not been for him.

It may be remarked that the crop of 1873 did not fall under the widow's administration as executrix. Further, it would appear that the late tenant, Alexander Peddie, was not possessed of any capital, and that his father, the de

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fender, was a large creditor on his estate. His active assistance and interference may have been with the object of saving something out of the fire for himself.

After he had begun to intromit with the crop he received a letter from the landlord's agent addressed to himself, and asking him in effect,—"You are acting as if this were your affair. Are you prepared to pay the rent?" If this letter had been answered one way or other it would have influenced the landlord's conduct. If the defender had denied all liability, a sequestration would have been taken out immediately. He does not answer the letter, and in the meantime is actively engaged in influencing the widow's conduct as to what was to be done with the remaining subjects. It is plain that he approved of the selling of the stock, because he says he calculated that there was enough on the farm to pay the rent in turnips yet in the ground, and in meliorations on houses. Nothing can be more candid, but, at the same time, more fatal to his case than his answers to the Lord Ordinary's questions. A more plain admission that he was the person upon whose decision depended what was to be done could not be conceived. He implies that, either from his power as a creditor or his natural influence as father-in-law, his advice was conclusive.

All this appears to me to give great weight to what the Lord Ordinary says in his note, that his conduct was quite proper provided he was ready and willing to pay the rent. But if he acted with the intention of pulling his own neck out of the collar and leaving the landlord in suspense, his conduct was so disingenuous as to make him liable for the whole rent.

In short, the view which I take of the case is, that his conduct in regard to the subjects of the hypothec was an *unum quid*, and that it places him precisely in the same situation as if he had undertaken the liability which that conduct naturally inferred.

Without saying that every advice implies liability, there is sufficient to make the defender liable for the whole rent. The term "vitious intromission" may not be applicable to his conduct, for that properly applies to interference with the goods of a deceased person, but it was interference with the subjects of the hypothec to the prejudice of that right by a person who ought not to have so acted.

The LORD JUSTICE-CLERK was absent.

THE COURT adhered.

MAITLAND & LYON, W.S.—ALEXANDER MORISON, S.S.C.—GEORGE ANDREW, S.S.C.—Agents.

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Nov. 19, 1874.
Baird v. Mount.

ALEXANDER BAIRD, Pursuer.—*Guthrie Smith—Mackintosh.*
WILLIAM BRUCE MOUNT, Defender.—*Sol.-Gen. Watson—J. P. B. Robertson.*

Lease—Miscropping—Additional Rent—Receipt—Discharge.—Held that a landlord was barred from recovering additional rent for miscropping, which, by the lease, was payable at the same terms as the ordinary rents, in respect that the ordinary rents had been paid and settled, and receipts granted by him without reservation of further claim.

1ST DIVISION.
Lord Gifford.
M.

THIS action was raised on 21st April 1874 by Alexander Baird of Ury against Mr William Bruce Mount, tenant of the farm of Castleton of Eassie. The defender held the farm under an assignation to a lease which expired at Martinmas 1873. This lease, after special stipulations as to cropping, bore that in case the tenant should deviate from the course of cropping prescribed he should "pay to the proprietor an additional rent of £5 for every imperial acre which shall be cropped differently from the rotation above laid down, during any year other than the last year of this lease; and if

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the deviation shall take place during the last year of the lease, then the additional rent shall be at the rate of £10 for each imperial acre cropped differently from the rotation above provided, for, and that over and above the rent stipulated for the whole lands as aforesaid; and the said additional rent shall not be considered penal, or be subject to modification, but shall in each case be deemed the actual agreed on rent or value to be paid by the tenant for the benefit to be derived from the deviation; and even though there be consent by the proprietor or his factor to the departure from the rotation, the additional rent shall nevertheless be paid, nothing liberating the tenant but the written consent of the proprietor or his factor, agreeing in explicit words to the departure without payment of extra rent; and the additional rent shall in all cases be payable at the same terms as the ordinary rent before stipulated as aforesaid, commencing the first term's payment of such additional rent at the first of these terms after reaping the crop of the year in which a departure shall take place; and it shall continue to be paid year by year so long as the deviation shall subsist."

The pursuer alleged that the defender had deviated from the regulations as to cropping during the three last years of his lease, 1871, 1872, and 1873, and concluded for "(1) the sum of £45 sterling, which became payable in equal moieties at the terms of Candlemas and Lammas in the year 1872; (2) the sum of £180 sterling, which became payable in equal moieties at the terms of Candlemas and Lammas in the year 1873; and (3) the sum of £120 sterling, payable in equal moieties at the terms of Candlemas and Lammas in the year 1874, with the legal interest of each moiety of each of the said sums from the term at which it became or shall become payable as above set forth until payment."

The defender alleged that the mode in which he had cropped the ground was more beneficial than the mode prescribed in the lease. He further founded upon half-yearly receipts granted by the landlord for the rents of crops 1871 and 1872, and maintained that the landlord was barred from recovering anything more than the sums already paid. The receipts were thus expressed:—"Estates of Ury, Inshes, and Drumkilbo. Account of rent, &c., due by Mr William B. Mount, Castleton, at the term of Candlemas 1872:—

"To first half of rent, crop 1871, . . .	£446	15	1
"To fire insurance charges, ...	1	6	0
"Received payment,	£448	1	1

"D. & P. Dickson,
"Factors for the Proprietor."

Similar receipts were granted at Lammas 1872, and at Candlemas and Lammas 1873.

The defender pleaded;—2. The pursuer is barred from insisting in the present claim by *mora*, taciturnity, and acquiescence. 3. The pursuer cannot insist in the present action, in respect (1) he discharged the defender by the receipts granted, and his other actings; and (2) he approved of and acquiesced in the cultivation now complained of.

A proof was led, and thereafter the Lord Ordinary pronounced this interlocutor:—"Assoilzies the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses, and remits," &c.*

* "NOTE.—The question in this case is whether the pursuer is entitled to exact, and the defender bound to pay, penal but pactional extra rent, in respect the defender has 'deviated from the mode of cropping described and agreed upon' in the lease between the parties. The case involves several points of some difficulty and nicety.

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The pursuer reclaimed.

The defender admitted that he was bound to pay the landlord the stipulated extra rent for the ground which had been improperly cropped during the last year of the lease. He maintained, however, that any claim for the other two years was barred by the receipts granted by the landlord. He founded on the case of Hunter v. Broadwood, Feb. 2, 1854, 16 D. 441, 26 Scot. Jur. 295, and argued that the present

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"The Lord Ordinary was favoured with an able and instructive argument as to how far pactional rent of a penal nature, such as that stipulated for in the present lease, was subject to equitable modification by the Court; and how far there was room for the equitable interposition of the Court to restrict the pursuer's claim. The Lord Ordinary is of opinion that, if the pursuer can clearly establish the contravention or miscropping, the Court has no power to restrict the liquidated or pactional damages which the parties themselves have fixed and ascertained under the name of additional rent. This doctrine seems to be quite established by a long series of decisions, both in this country and in England. (See the cases collected in Hunter on 'Landlord and Tenant,' vol. ii. p. 265, 3d editn. One of the leading cases is Miller v. Lord Gwydir, 26th May 1824, affd. H. L., 3d March 1826, 2 W. & S. 52; but there are many other cases to the same effect.) The principle is, that where the parties themselves have agreed upon and liquidated the damages, the Court cannot interfere to modify, for this would be setting aside the deliberate bargain of the parties themselves. The terms of the lease in the present case are exceedingly explicit, that the penal rent shall not be subject to modification, and although, notwithstanding such a clause, the inherent equitable power of the Court may not be excluded, and exceptional cases for interference may arise, the present does not seem one which can be made an exception from the general rule. (See Forrest and Barr v. Henderson, 26th Nov. 1869, 8 Macph. p. 187.)

"But while the Lord Ordinary is of opinion that the pactional rent is not subject to modification by the Court, if it can be shewn that it has been really incurred, he feels that it is a demand of a highly penal nature, and great strictness must be applied in considering whether it has been really incurred or not. The whole proper rent stipulated in the lease has been paid. It was hardly pretended on the part of the pursuer that the defect in the amount of grass of a particular age, of which alone he complains, had led to injury anything like the penal rent claimed, and no attempt was made to prove actual damage from deficiency of grass. In short, it was conceded, at least in argument, that if the tenant was found liable it would be an exceedingly hard case; and no attempt was made to shew that the pursuer's demand was to any extent founded in equity. In such circumstances, and where the landlord's severe demand is founded on the precise words of the lease, he cannot complain if a strict interpretation is applied to that lease in ascertaining whether it supports his plea. In short, while the Court will not modify the penal rent, they will equitably consider whether penal rent at all has been incurred. Certainly on this last point equity is not excluded, but imperatively called for.

"Now, on considering the whole structure and terms of the lease, and applying them to the facts established in evidence, the Lord Ordinary has come to be of opinion, though not without difficulty, that the pursuer has failed in sufficiently establishing 'miscropping' in the fair sense of the lease, or that the defender has 'deviated from the mode of cropping above described and agreed on.'

. . . . . .

"There is some force in the defender's plea, founded on the discharges for rent. No doubt, the landlord's mere silence, or not stating objection, would not be enough; but, seeing that the penal rent is due year by year, and was not reserved when the ordinary rent was received and discharged, each discharge may fairly imply a passing from the penal claim. This defence was expressly sustained in Hunter v. Broadwood, 2d Feb. 1854, 16 D. 441; but, perhaps, there were specialties which may found a distinction. On the whole, the Lord Ordinary thinks that the landlord has failed to make good his claim."

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case was stronger, as the receipts were formal receipts, whereas in Hunter v. Broadwood there were only payments initialed in a pass-book.

Argued for the pursuer;—A receipt was not an admission of the rights of the parties, but merely an acknowledgment of the payment of money. The landlord at the time he granted the receipts was ignorant that there had been miscropping, and was not barred, by granting the receipts, from making his claim, when he discovered that his tenant owed him the money. The tenant was not entitled to deviate without the written consent of the landlord, and so the landlord was entitled to assume that he was cultivating the farm according to the lease, until he came and asked his consent to deviate.

Lord President.—In this action the landlord claims additional rent for the three years, 1871, 1872, 1873, which were the last three years of the lease, and he does so on the ground that in each of them a mode of cropping was pursued which entitles him to make that claim. What he is suing for is not damages, but liquid rent, and the clause under which he sues is very stringent. It provides "that during the last three years of the lease there shall never be more than two-fifth parts of the whole lands let in crops of corn, nor less than two-fifth parts thereof in one or two year old grass, one-fifth at least being two years old, the remaining fifth part of the farm being to be in green crop, to which, and to the sowing down to grass corn crop, the whole manure made from the preceding crop shall be applied." And then, further, the tenant is bound, if he miscrops or violates the provision which I have just read, "not only immediately to restore such part of the lands as may be so miscropped to the rotation and course of cropping applicable thereto under this lease, but likewise to pay to the proprietor an additional rent of £5 for every imperial acre which shall be cropped differently from the rotation above laid down, during any year other than the last year of this lease: and if the deviation shall take place during the last year of the lease, then the additional rent shall be at the rate of £10 for each imperial acre cropped differently from the rotation above provided for, and that over and above the rent stipulated for the whole lands as aforesaid; and the said additional rent shall not be considered penal or be subject to modification, but shall in each case be deemed the actual agreed-on rent or value to be paid by the tenant for the benefit to be derived from the deviation; and even though there be consent by the proprietor or his factor to the departure from the rotation, the additional rent shall nevertheless be paid, nothing liberating the tenant but the written consent of the proprietor or his factor agreeing in explicit words to the departure without payment of extra rent."

This clause is very stringent, and it makes it quite clear that the payment demanded is rent, and nothing else. Now, for all the years except the last the rent has been paid and received in full; that is quite plain from the excerpts from the books which are before us; and it seems to me impossible, after the case of Hunter v. Broadwood, to hold that the landlord's claim for those years is not barred. With regard to the last year, it is practically conceded that there has been miscropping, and that the additional rent is due. In 1873 there was somewhat more grass than the required minimum, but the proportion of old grass to the whole was too small. Now, if it could have been shewn that this was an inevitable consequence of the tenant's rotation, and that that rotation was not illegal in terms of the lease, there might have been some justification for the tenant; but that is not the case. The simple fact is, that he breaks up the

grass in order to put money into his own pocket by means of a corn crop. That is a clear case of violation of the lease, and it is impossible not to hold that the additional rent is due. I am therefore disposed to say that the tenant is liable for the miscropping of the last year, but not for the other years, on the ground that the rent for those years has been settled.

LORD DEAS.—I agree with your Lordship that the granting and acceptance of those receipts for the particular years' rents exclude the claim of the landlord for additional rent for these years. There can be no doubt that the additional rent stipulated for is pactional rent, and the effect is that it is not subject to modification as penal rent would be. But it differs from the regular rent in being payable in respect of deviation from the rules laid down in the lease. Unless the deviation occurs the additional rent is not due. In sustaining a claim for such additional rent it is necessary to see that this is not done in a way oppressive to the tenant. Suppose that the deviation had been beneficial to the landlord the pactional rent would have been due all the same. If then the landlord had allowed the deviation to go on for a number of years, knowing it to be beneficial, it would be hard to allow him to come forward at the end of the chapter, and exact the additional rent for these years. We cannot make a distinction between such a case and a case of injury to the landlord, and it therefore becomes necessary to deal with the claim on some general principle. It is quite reasonable that a landlord who has every opportunity of seeing and knowing what is going on on an agricultural farm should not be allowed to go back on the receipts he has granted for the full rent of a particular crop and year. It does not follow that the same principle would apply to a mineral lease, where the landlord has not the same opportunity of observation. But in this case I am of opinion with your Lordship that the claim for additional rent for the two first years is barred by the receipts granted by the landlord.

As to the last year I will only say that I think the tenant has been well advised in conceding that the landlord has a claim for that year.

LORD ARDMILLAN.—This estate is managed by a factor who had every opportunity of seeing how the farm was being cultivated. In that position the tenant is said to have incurred liability for pactional additional rent. The rent of each year is included in the receipt for each payment. If the pactional additional rent was payable along with the ordinary rent, and was due at the same time, it was necessarily then payable. Even if there was no authority on the point I should have no doubt that the receipt for the rent of the year discharged the whole rent then payable, whether pactional or ordinary. But the case of Hunter is an authority on the point. It is a decision pronounced under circumstances not more favourable to the tenant. Therefore I am of opinion that since the pactional rent is due and payable at the same time as the ordinary rent a receipt for the year's rent is a discharge of the whole.

The pursuer's counsel attempted to explain the receipts by saying that the factor intended to reserve the claim for pactional rent, and he referred to letters by the factor in August 1872 and February 1873 as shewing that the factor did so intend. But he must have forgotten that the factor when examined on oath stated that he did not know, till three months before he was examined, that there was any deviation from the terms of the lease. Now, as he was examined on 10th June 1874,—he first knew of the deviation about 10th March 1874,—

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and did not know of it or mean to refer to it in August 1872, or in February 1873, the explanation cannot be accepted, and the receipts are without reservation. I have therefore no doubt that the landlord's claim for pactional rent for 1871 and 1872 is excluded by the receipts.

In regard to the last year of the lease I agree with your Lordship.

LORD MURE.—I concur with your Lordships. It appears to me upon the evidence that the tenant deliberately miscropped in the last year of his lease, and that his counsel have exercised a wise discretion in giving up that part of the case. But I am equally clear that, under the authority of the case of Hunter, the tenant is free from all claim for additional rent during the former years. The half year's receipts are for the whole rents for each of those years, and in none of them is there any reservation of any further claim; and I do not think that the letters which have been referred to, as shewing that intimation of the existence of some kind of claim was made, weaken the case of the tenant. The letter of the 8th of August 1872* is the one mainly relied on by the pursuer, and was evidently written about the time when one of the receipts was granted. If, therefore, it was then the pursuer's intention to claim the additional rent, the reservation ought to have been made in that and the subsequent receipts, and as that was not done the pursuer's claim for those years appears to me to be excluded.

THE COURT pronounced the following interlocutor:—"Recall the said interlocutor: Find that the rents for the crops and years 1871 and 1872 were regularly paid and settled, and receipts granted therefor by the pursuer's factor in terms of the lease: Find that the pursuer is barred by such payment and settlement from now insisting in a claim for additional rent for the said years: Find that the defender violated the provisions of the lease by miscropping in the last year of the lease to the extent of twelve acres, at the rent of £10 per acre: Therefore decern against the defender for payment to the pursuer of £120 sterling, with interest at £5 per centum per annum on one-half thereof from Candlemas 1874 till payment, and with interest at said rate on the other half thereof from Lammas 1874 till payment: *Quoad ultra* assoilzie the defender."

HENRY & SHIRESS, S.S.C.—NEIL M. CAMPBELL, S.S.C.—Agents.

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Murray v. Countess of Rothes.

JOSEPH MURRAY, Pursuer.—*Sol.-Gen. Watson—Kinnear.*
HENRIETTA ANDERSON MORSHEAD WALDEGRAVE LESLIE, Countess of Rothes, AND HUSBAND, Defenders.—*D.-F. Clark—Adam.*

Teinds—King's Annuity—Warrandice.—In 1632 the teinds of certain lands were sold by the titular to the heritor for a price, the heritor becoming bound to relieve the titular of the king's annuity of six per cent, and of all taxations to be imposed on the teinds, and of the stipend then payable,—the titular becoming bound to warrant the teinds free from all future augmentations. In 1644 the heritor redeemed the king's annuity, and about 1674 these annuities were relinquished by the Crown throughout the country. In 1812 the whole teinds were exhausted by augmentations, including the portion which, in 1632, was payable as king's annuity.

* In this letter the factor called the tenant's attention to the obligations in the lease, particularly as to the management of the land, keeping up of buildings, fences, &c. and added, "some of these have been undoubtedly neglected by you."

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2D DIVISION.
Lord Shand.

In a question between the representatives of the titular and the heritor, *held* (*rev.* judgment of Lord Shand) that the warrandice against augmentations of stipend extended to the whole teinds, including that portion which, in 1632, was payable as king's annuity.

IN 1632 John Aytoune of Aytoune, then proprietor of the lands of Glenduckie, in the parish of Flisk and county of Fife, with advice and consent of Andrew Aytoune of Logie, acquired right to the teinds of these lands from the Earl of Rothes, the titular, for payment of 2000 merks Scots. A contract of alienation and disposition was entered into by the parties, whereby the Earl of Rothes conveyed to John Aytoune the teinds of his lands of Glenduckie "to be haldin of our said sowerane Lord and his successors in frie blench for the yeirlie payment to his Matie and his successors of ane pennie usuall monie of this realme, togidder withe the annuitie dew to his Matie and his successors for the foirsaids teinds, personage and wiccarage, of the lands and utheres particularlie abone mentionat, according to the present valuatioune thairof." * . . . . . "And relevand, the said Nobill Erle and his abone writtine, lykas ye said Johne Aytoune and ye said Mr Andrew Aytoun, takand burden upoun him for ye said Johne Aytoune, bind and obleis them and thair foirsaids to releuve the said Noble Erle and his abone wreittine of the samen annueties and of all taxatiounes to be imposed upoune the teinds of the said parochin proportionablie and *pro rata* effeirand to the reat and quantetie of the foirsaids teinds of the lands and utheres particularlie abone mentionat, and pnt. waluation of the samen;" . . . . . "and in lyke maner the said Johne Aytoune and his foirsaids payand lykas the said John Aytoune, and the said Mr Andro Aytoune takand the burdein upoun him for the said Johne Aytoune, bind and obleis them and thair foifsaids to pay to the minister serving the cuir at the said Kirk of Flisk and his successors serving the cuir thairat, in pairt of payment of thair stipend for thair service of the cuir at the said Kirk, ane chalder wictuall of the qualiteis following, viz., thairof ten bollis aitis four bolls halff boll beir and sex firlottis quheit betwix the feist of Zuill and Candilmis, and fyftie merkis monie foirsaid at the terme of Whitsunday,"—(being the amount of stipend localled on the lands of Glenduckie at the date of the deed); . . . . "and to releiwe the said Noble Erle and his foirsaids of the foirsaid pairt of the said minister's stipend." . . . . . "Qlkis translatioune dispositioune and resignatioune rexive abone writtin the said Noble Erle binds and obleises him, his aires and successors qtsumewir, to warrand, acquyit, and defend to the said Johne Aytoune and his abone wreittin fra all factis and deids doine be the said Noble Erle or anie of his predicessors, or done or to be done be him, his aires or successors, or be qtsumewir persones prowydit or to be prowydit to the said Kirk of Flisk, personag and wiccarage, yrof." . . . . . "And lykewayes, the said Noble Erle binds and obleises him and his abone wreittin to warrand, freithe, reliewe and skaitheles keipe the said Johne Aytoune of that ilk and his foirsaids of the remanant of the said ministeres stipend remaining owir and abone the foirsaid chalder wictuall and fyftie merkis monie appoyntit to be payit be the said Johne Aytoune and his abone wreittin; and lykwayes of all utheres impositiones imposeit or to be imposeit upoun the teinds of the said parochin, ather for augmentatione of the said ministeres stipend or to anie vther use qtsumewir (except the annueteis and taxationes abone speit, of the foirsaids teinds of the particular lands abone mentionat,

* The lands were valued by decree of approbation, dated 17th February 1632, at fifteen chalders victual for stock and parsonage teind, and five merks for the vicarage teind.

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appoyntit to be payit be the said Johne Aytoun and his abone wreittin in maner abone expremit), and of all cost, skaithe, dampnaige, and expenses, and interes that the said Johne Aytoune and his successors and utheres foirsaids sall happin to sustein and incur throw thair not thankfull and tymous releiff yrof."

By the Act 1633, c. 15, it was provided that the king's annuity out of the teinds should be disposable according to His Majesty's pleasure, and, accordingly, on 7th May 1642, King Charles I. made a grant of it to John Earl of Loudon, with power and warrant to him to sell and dispose of it. In terms of this grant the Earl of Loudon, in 1644, sold to John Aytoune of Aytoune the king's annuity, payable out of his lands of Glenduckie, for payment of £300 Scots, and payment of the annuity out of these lands thereafter ceased. The exaction of the king's annuity was voluntarily departed from throughout Scotland generally towards the close of the seventeenth century.

In 1723 Patrick Murray, the pursuer's ancestor, bought the lands of Glenduckie and the teinds thereof from Ayton of Ayton.

As stipulated in the deed of 1632 John Aytoune and his successors paid the proportion of stipend to the minister of Flisk localled on the teinds of the lands of Glenduckie. No augmentation of stipend was granted to the minister of Flisk till 1763. But in 1763, in 1794, and 1812, augmentations were granted, the latter of which exhausted the teind of the parish.

Murray of Glenduckie, founding on the deed of 1632, claimed relief from the Earl of Rothes of the amount of augmented stipend modified in 1763 and localled upon Glenduckie in 1764. The Earl, in 1767, redeemed this claim by a payment of £112 sterling. Murray's claim of relief of augmentation of stipend under the augmentations of 1794 and 1812 was settled after mutual actions and a long accounting by payment in 1834 of £289, 15s. 11d. by the Countess of Rothes to Mr Murray in full of all claims up to that date.

From 1834 to 1871 the Countess of Rothes made regular payment of the various sums of augmented stipend, but in 1872 she refused to make further payment on the same footing, alleging that the previous payments in relief from 1812 onwards were made in error, and in ignorance that credit had not been given to her and her predecessors for the amount of the king's annuity.

She stated that in any view she was only bound to relieve the pursuer of the amount of the valued teind under deduction of the king's annuity, which amounted to six per cent of the value of the teind.

This action was raised on the clause of warrandice in the deed of 1632 to recover the amount of stipend localled upon the lands of Glenduckie, over and above what was payable under the decree of locality of 19th December 1764.

The pursuer pleaded;—(1) By the contract of alienation and disposition above mentioned, the Earl of Rothes, granter thereof, and his heirs and successors, became bound and liable in payment of relief as now concluded for. (5) The defender and her predecessors having by repeated acts recognised and acknowledged their liability under the said obligation to the pursuer and his predecessors are now barred from disputing the same.

The defender pleaded;—(1) This case ought to be sisted until the amount of stipend truly payable out of the said valued teind is legally ascertained and adjusted. (2) The defender is only bound to relieve the pursuer of the amount of stipend alleged to have been paid by him, under deduction of the amount of the king's annuity.

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The Lord Ordinary, on 17th August 1874, pronounced this interlocutor:—"Repels the first plea in law for the defenders, sustains the second plea stated by them, and appoints the cause to be enrolled for further procedure, if necessary: Finds the defenders entitled to expenses." *

* "NOTE.—The defender, the Countess of Rothes, has since 1872 disputed her liability to relieve the pursuer to the full extent demanded, maintaining that, in so far as the augmentation of 1812 has created a charge on that part of the teinds formerly payable as king's annuity, the pursuer is bound to bear the burden himself. The present action has been raised to try this question, and the pursuer's grounds of action are—(1) that by the contract of 1632, and (2) by the contract and long usage on it, the defenders are bound to relieve him of the whole augmentation of 1812, including that part which exhausts the amount formerly payable out of the teinds as king's annuity.

"It may be here mentioned that in 1644 the pursuer's predecessor, John Aytoune, the heritor of the lands, bought up the claim for the king's annuity by a transaction with his Majesty's commissioner, John Earl of Loudon; for a payment of £300 Scots he obtained a conveyance and discharge of all claim for the king's annuity payable from the teinds of various lands belonging to him, including the lands of Glenduckie, from the year 1630, and in all time coming. It appears to me that this transaction, to which the titular was no party, and in which I think he had no interest, cannot in any way affect the question raised in this case; and I am of opinion, on the merits of that question, that the pursuer is not entitled to relief to the extent he asks, but that the defenders are right in their contention that the pursuer must himself bear the burden of the augmentation of 1812 to the extent of the amount formerly payable as king's annuity.

"An account of the origin and history of the king's annuity payable out of teinds is given by Sir John Connell in his Treatise on Tithes, vol. i., p. 265, *et seq.*, and p. 313, under reference to the Acts and documents there mentioned, some of which are printed in the appendix. It is sufficient here to say that the revocation by Charles I. of the grants in favour of Lords of Erection was enforced to the effect of the king's insisting on receiving an annuity out of all teinds liable to the burden of supporting the clergy, excepting the part then actually paid to the ministers in name of stipend for serving the cure, and to colleges, hospitals, and other pious uses. The Act 1633, cap. 15, ratifies the Acts of the commissioners of 1627 and 1631, fixing the amount of the annuity at six per cent on the amount of the teind liable to augmentation of stipend; and the right was enforced at least until 1674, if not to a later date, as appears from the memorial amongst the Blair-Drummond MSS., dated in 1688, forming No. 76 of the appendix to Sir John Connell's work, from which document it also appears that about one-half of the heritors liable in the annuity took advantage of the opportunity given to them of purchasing the king's right, and getting the annuity conveyed to them and the claim discharged. From the decree of the commissioners, dated in 1632 (the date of the agreement in question), forming No. 74 of the appendix just mentioned, it appears to have been determined that so long as the heritor paid his valued teind to the titular the king's annuity was payable by the titular, but that after the heritor bought his teinds he became liable in payment of the annuity as one of the burdens to which they were liable.

"The annuity was thus a burden on the teinds, and payable out of the teinds for the heritor who had acquired right to them; and the obligation undertaken by the heritor in the agreement of 1632, by which the present case is to be determined, was so far in accordance with the ordinary rule.

"The heritor is only entitled to relief from the titular of future burdens on the teinds, in so far as the obligation has been expressly undertaken by the titular in granting the conveyance, and the clause of warrandice contains the obligation of relief, which is said to impose the liability sought to be declared and enforced. That clause follows various other clauses, providing that the heritor shall pay, *inter alia*, the king's annuity and the existing stipend, and

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The pursuer reclaimed, and argued;—The king's annuity was never intended to interfere or compete with the minister's stipend. It originated the obligation on the titular is to warrant, free, relieve, and skaithless keep the heritor 'of ye remanent of ye said minister's stipend,' over and above the stipend then payable, and of all other impositions on the teinds, either for augmentation of stipend, or for any other use whatever, 'except ye annuities and taxations above specified,' being the king's annuity, and the stipend then payable. The clause of warrandice thus, in terms, excepts these two burdens on the teinds. It extends merely to the remainder of the teinds after these burdens have been deducted, and it is only reasonable to assume that the price paid for the teinds was estimated on the footing that the titular's obligation could not, in any event, be extended beyond that of warranting the remainder of the teinds, as thus defined, to be free from future burden.

"If this be the true construction of the clause just noticed, or the true meaning of the transaction which forms the subject of the agreement, as that transaction is to be ascertained from the deed as a whole, there is, I think, an end of the pursuer's claim to the relief demanded, for he is here claiming relief, not on account of burdens imposed on the remainder of the teind, after deducting the king's annuity, but of a burden imposed on that part of the teind formerly payable as annuity, and which was, when so payable, a burden on the heritor without any claim of relief. Taking the case as if the liability for annuity had not been brought up, and assuming that shortly after the date of the agreement the minister's stipend had been augmented so as to exhaust the whole teind, including the amount payable as annuity, I cannot see any good reason for the heritor demanding relief of the whole augmentation without crediting the amount of the annuity. The clause of warrandice applies, I think, in express terms to the remainder only of the teind after deducting the amount of the annuity. It expressly excepts the annuity, and if the minister, in place of the king, came to have right to that part of the teind, this was a change only in the creditor, to whom the heritor must make the payment for which he alone was liable, and for which he had no claim of relief. It did not enlarge the heritor's obligation, for he had just to pay to the minister what he was formerly bound to pay to the king; and I think it would have been against both the letter and the spirit of the agreement of 1632, and unjust to the titular, that his obligation should be enlarged, and the liability of the heritor diminished, from the mere circumstance that the king's annuity was no longer payable as such, but as stipend to the minister.

"It was not maintained in the argument for the pursuer that the heritor could have been at any time compelled to pay more than the full amount of his teind. If the whole teind was allocated to the minister it is not said that the annuity also would have been payable; either the annuity must have ceased, or the stipend must have been restricted by the extent of the annuity, for the owner of the teinds could not be required to pay any part of his teind twice over. Had the king's annuity been of the nature of a fine, or a premium paid by the heritor, in order that he might obtain an indisputable title to his teinds, the case would have been different, and the whole teind might have been liable to stipend notwithstanding payment of the annuity; but the annuity was really part of the teind.

"I am not aware of any direct authority on the question, whether after the Act 1633, c. 15, the benefice had a valid claim to the whole teind, preferable to the king's annuity, so that future augmentations would supersede and extinguish the annuity. The memorial already referred to (Connell, II., Appendix, p. 234) contains a statement that the king's annuity was, unlike the rest of the teind, free of future burdens. If the question had been raised, however, I think that it must have been held, in accordance with the general principles stated by the majority of the Judges in the case of Prestonkirk, February 1808 (Connell, II. Appendix, p. 313), that the teinds must, if necessary, be wholly applied for the benefit of the minister, and that the annuity must in that case cease; and this view is strongly confirmed by the circumstance that in the origin of the right i

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in the compromise which followed Charles First's attempt to resume the grants made to the Lords of Erection. It was enacted by 1633, c. 15, approving various Acts of the commissioners, "That his majestie and his successors shall have the constant rent and dutie following paid out of the teind bolls of victual, and out of the bodie of the rest of the teinds of the kingdome redacted in money" . . . . . "except the teind bolls and silver paid to ministers in name of stipend for serving the cure." . . . . . "And that, according to the true and just prices of the victual in ilk part of the country, compting for ilk hundred marks of the prices of the said victual being redacted in money six marks for his Majestie's annuitie." The king's annuity was therefore a burden on the Lords of Erection only, and not on the minister's stipend.[1]

But apart from this the claim of the minister for stipend is a para-

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was limited only to that part of the teinds not at the time applicable to stipend or other pious uses.

"However this may be, and whether the king's claim or the minister's claim was preferable, it is, I think, clear that both could not exist so as to make the heritor liable for more than his whole teind. This being so, if the annuity was preferable, then the heritor should have resisted any part of the augmentation being localled on that part of his teind which was, or had been, liable to annuity, and his failure to do so cannot throw an additional burden on the titular. If, on the other hand, all right to the annuity would cease by the whole teind being allocated as stipend, the heritor must, I think, pay the amount of the annuity to the minister in place of the king, and I see no just reason for compelling the titular to relieve him of this, which was all along his burden.

"The heritor's purchase in 1644 of the right to the king's annuity cannot, I think, make any difference on the result. If the king's right, like the heritor's right, to his surplus teind, was liable to be extinguished by future augmentations for the benefit of the cure, as I think it was, the purchase of the annuity was the acquisition of what might turn out to be a temporary advantage only. The price given was probably estimated in that view, and the burden actually ceased from 1630 till 1812. In the same way the right to teinds was acquired by heritors at nine years' purchase only of their free teind, because of the liability of that teind to future burdens, and in most instances a temporary advantage only was gained, as future augmentations were from time to time the cause of an increasing charge, which in many instances has now exhausted the whole teind.

"Holding, as I do, on the grounds now explained, that there is no obligation on the titular, under the deed of 1632, to grant the relief asked, I am further of opinion that nothing has occurred in the actings of the parties which has imposed the obligation. There have been no judicial proceedings in which the question was ever raised for determination. It is true that in a settlement of the heritors' claims in 1834, embracing the period from 1812 to that date, the titular in error paid the whole augmented stipend, and omitted to deduct the annuity, and that the same error was repeated in the different settlements from 1834 till 1872. The defenders probably have no claim to repetition of the sums for which they should have claimed deduction at the time, but I see no grounds whatever which preclude them from requiring the mistake to be corrected in future, and from disputing the existence of any obligation on their part to relieve the pursuer to the full extent claimed. Long usage following on a contract, particularly a contract of old date, is often most important, as giving a contemporaneous exposition of the meaning of parties in a deed which is expressed in obscure and ambiguous terms. There is nothing of the kind here. The contract is not in any view ambiguous in its terms; and the usage is, comparatively speaking, recent. Such usage cannot, I think, create an obligation which did not previously exist."

[1] 1 Connell, 2d ed. pp. 265, *et seq.*, and 313; and 2 Connell, Ap. No. 41, p. 85, No. 74, p. 228, and No. 76, p. 233.

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mount claim in whosesoever hands the teinds are.[1] It was clear therefore (1) That the king's annuity did not affect the minister's stipend. (2) That its amount was to be ascertained by taking six per cent of the teind that remained over after paying the minister's stipend reduced to a money value. Accordingly, when the free teind was diminished by an augmentation being laid upon it, the subject burdened by the king's annuity was diminished, and consequently the annuity itself diminished. This process might go on, as it had done in the present case, until both the subject burdened and the annuity itself vanished.

But even if it were held that the king's annuity, so far as this case was concerned, was six per cent of the free teind, as at the date of the arrangement in 1632, still the parties to that arrangement acquired mutual rights and undertook mutual risks. The one acquired right to the teinds and undertook the burden of the king's annuity, and the risk of any other such tax that might be laid upon the teinds. He was entitled to the benefit of the king's annuity having been redeemed and relinquished. The other obtained a price paid down, and undertook the risk of augmentations of stipend. What had actually happened was fairly within that risk, and he must now accept the consequences. In any view, the defender having transacted on the footing that this was the true construction of the agreement, from 1812 to 1871, and having even done so judicially, it was now too late for him to come forward and plead that the construction was erroneous.

Argued for the respondent;—In 1632 Mr Aytoune undertook, in terms of the contract founded on, the existing burdens of stipend and of king's annuity. The Earl of Rothes undertook the burden of future augmentations of stipend. The question therefore was, what were, at that date, the existing burdens, on the one hand, and the possible augmentations, on the other. Mr Aytoune got the free teinds after deducting the existing stipend and the king's annuity. Of that the Earl of Rothes granted warrandice, but of no more. Mr Aytoune was entitled to redeem the king's annuity, but if he did so he took the risk of its ultimately being localled on in his hands for augmentation. He could not thereby increase the measure of the Earl's warranty, which remained as in 1632, the transaction between Mr Aytoune and the Crown being one to which he was no party, and which had no connection with that of 1632.[2] Moreover the king's annuity was not originally, or at the date of the contract of 1632, subject to stipend. Mr Aytoune only made it so by redeeming it. Had it remained king's annuity and the Crown's claim not been relinquished, as it was voluntarily about the end of the seventeenth century, it never could have been localled on for stipend. Like bishops' teind in the hands of the Crown, it was not affectable by the minister's right to stipend. It was, by 1633, c. 15, a constant rent or annuity not to go on diminishing as contended for by the pursuer, and there was no exception of future augmentations of stipend.[3]

At advising,—

Lord Justice-Clerk.—This case presents considerable difficulty. The question raised is whether, under the terms of the contract entered into in 1632 by

[1] Wemyss v. Macqueen (Prestonkirk case), Mor. App. *voce* Stipend, No. 6, and H. of L., May 20, 1808, 5 Pat. 210; Mitchell v. Officers of State (Dingwall case), May 22, 1789, 3 Pat. 140; Milligan v. Wedderburn (Kirkdean case), July 8, 1784, 2 Pat. 621.

[2] Spottiswoode v. Ker Seymer, March 2, 1853, 15 D. 458, 25 Scot. Jur. 284.

[3] Stair, 2, 8, 35; 1 Connell, 271; and 2 Connell, App. No. 40, p. 77; Submission printed in 5 Thomson's Acts, 193.

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Lord Rothes on the one part, and Aytoune of Aytoune on the other, Lord Rothes became bound absolutely to relieve Mr Aytoune, the disponee, of all future augmentations of stipend to the minister. The Lord Ordinary has found in effect that the representative of Lord Rothes is not bound to relieve Mr Aytoune's successor of a part of the augmentation equivalent to the old king's annuity. In other words, he has found that the obligation to relieve only extends to ninety-four per cent of the teinds, which were conveyed to the disponee. The ground of judgment seems substantially to be this, that the disposition did not truly extend to give the disponee right to the six per cent of the teinds of which the king's annuity consisted, or at least that the obligation of warrandice did not extend beyond the other ninety-four per cent.

The nature of the deed of 1632, though complex in form, is simple enough in substance. Lord Rothes, as one of the Lords of Erection, held the teinds of the parish of Flisk. In 1611 he granted a tack of the teinds to Sir Alexander Seytoune, and the next day, for some unexplained reason, he took an assignation to himself of this tack from Sir Alexander. After narrating this tack and assignation, and assigning the tack so far as it included the teinds of the lands of Glenduckie, the deed then dispones to Mr Aytoune of Aytoune, the heritor, the whole teinds of these lands of Glenduckie. Then follow corresponding obligations of relief, the first on the part of the disponee in favour of the disponer, and the second on the part of the disponer in favour of the disponee. Upon the true construction of these obligations of relief the present question depends.

The disponee undertakes to relieve the disponer of the existing minister's stipend, of the king's annuity, and of all taxations to be imposed upon the teinds of the parish, proportionally to the existing valuation of the teinds of the lands so disponed. Now, the king's annuity was an exaction of six per cent on the teinds in the hands of the Lords of Erection, and had been accepted by King Charles I. as a compromise with them instead of altogether resuming the teinds granted out to them. It is quite clear that the annuity was not intended to prejudice in any case the minister's stipend. It was intended to be laid on the lay titulars only, and to affect only the part of the teinds remaining in their hands after payment of stipend. Negotiations were going on between the Crown and the titulars in 1632, which took the shape of the Act of Parliament in the following year which constituted or recognised the annuity. Accordingly it is manifest that it was with a view to these proceedings that the disponer in this deed stipulated for relief of the annuity of six per cent, and of any other taxation which might afterwards be imposed on the titular as Crown donatary.

On the other hand, the disponer comes under an obligation to relieve the disponee of all subsequent imposition on the teinds for augmentation of the minister's stipend, or other uses, except the annuity and taxations above mentioned. Now, that obligation is unlimited in extent, with the exception referred to. The state of facts which followed on this disposition was, that the disponee enjoyed his own teinds under burden only of the minister's stipend, as localled at the date of the disposition and of the king's annuity. I doubt whether the king's annuity was very generally exacted. But it seems to have been paid by Aytoune, and to have been redeemed or purchased up by him in 1644, and about 1674 to have fallen into general desuetude. From 1644, and for more than a century and a half, Mr Aytoune and his successors had full right to these teinds, under burden only of the minister's stipend as it stood at 1632, and had been relieved

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by the representative of the disponer of the augmentations awarded from time to time. But in 1812 the minister obtained an augmentation which exhausted not only the ninety-four per cent of the teind, but the whole teind. From that time forward for sixty years the Countess of Rothes or her predecessors have relieved the proprietors of Glenduckie of the whole amount of the augmentation. But in 1872 it was suggested that the minister had no right to draw stipend out of the six per cent which represented the king's annuity, or at any rate that Mr Murray, Aytoune's successor, was not entitled to be relieved of the proportion of augmentation which was composed of this six per cent.

The first point was very faintly maintained, and I am quite satisfied that the contrary assumption is the true one, namely, that the minister is entitled to exhaust the whole teind by augmentation, notwithstanding the king's annuity.

The second question presents the only real difficulty in the case, Did the obligation of relief in the deed extend to the whole teind, including the proportion which, if the annuity had continued to be exacted, would have gone to the king? Now, I think a considerable amount of confusion has crept into the argument in this case, from not properly distinguishing between the obligation by Aytoune to relieve Lord Rothes of king's annuity, and the obligation by Lord Rothes to relieve Aytoune of augmentation.

It is quite clear that the first obligation never came into play, for no demand was ever made against the Earl of Rothes or his successors for king's annuity. They were never distressed for it, and therefore had no opportunity for having recourse upon Aytoune and his successors under their obligation of relief. But with regard to the second obligation of relief, I take the words to mean what they plainly bear, "I am to relieve you of any claim on the part of the minister to augmentation of stipend, but not of any claim on the part of the Crown." Now, does the claim here made fall under the designation of a claim on the part of the minister for augmentation of stipend, or of a claim on the part of the Crown? Clearly, I think, of the former. The argument was ingeniously put to us that the heritor never obtained right from the titular to the six per cent of the teinds representing the king's annuity; that this six per cent did not enter into the transaction between them; that if the heritor is now in right of it, it is because he has purchased it from the Crown; and therefore that the titular's obligation of relief does not extend to the last six per cent of the teind. I cannot accept this argument as sound. There is nothing either in the words or the spirit of the agreement which imports any limitation. It is impossible to read the agreement but as a complete conveyance of the whole teind, and the clause in question as other than an absolute and unreserved obligation to relieve the heritor of augmentations of stipend. I am therefore for altering the judgment of the Lord Ordinary.

Lords Neaves, Ormidale, and Gifford concurred.

The Court pronounced this interlocutor:—"Recall said interlocutor, and decern in terms of the conclusions of the summons, in so far as regards the obligation of relief," &c.

Murray & Falconer, W.S.—Tods, Murray, & Jamieson, W.S.—Agents.

PROCTOR AND SONS, Pursuers and Respondents.—*Asher.*
JOHN COWAN, Defender and Appellant.—*Rhind.*

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Nov. 20, 1874.
Cowan v. Proctor.

Process—Fee-Fund Dues—Appeal—Joint Minute.—Before an appeal from the Sheriff-court had been heard the parties compromised the case by a joint minute. *Held* that the minute was not to be regarded as a first step for the respondent in the sense of the Act 1 and 2 Vict. c. 118, regulating fee-fund dues, and that a 2s. 6d. stamp was sufficient.

THIS was an appeal from the Sheriff-court of Forfarshire of a final judgment under the Court of Session Act, 1868. The appellant duly boxed and lodged a print of the appeal, record, and proof, and affixed thereon stamps denoting 15s. Each of the parties afterwards printed, boxed, and lodged an appendix, on each of which a 2s. 6d. stamp only was affixed. Before the case was heard the parties, having compromised the case, lodged a MS. joint minute consenting to decree, which was signed by counsel for both the parties, and tendered to the Clerk of Court, with a fee-fund stamp of 2s. 6d. thereon, which minute he declined to receive as not sufficiently stamped, in respect that it was a first step for the respondent, for which the fee was 12s. 6d.*

1ST DIVISION. Sheriff of Forfarshire. M.

The Court held that the joint minute could not be regarded as a first step for the respondent in the sense of the schedule of the Act 1 and 2 Vict. c. 118, and that a 2s. 6d. stamp, was sufficient.

MACLACHLAN & RODGER, W.S.—WILLIAM OFFICER, S.S.C.—Agents.

WILLIAM MACKIE, Pursuer and Respondent.—*Paterson.*
DAVID RIDDELL, Defender and Appellant.—*Mackintosh.*

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Nov. 20, 1874.
Mackie v. Riddell.

Compensation—Liquid and Illiquid—Mercantile Law Amendment Act, 1856, 19 *and* 20 *Vict. c.* 60, *sec.* 5—*Express warranty.*—In an action for payment of the price of goods the defender admitted the debt, but pleaded compensation in respect of a counter claim of damages arising out of a separate transaction, which was disputed by the pursuer. *Held* that the defender was not entitled to plead compensation in respect of the illiquid claim of damages.

Sale—Express warranty—Mercantile Law Amendment Act, 1856.—*Observed* (*per* Lord President), that the Mercantile Law Amendment Act requires warranty to be express, and to prove an express warranty it is not enough for witnesses to say that the goods were warranted. They must specify the terms in which the warranty was granted.

THIS was an action brought in the Sheriff-court of Stirling and Dumbarton shires by William Mackie against David Riddell, concluding for payment "of the sum of £30, 15s., being the price of three stots sold by the pursuer to the defender on or about the 1st day of February 1873."

1ST DIVISION. Sheriff of Stirling and Dumbarton. M.

The defender did not dispute his liability for the price. He averred that the pursuer, on 15th September 1872, sold to him, for £52, 10s., a two-year-old filly, and warranted it as sound, and that the animal having turned out to be unsound he received from the pursuer authority to dispose of it to the best advantage, and he, the pursuer, would "stand" the greater part of the loss sustained; and that, at the time the stots were

* The Act 1 and 2 Vict. c. 118 (schedule of fees), sets forth, as the fees payable for proceedings in the Inner-House, *inter alia*, "Original petitions, and petitions and complaints, or any other writ or step by which a cause is originated, as also answers thereto or other first step for a respondent or other party, each paper, printed, 15s., written, 12s. 6d."

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purchased by him from the pursuer, it was agreed that he should be allowed to retain the said loss sustained by him at the payment of the price of the same.

The defender further averred that he had resold the filly, sustaining a loss of £12, 10s., and pleaded compensation to that amount, offering to pay the balance of the sum concluded for, amounting to £18, 5s.

The pursuer pleaded;—(1) In the circumstances above set forth, the defender is not entitled to plead compensation; and his statement of facts and pleas in law being irrelevant, unfounded in fact, and untenable in law, ought to be repelled. *Separatim*, (2) No warranty having been given with said filly, the defender has no claim against the pursuer for repetition of the price, or any portion thereof.

The Sheriff-substitute (Steele) pronounced this interlocutor:—"Allows the pursuer a proof of his averments *prout de jure*, and the defender a counter proof, including therein a proof of the defender's averments."

The Sheriff (Blackburn), on appeal, pronounced this interlocutor:—"Recalls the interlocutor appealed against, and, before answer, allows the defender a proof of his averments, and to the pursuer a conjunct probation."

A proof was then led before the Sheriff-substitute. The evidence chiefly related to the sale of the filly by the pursuer to the defender, and to the question of its soundness or unsoundness. The pursuer and the defender were the only persons present at the sale, and their evidence was contradictory.

The Sheriff-substitute pronounced an interlocutor on the proof, which, after detailed findings, concluded—"Decerns against the defender in terms of the conclusions of the summons, but under deduction of the said sum of £12, 10s., with corresponding interest thereon: Finds the pursuer liable in expenses."

On appeal the Sheriff pronounced this interlocutor:—"Finds that the defender has failed to prove that at the time of the sale of the filly, in September 1872, the pursuer granted an express warranty of her soundness, or that at that time she was unsound: Finds that, in February 1873, the defender purchased from the pursuer the stots libelled, at the price of £30, 15s.: Therefore recalls the interlocutor appealed against, and decerns against the defender for the said sum of £30, 15s., together with interest thereon as libelled: Finds the pursuer entitled to expenses," &c.*

The defender appealed.[1]

LORD PRESIDENT.—This action has been brought to recover "the sum of £30, 15s., being the price of three stots sold by the pursuer to the defender on or

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* "NOTE.—A purchaser intending to rely on an express warranty, must either have it in writing, or take care to have evidence sufficient to prove the fact and terms of the warranty.

"In this case the only two persons present when the warranty is said to have been given are at variance on the fact; and while, on the one hand, there are some points on which the Sheriff-substitute strongly founds in his note, which may lead to the belief that the defender was conscious that the filly was unsound when he sold her, and that he had warranted her, there is, on the other hand, the fact that the defender did not, as averred in his defence, at the time of the purchase of the stots, stipulate that he was to be allowed to retain the loss sustained by him on the filly out of the price of the stots. On the contrary, it is proved that he did not make any such stipulation, and abstained from making any such claim until he had got possession of the stots from the pursuer."

[1] Scottish North-Eastern Railway v. Napier, March 10, 1859, 21 D. 700, 31 Scot. Jur. 350; M'Leay v. Rose, July 8, 1826, 4 S. 812 (N. E. 819).

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about 1st February 1873, and taken delivery of by him on or about the 11th of said month." The sale and delivery are admitted, and it is further admitted that the defender has not made payment, and therefore that the pursuer's demand is well founded. But the defender pleads compensation arising out of a claim of damages. The amount of damages claimed is £12, 10s. The pursuer adds this additional plea—"1. In the circumstances above set forth the defender is not entitled to plead compensation." In my opinion the Sheriff-substitute ought at once to have sustained this plea. The pursuer's claim being admitted, and the defender's counter claim being entirely illiquid and requiring to be constituted in an ordinary action, there can be no compensation between two such claims. The case of the North-Eastern Railway is on all fours with the present. The law was placed in that case on a satisfactory footing. Therefore I am of opinion that everything that was done in the Sheriff-court since the record was closed is irregular, and must be swept away.

But as the parties are here it will only be kind to them to state my opinion on the question of warranty. I am clearly of opinion that warranty has not been proved, and it is quite plain that it never can be proved, because the only persons present were the pursuer and defender, and they are at variance on the facts. The observation of the Sheriff, with which he begins his note, is a very good one, and I entirely agree with him—"A purchaser intending to rely on an express warranty must either have it in writing or take care to have evidence sufficient to prove the terms of the warranty." The Mercantile Law Amendment Act requires an express warranty, and to prove an express warranty it is not enough for witnesses to say that the goods were warranted. They must specify the terms in which the warranty was granted. Therefore the claim must fail on its own merits if it were before us.

LORD DEAS.—The claim on which this action is founded is not what is called a liquid claim in the correct sense in which bonds, bills, and leases constitute liquid claims. But it is admitted on record that the three stots libelled were sold and delivered to the defender in the action, at the price of £30, 15s., and that the price has not been paid. The defender avers that on a previous occasion the pursuer had sold him a filly at the price of £52, 10s., which was paid; that the filly turned out to be unsound, and was sold at a loss of £12, 10s., which the pursuer, on the occasion of the sale of the stots, agreed to allow the defender to retain from the price, leaving a balance of £18, 5s., which the defender had all along been willing to pay. This agreement was the only thing relevant to be proved in defence of the action. I am of opinion that the agreement has not been proved, and that being so we have just an admitted claim of debt on the one side and an illiquid claim of damages on the other. This leaves the case on all fours with the case of the North-Eastern Railway v. Napier.

I may add, however, so as not to encourage further litigation, that if we were to go into the rest of the proof I should agree with your Lordship that there was clearly nothing at the sale of the filly which amounted to a warranty of soundness.

LORD ARDMILLAN.—I agree with your Lordship on the first point. In the case of the Scottish North-Eastern Railway v. Napier your Lordship observed—"The defence, therefore, was entirely based on the counter claim, and the pur-

No. 35.
Nov. 20, 1874.
Mackie v. Riddell.

suers replied by this plea, that the account libelled being admitted, while the alleged counter claim, arising on a previous transaction between the parties, was matter of dispute, the defender could not plead the latter as a set off against the pursuer's liquid ground of debt. I think this plea is well founded." I am of the same opinion. The only way the defender tries to escape from paying his debt is by stating a counter claim,—"The defender received authority from him to dispose of the said filly to the best advantage, and he, the pursuer, would 'stand' the greater part of the loss sustained; and at the time the stots were purchased by the defender from the pursuer he was to be allowed to retain the said loss sustained by him at the payment of the price of the same." The statement would require to be more definite and specific if effect were to be given to it, and if insisted in would require to have been proved. But in any view of it, compensation against an admitted debt cannot be pleaded.

I should have rather more difficulty on the other part of the case if we had materials for deciding it. But we have not. It is doubtful if warranty or the unsoundness of the horse has been proved; and I cannot help thinking that, if well founded, the statements might have been proved. This, however, was not the case of a horse which had been tried and proved, but of a young two-year-old filly, in regard to which warranty is not very common, or easily presumed. The buyer generally takes at his own risk. It would have been all the more necessary to have had the warranty distinctly proved. But really the buyer must prove warranty, and he has not done so.

Lord Mure concurred.

The Court pronounced this interlocutor:—"Recall the interlocutor of the Sheriff of date 21st August 1873, and all the subsequent interlocutors in the cause: Find that on the 1st February 1873 the pursuer (respondent) sold to the defender (appellant) three stots at the price of £30, 15s.: Find that the defender received delivery of the said stots on the 11th of the same month: Find that the defender has failed to pay the price of the said stots: Find that the claim on which the defender pleads compensation, being illiquid, cannot be set off against the pursuer's admitted claim: Therefore repel the defences, and decern against the defender in terms of the conclusion of the summons: Find the pursuer entitled to expenses both in the Sheriff-court and this Court; allow accounts thereof to be given in," &c.

J. & A. Peddie, W.S.—Gifford & Simpson, W.S.—Agents.

No. 36.
Nov. 21, 1874.
Park v. Watson, &c.

John Park, Pursuer, Nominal Raiser.—*Keir.*
Alexander B. Watson and Another, Defenders, Respondents.—*Reid.*
John Henderson Milne, Defender and Real Raiser.—*Reid.*
James Cruickshank, Defender and Appellant.—*Mackintosh.*

Process—Multiplepoinding.—The outgoing tenant of a farm allowed the incoming tenant to reap his crop, under an agreement by which the incoming tenant bound himself to pay the value of the crop to the landlord, the balance, after payment of rent, to be paid by the landlord to the outgoing tenant. A creditor of the outgoing tenant having arrested the funds in the hands of the incoming tenant, a multiplepoinding was raised by the landlord in the name of the incoming tenant. *Objection* to the competency of the multiplepoinding, on the ground that there was no double distress, *repelled.*

No. 36.

Nov. 21, 1874.
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1ST DIVISION.
Sheriff of Aberdeen.
M.

THIS action of multiplepoinding was raised by John H. Milne of Craigellie, proprietor of the farm of Tillykeira, Aberdeenshire (real raiser), in name of John Park, incoming tenant of said farm (nominal raiser), against (1) Mr Milne himself, the real raiser, (2) the outgoing tenants, Alexander B. Watson and Mrs Sophia Watson, (3) James Cruickshank, a creditor of the outgoing tenant, who had used arrestments in the hands of the incoming tenant.

The summons set forth as the fund *in medio* £140, 6s. 7½d., being the price of the waygoing crop, "in terms of agreement between the outgoing and incoming tenants."

This agreement (*inter alia*) bore,—"It is further agreed that the incoming tenant pay over the price of the said crop to the proprietor, Mr Milne of Craigellie, or his factor, say 15s. per quarter to account at Martinmas 1873, and the rest when the fiars are struck, the said proprietor or his factor being bound to pay over the same to the outgoing tenants above named, after deducting the rent due for crop 1873."

The defender Cruickshank lodged a minute of defence, in which he pleaded that the action was incompetent, in respect that there was no double distress.

The defenders Watsons also lodged defences in which they stated,—"The action was incompetent, and ought to be dismissed, in respect there was no double distress or competing interests, and that no evidence has been produced by the real raiser of such double distress or of competing interests; that the fund arrested was specially set apart for payment to the real raiser under minute of agreement, . . . and was not attachable by arrestment; and that the landlord's claim, in any event, is a preferable claim, which goes to diminish the fund, and not to demand a share of it, and the only other claim being that of James Cruickshank, one of the defenders, there is in the circumstances no double distress."

The Sheriff-substitute (Comrie Thomson) pronounced this interlocutor:—"Finds that there is no double distress, and that there are no competing interests on the fund *in medio*: Dismisses the action: Finds the defenders entitled to expenses from the real raiser; allows accounts," &c.*

The real raiser appealed.

The Sheriff (Guthrie Smith) pronounced this interlocutor:—"Affirms the interlocutor appealed against, and decerns, but varies the finding as to expenses as follows,—Finds no expenses due to or by the arrester Cruickshank, but finds the other claimants entitled to expenses from the real raiser, of which allows an account," &c.†

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* "NOTE.—The Sheriff-substitute refers to the cases of Bell v. Hill, 18th November 1837,[1] and Mitchell v. Strachan, 18th November 1869,[2] as the authorities on which the above judgment proceeds."

† "NOTE.—The Sheriff regrets to be obliged to throw out this action on a technical ground, but it is impossible to resist the objection stated to the competency of the process by the claimants A. B. Watson and Mrs Watson. In 1873 these persons were leaving the farm of Tillykeira. The crop on the lands was their property, and by agreement, dated 5th August 1873, they assigned it over to Park, the incoming tenant, on condition that he should pay the value thereof to the proprietor Mr Milne, or his factor, who again was taken bound to pay over the same to the granters of the deed, after deducting the rent due for crop 1873. Mr Park thus held the crop as trustee for the landlord, and the subsequent arrestment used in his hands by Cruickshank as a creditor of the Watsons attached nothing. Nor does the circumstance that the landlord, after getting the money and paying himself, will hold the reversion for behoof of the Watsons, or any person in their right, constitute double distress. In no view,

[1] 16 S. 81, 10 Scot. Jur. 85. [2] 8 Macph. 154, 42 Scot. Jur. 67.

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The defender Cruickshank appealed, and argued;—The Sheriff had gone on the merits in deciding the competency. He assumed that under the agreement the landlord was the sole creditor of the fund. This was dealing with the merits, which he was not entitled to do in a question of competency.[1]

LORD PRESIDENT.—The point we have to decide is whether the multiplepoinding is competent. The Sheriff-substitute and the Sheriff have found that it is not competent, because there are not different claimants of the fund. The fund *in medio* is just the price of the waygoing crop when it becomes due. A debtor of the outgoing tenant has arrested this fund in the hands of the incoming tenant, and claims to have his debt paid out of it. On the other hand, the landlord claims to have his rent paid out of the fund. Now, it is difficult to understand what double distress is if this is not. One of the defenders claims the whole fund, and another claims a part. The landlord's claim is based on an agreement between the outgoing and incoming tenant. Two questions are raised by the agreement, 1st, whether the landlord can found on the agreement, and 2d, whether the agreement is binding at all. It is a pity any such question should ever have been raised, and if the parties were reasonable they might easily settle the question between them. But the way in which the Sheriff deals with the question of competency is by assuming that the arrestment creates no *nexus*, and thus by assuming that the judgment in the competition will be one way, he arrives at the conclusion that there is no double distress. I think that his judgment is wrong, and that we ought to send the case back to the Sheriff-court.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutors of the Sheriff-substitute of date 22d May, and of the Sheriff of date 2d July 1874: Repel the objections to the competency of the action, and remit to the Sheriff to proceed further in the cause: Find the respondent, John Henderson Milne, entitled to expenses in this Court; allow an account," &c.

DAVID H. WILSON, S.S.C.—DAVID MILNE, S.S.C.—MORTON, NEILSON, & SMART W.S.—Agents.

No. 37.
Nov. 21, 1874.
Walker v. Stronach.

GEORGE WALKER AND OTHERS (Original Trustees of the late James Giles), First Parties.—*Dickson.*
ALEXANDER STRONACH Junior AND ANOTHER (Assumed Trustees of the late James Giles), Second Parties.—*Lee.*

Pupil—Tutor-nominate.—A father conferred on the trustees under his trust-disposition and settlement a power to assume new trustees, and appointed his trustees "named or to be named or assumed, and the survivors and survivor of them," tutors to his pupil children. *Held* that the appointment of assumed trustees as tutors was invalid.

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therefore, is there anything to warrant a multiplepoinding, and the judgment of the Sheriff-substitute dismissing the action is right. No expenses have been given to the arrester, because his arrestment, although obliging the real raiser to call him as a party, is utterly inept, and, properly speaking, he has no *locus standi* in the case at all."

[1] Mitchell v. Strachan, Nov. 18, 1869, 8 Macph. 154, 42 Scot. Jur. 67; Scott and Bonar v. Drysdale, May 22, 1827, 5 S. 689, (N. E.) 643; M'Target v. M'Target, May 12, 1829, 7 S. 591, 1 Scot. Jur. 167; Miller v. Ure, June 23, 1838, 16 S. 1204, 10 Scot. Jur. 519.

No. 37.
Nov. 21, 1874.
Walker v. Stronach.
2D DIVISION. I.

THE late James Giles, R.S.A., died at Aberdeen on 6th October 1870, leaving a trust-disposition and settlement whereby he conveyed in trust his whole property to Alexander Bruce, S.S.C., George Walker, North of Scotland Bank, Aberdeen, James Bruce, W.S., and Alexander Ellis, architect, Aberdeen, "and the survivors or survivor of them, or of such of them as shall accept, and to such other person or persons as I may hereafter name and appoint by any writing under my hand, as trustees, and to the assignees of my said trustees either named or to be named or assumed." The deed also contained this nomination of tutors and curators to the truster's children,—"I hereby nominate and appoint my said trustees named or to be named or assumed, and the survivors and survivor of them, tutors and curators, or tutor and curator, of such children of my present marriage as may be alive at my death, and also to be my sole executors or executor, and only intromittors with my moveable means and estate." Mr Giles left two children in pupillarity, one born in February 1867, and the other in October 1868.

Upon Mr Giles' death all the trustees nominated by him accepted office, and proceeded to act in the administration of the trust-estate. On the death of one of their number, Alexander Bruce, in 1872, the surviving trustees assumed Alexander Stronach junior and Henry John Gibson as trustees under Mr Giles' trust-disposition and settlement.

The surviving original trustees and the assumed trustees thereafter acted as trustees under the trust-disposition and settlement. But a question arose whether the assumed trustees became, as such, tutors of the pupil children of the truster, along with the original trustees. Accordingly this special case was presented to the Court.

George Walker, James Bruce, and Alexander Ellis as surviving original trustees were the parties of the first part, and Alexander Stronach junior and Henry John Gibson were the parties of the second part.

The judgment of the Court was asked on the questions, whether the parties of the first part were the sole tutors of the truster's pupil children, or whether the parties of the second part were tutors along with the parties of the first part.

Argued for the first parties;—A father was permitted by the law of Scotland, which in this matter was founded on the civil law, to nominate tutors to his children, not as an extension of the *patria potestas* after his death, but because he was presumed to be best qualified for making the selection. To allow a father to appoint an uncertain person would therefore be a departure from this principle. The attempt made by the truster in this deed was not to appoint tutors by designation though not nominatim, which might be allowable, but to delegate the power of nomination.[1]

Argued for the second parties;—It had never been decided that a father could not appoint tutors in the manner adopted in this case. In practice such appointments had frequently passed unquestioned, owing to the manifest expediency of having the power of administration of a father's estate and the guardianship of his children in the same hands. The father had very clearly indicated what his wish was in this matter, viz., to continue the guardianship of his trustees as a body over his children, though from death it should be necessary to replace some of the original by assumed trustees. Such was no stretch of the father's *patria potestas*, which laid upon him the duty as well as the power of continuing his guardianship over his pupil children after his death through tutors

[1] Dig. 26, 2, 20; 1698, c. 8; Stair, 1, 6, 6; Ersk. 1, 7, 3.

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appointed; and to give effect to the father's intention in the present case, was only to follow the principle governing the law in this matter.[1]

At advising,—

LORD NEAVES.—This case raises a question of very considerable importance. There is not much authority to be found on the point, but it is very material to attend to this, that no case can be pointed to in the whole range of legal practice and experience in which a tutor-nominate has been allowed to be appointed to pupil children by any person, not being the father himself. It is a very delicate act to select after a father's death a person who shall be guardian of the person and administrator of the affairs of his pupil children. If the father before his death has exercised his admitted power of selection, the law recognises the tutor so nominated. It may be that he need not designate him by name so long as he designates him by description so as to distinguish him individually from all others, for it would not be sufficient for the father to appoint the holder of a particular office at the time of his death. But we have no example of a tutor nominated by any one else than the father being admitted to the office. Considering this fact, and looking to the origin and source of the office of tutory itself, I think we have enough to determine this present point. The father is empowered to name tutors to his pupil children. But he cannot delegate that power to a third party. A tutor named by a person to whom the father has delegated his power of nomination would not be a tutor nominated by the father, and would want the very characteristic which in the eye of the law forms the qualification of the father's nominee, namely, the father's personal selection. To whatever origin we may trace back the principles which guide our law and practice on this point it would be a matter of extreme delicacy to innovate in any way upon them. I accept the maxim of the Roman law, "tutor incertus dari non potest." It implies a *delectus personæ* residing in the father, and to be exercised by him, and him only. Now, these assumed trustees are not the father's selection; they are the selection of the surviving and acting original trustees. They may be well assumed as trustees, but a power to assume trustees does not make the assumed trustees assumed tutors. If there is an inconvenience in this I cannot help it; the remedy must be found in further legislation.

The LORD JUSTICE-CLERK and LORDS ORMIDALE and GIFFORD concurred.

THIS interlocutor was pronounced:—"Find that George Walker James Bruce, and Alexander Ellis, as surviving trustees nominated by James Giles, are sole tutors of Alexander Bruce Giles, and Mary Giles, the pupil children of the said James Giles, and find both parties to the special case entitled to payment of their expenses out of the estate, and decern."

BRUCE & KERR, W.S.—TODS, MURRAY & JAMIESON, W.S.—Agents.

No. 38. Nov. 24, 1874. Harrison v. Anderston Foundry Co.

HENRY HARRISON AND WILLIAM HARRISON, Suspenders.—*D.-F. Clark—Asher—Mackintosh.*

ANDERSTON FOUNDRY COMPANY, Respondents.—*Sol.-Gen. Watson—Balfour—R. V. Campbell.*

Process—Jury Trial—Issues—Note of Particulars—Patent—Prior Invention—Prior Use.—In a suspension and interdict brought by the holder of a patent to

[1] Stair, 1, 12, 13; Ersk. 1, 7, 2.

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prevent infringement, the respondents alleged that the patent was invalid, in respect that the patentee was not the first and true inventor, and that the invention had been publicly known and used prior to the date of the patent, the respondents stating that an invention substantially the same had been described in seventeen prior patents, which were specified, and had been used by thirty different manufacturers.

Held that it was not necessary for the respondents to specify the passages in the specifications of the respective patents which they intended to found upon, or the dates of the alleged prior use.

Observed, that the record was the proper place for making the necessary allegations of prior use.

1ST DIVISION. Lord Young. B.

THIS was a note of suspension and interdict by William Harrison and Henry Harrison, of Blackburn against the Anderston Foundry Company, carrying on business at Anderston, near Glasgow.

The prayer was for interdict against the respondents infringing certain patents for weaving machinery held by the suspenders.

The respondents stated,—(Stat. 1) "Quintin Whyte and John Whyte, in whose favour the letters-patent libelled on were granted, were not the first and true inventors of the alleged invention described in the said letters-patent and specification, and the said invention was not first published in Great Britain by the said Quintin Whyte and John Whyte, or either of them. The said alleged invention was published, and was publicly known and used in Great Britain prior to the date of the said letters-patent." (Stat. 2) "Inventions or contrivances similar to, or substantially the same with, the alleged invention described in the letters-patent founded on by the complainers were described and disclosed in (1) letters-patent granted to John Watson, No. 11,498, dated 21st December 1846, and in the relative specification and drawings, dated 17th and enrolled 21st June 1847." Then follow sixteen other similar statements of prior patents. (Stat. 3) "The alleged invention specified and described in the letters-patent and specifications libelled on was publicly used in Great Britain prior to the date of the said letters-patent in the following amongst other instances, viz., Messrs Gilmour and Kerr's weaving factory, 95 Garngad Road, Glasgow." Then follow the names of twenty-nine different manufacturers in different parts of the country, but principally near Glasgow.

The respondents pleaded;—2. The alleged letters-patent founded on by the complainers are null and void or invalid, in respect—(1) The said Quintin Whyte and John Whyte were not the first and true inventors of the alleged invention described in the letters-patent and specification. (2) The alleged invention was publicly known prior to the date of the letters-patent. (3) The alleged invention was publicly used prior to the date of the letters-patent. (4) The said alleged invention is of no public utility.

The following issues and counter issues were proposed:—"It being admitted that Quintin Whyte and John Whyte, of the city of Glasgow, obtained the letters-patent, No. 6 of process, dated 29th October 1868, and sealed 19th March 1869, and filed the specification of which No. 7 of process is a certified printed copy, and that the said letters-patent were assigned to the pursuers by assignation dated 30th September 1871—Whether from the 29th October 1868 to the 19th September 1874, or during part of said period, and during the currency of the said letters-patent, the defenders did, at their works at Anderston, Glasgow, wrongfully and in contravention of the said letters-patent, use the invention described in the said letters-patent and specification? Or, 1, Whether the said Quintin Whyte and John Whyte are not the first and true inventors of the inven-

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tion described in the said letters-patent and relative specification? 2, Whether the invention described in the said letters-patent and specification was publicly used in the United Kingdom prior to the date of the said letters-patent? 3, Whether the invention described in the said letters-patent and specification is not practically useful for the purposes therein set forth?"

The suspenders objected to the counter issues being granted.

The Lord Ordinary reported the issues and whole case.*

* "NOTE.—I have taken the exceptional course of reporting the case at this stage in the special circumstances, which I shall briefly explain, and with a view to promote the reasonable desire of the parties to have the case tried at the ensuing sittings of the First Division of the Court.

"The suspenders complain of an infringement of a patent, and seek by interdict to restrain the respondents from continuing the alleged infringement. The respondents impugn the validity of the patent, on the grounds,—1st, that the patentees are not the first and true inventors; 2d, prior use; and 3d, inutility. The issue proposed by the complainers is in common form, and was not objected to. The counter-issues proposed by the respondents are also in common form, and were not objected to in point of form or expression.

"But the complainers require (statement 7) from the respondents further specification than the record gives of their statements with respect to prior invention and use, and it is with reference to the proper mode of directing the respondents to comply with this desire (if it should be thought reasonable, as I think it is) that I have reported the case at this stage. The doubt is whether, when a party maintains such pleas as the counter issues proposed by the respondents are founded on, there is any other way of compelling him to give more specific information than by refusing his issues unless he shall amend his record? In short, whether it is competent, after the adjustment of issues, to order further specification for the reasonable information and guidance of the other party. From the position taken by the parties it was obvious that, in whatever way I decided the controversy between them, there would be a reclaiming note, and I therefore (with the assent of both, as I understood) report the matter, as the course whereby the judgment of the Court may be obtained with the least hindrance to the progress of the case.

"My own opinion is that the respondents are entitled to the issues which they propose; and that by allowing the issues the complainers are not precluded from applying to the Court for an order on the respondents to furnish them with such further specification as they (I think reasonably) require. Such an order has been made of consent; and I should, for my part, be prepared to decide that it may be made without consent, or in the face of opposition. Information so ordered to be furnished by one party to the other for his guidance may not be such as ought to be, or conveniently can be, set forth on record, and I should not be disposed to regard it as of exactly the same technical character. The rules of candour and good faith would of course be enforced, and indeed are unlikely to be violated. But, consistently with these, the party furnishing the information, whether voluntarily or in obedience to an order of Court, might, in my opinion, be properly allowed at the trial to go beyond it to such extent as the Judge thought fair and reasonable in the circumstances.

"The record is perhaps not the place to specify the particular passage of books or specifications intended to be relied on; and if a note of them should be furnished to the opposite party, I think no more ought to be required at the trial than a substantial observance of the good faith of such note, regarded as notice,—without precluding the party from founding on other passages similar in character subsequently discovered,—notice of which was not purposely withheld, and reference to which may be allowed without prejudice to the reasonable interests of the adversary. I venture to offer these remarks in support of the preference I should feel to the one mode of giving the information required rather than the other, and also with reference to the alarm which the respondents seemed to feel, that by giving the information required of them they would

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The suspenders argued;—The respondents were not entitled to have their issues, because they had not given sufficient specification of prior publication, or prior use, in their statements, or, at all events, they were bound to furnish to the suspenders a note of the particulars which they intended to prove. The dates of the alleged prior use ought to have been given. On account of the large number of allegations of prior use and prior publication it would be impossible to prepare a case to disprove all.[1]

Argued for the respondents;—It had never been the practice to give the dates at which an alleged prior use took place.[2]

LORD PRESIDENT.—The point before us is whether we are to allow the first and second issues for the defenders. There is no question properly before us as to whether the pursuers are entitled to further information or notice, so as to make the record more specific. Indeed, I do not think that any other mode of stating what is to be proved is competent. In the case of Neilson v. Househill Co.,[3] there was a want of a proper notice of certain acts of prior use on the record, and that was afterwards attempted to be supplemented by the defenders lodging a note of particulars, in which they stated the particular acts of prior use. At the trial the presiding Judge refused to look at the note of particulars, because that was not the proper mode of stating the particulars. Exception was taken to the ruling, and the exception was disallowed by the Second Division of the Court, and their judgment was affirmed on appeal. It appears to me that any other mode of stating the prior use than on record is incompetent and inadmissible.

As to the first issue, the averment on record of the respondents is that "inventions or contrivances similar to, or substantially the same with the alleged invention described in the letters-patent founded on by the complainers, were described and disclosed in"—then follows a list of 17 other patents, all registered under the statute. The pursuer says this is not a sufficient averment, because it sets him to work through the whole of these documents. I do not think that the objection is good, or that the respondents are bound to particularise the lines in each specification on which they found. The patent is not to be understood except from reference to the whole specification. I think that the whole convenience at the trial is all one way, and that the inconvenience would be greater if the respondents were tied down to particular passages.

In former cases I have often seen prior patents referred to, but never heard

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be deprived of the benefit which they might take from the more minute and careful investigation and consideration of the case which will probably precede the trial.

"It may be, and probably is, quite possible so to amend the record as to keep the respondents reasonably safe, while giving all the information that can properly be required of them; and I do not forget Lord Campbell's commendation of our records, which he illustrated by reference to this very subject of notice in patent cases.

"Therefore, although, on the whole, I have the preference which I have ventured to express, I think it is precisely a subject which it is important to have settled one way or the other, without its very much signifying which."

[1] Glover and Baker Sewing Machine Co. v. Wilson, Weekly Notes, March 12, 1870; Sykes v. Wilson, Feb. 2, 1866, 4 Macph. 349, 38 Scot. Jur. 181.

[2] Jones v. Berger, Jan. 28, 1843, 12 L. J. (C. P.) 179; Morgan v. Fuller, April 28, 1866, Law Reports, 2 Equity, 297.

[3] March 6, 1843, 2 Bell's App. 1, 15 Scot. Jur. 524, June 8, 1843, 5 D. 1180.

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of any demand being made for particular lines in the specifications which were to be referred to. The plausibility of the demand arises from the number of prior inventions here founded on. But that is not a sufficient reason. No doubt, it will give the pursuers, and any experts they may employ, more trouble in examining so many patents.

As to the averment of prior use, the number of instances is very considerable. They occur in Glasgow and in other towns, but principally in Glasgow. If so many people have been in the habit of using the invention I cannot doubt but the pursuers will have no difficulty in finding out what is the particular thing the respondents are to prove. If they go to half a dozen of those people they will easily learn the kind of use which is alleged. Of course, the use must be prior to the date of the letters-patent, but there is no reason otherwise for limiting the respondents as to the time.

LORD DEAS.—I concur in the views expressed by your Lordship.

LORD ARDMILLAN.—I agree with the Lord Ordinary that the defenders are entitled to their issues. I think that the record is the proper place, and, indeed, the only proper place, for stating the particulars demanded in regard to prior use; but I think that the defenders have given as much specification as the pursuers were entitled to demand, and quite as much as the pursuers gave. A demand for more minute statement might, if sustained, operate unfairly. It might, indeed, become a snare to the defenders, because if they fixed one particular day, as the time of use, or one particular line of a specification, it might prevent them from proving use on the next day, or from founding on other lines in the specification. The mere multiplication of the number of prior patents, and the number of places where prior use is alleged, can really make no difference. If the defenders would not be bound to give the minute specification demanded in regard to one time, or one instance, where he only gave one example, I do not see why they should be called on to give more minute specification where they have alleged several times and several instances. Viewed apart from the number of instances of prior use, it cannot be said that there is any unfair withholding of information, and the mere number does not alter the question. I am therefore of opinion that the defenders are entitled to their issues, and that the demand for further and more specific information should not be granted.

LORD MURE concurred.

THE COURT approved of the issues as reported.

HAMILTON, KINNEAR, & BEATSON, W.S.—DAVIDSON & SYME, W.S.—Agents.

No. 39. Nov. 24, 1874. Shields v. North British Railway Co.

ROBERT SHIELDS, Pursuer.—*Sol.-Gen. Watson—Gloag.*
THE NORTH BRITISH RAILWAY COMPANY, Defenders.—*D.-F. Clark—Balfour.*

Jury Trial—Proof—Personal Injury.—In an action of damages for personal injury after several medical witnesses had been examined as to the state of the pursuer and the injury he had sustained, the jury gave a verdict for the pursuer. In a motion for a new trial the defenders produced affidavits from persons who deponed that the pursuer's health had materially improved since the trial. The Court, without deciding on the competency, refused to grant a new trial, on the ground that the affidavits did not shew that the medical witnesses were substantially wrong in the evidence they gave at the trial.

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1ST DIVISION. B.

ROBERT SHIELDS, draper in Falkirk, raised this action against the North British Railway Company, concluding for £5000 as damages for injuries sustained by him in a collision on the defenders' line of railway near Bonnybridge on 6th January 1874. An issue was tried before the Lord President and a jury at the July sittings, when a verdict was returned for the pursuer, assessing the damages at £3000.

The defenders obtained a rule on the pursuer to shew cause why the verdict should not be set aside. The grounds on which the defenders rested their motion were, 1st, that the damages were excessive, and, 2d, that the condition of the pursuer had materially changed for the better since the date of the trial, so much so as to shew that the medical witnesses had been wrong in their opinions. In order to support this second ground the defenders gave in affidavits.

Mr Hill, W.S., the agent of the defenders, deponed,—"That at the trial the pursuer was stated to be suffering from complete paralysis of the legs and left arm, by which these limbs were rendered powerless. That after the date of the said trial the pursuer resided at Helensburgh from the month of August until a recent date; and from inquiries which the deponent has made he is credibly informed, and believes, that a very great improvement in the health of the said Robert Shields has taken place. That for a short time after the said Robert Shields arrived at Helensburgh he seemed to be weak and comparatively helpless, and was moved about in the open air in a bath chair, drawn by members of his family. That after a time he seemed to improve in strength, and was able to walk about the doors with no other assistance than that of a walking-stick. For some time he was only observed to go out of doors in fine weather. That towards the end of September, and until a very recent date, the said Robert Shields has been walking about at a considerable distance from his house, unaccompanied, and with no other assistance than that of a walking-stick, and that without regard to the state of the weather. That during his visit to Helensburgh his left arm has regained its strength, and he now can use his left hand. That during the whole time of his stay at Helensburgh he has not been visited by any medical man. That from the information which the deponent has obtained relative to the history of Mr Shields since the trial he believes that it could now be clearly proved that the medical witnesses examined for Mr Shields at the trial were in error in believing that he would not recover. That there is now every probability that Mr Shields will recover, at all events to such an extent as to be able to resume and carry on his business, and that it is essential to the ends of justice that a new trial should be granted."

There were three other affidavits by persons residing in Helensburgh, who deponed to seeing a change for the better in the pursuer's health.

The pursuer produced certificates from the doctors who were examined at the trial. Professor Lister and Dr Watson stated as the result of their examination of the pursuer—"1. Mr Shields' general appearance has improved. 2. His powers of movement are increased. This is most marked in the left arm and hand. 3. The impairment of sensibility which affected the lower extremities, part of the trunk and left arm, has not undergone a commensurate degree of improvement.

"It is our opinion that the change which has taken place in Mr Shields' condition is only one of degree, that the paralytic condition is still in existence, and that any improvement which we have noticed does not justify us in concluding that Mr Shields is either now capable of attending to business, or likely ever to recover so as to enable him to do so."

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LORD DEAS.—It is not necessary to decide whether, if the pursuer had now completely recovered from the accident, that would have been a competent ground for granting a new trial. If competent at all a very strong case would certainly be required, and I think that no such case has been established on the face of the affidavits produced by the railway company. It is a remarkable circumstance that they have produced no medical certificates. There was nothing to have prevented them from doing so. Dr Macleod was the only medical witness who distinctly negatived the view that the pursuer was suffering from true paralysis. He called it "hysterical" paralysis, meaning that there was no organic lesion, as the other medical gentlemen thought there was. We do not know what Dr Macleod now thinks, and are left with the certificates of the other medical men who were examined for the pursuer at the trial, and who think it unlikely that he will ever substantially recover. That there may be partial recovery I am not disposed to doubt. We have all known persons in whom the symptoms, to say the least of it, became greatly abated, and who ultimately died of some other complaint. The pursuer may have partially recovered in that sense, but there is nothing to shew that he has so far recovered as to be able to carry on business. There is, in short,—assuming the competency of the ground relied on,—no such change of circumstances as would justify us in interfering with the verdict.

The only other ground of objection is that the damages awarded by the jury are too large. Now, it is plain that this was a case of severe injury, which disabled the pursuer from carrying on his business. He was also entitled to some compensation for the suffering he endured. Taking all this into account, however, the damages are high. If I had been on the jury I would have been for giving less. But the excess is not so great as to entitle us to interfere. I therefore think that the rule should be discharged.

LORD ARDMILLAN and LORD MURE concurred.

LORD PRESIDENT.—If I had been making a verdict I think I should not have given £3000. But I agree in thinking that the excess is not so great as to be a reason for granting a new trial. I cannot pronounce this verdict so exorbitant as to warrant us in interfering.

The other ground on which the defenders found is somewhat novel. If the trial had taken place during session the verdict would have been applied a few days after the trial, and there would not have been time for the new circumstances to emerge. But the opportunity is just a piece of luck for the defenders. If the circumstances are sufficiently strong, I am not prepared to say that they may not be taken advantage of. The question is whether the circumstances are such as to make it essential to the justice of the case for us to interfere with the verdict. In dealing with this I am disposed to throw out of view the amount of damages.

It is said that the medical evidence has turned out to be untrustworthy. If it had appeared that the medical witnesses were altogether wrong in their diagnosis it would make a difference. But I think that they were substantially right. Notwithstanding the fact that the pursuer has partially recovered the use of his right arm and his power of walking, I do not think that he will ever get the better of his accident. The certificate of Professor Lister and Dr Watson is very cautiously expressed. They still say that though there is an abatement of the symptoms of paralysis there is not the slightest

prospect of the man ever being able to conduct his business. These circumstances are, I think, insufficient to justify us in setting aside the verdict. No. 39.

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THE COURT discharged the rule.

GEORGE BURN, W.S.—HILL & FERGUSON, W.S.—Agents.

ALEXANDER SIMPSON AND OTHERS, Pursuers.—*Scott—Brand.* JOHN RAMSAY AND OTHERS, Defenders.—*J. G. Smith—Balfour—M'Kechnie.* No. 40.

Nov. 24, 1874. Simpson, &c. v. Ramsay, &c.

Friendly Society — Title to Sue. — By the Friendly Societies Act, 1855, secs. 18 and 19, the property of a friendly society established under it is vested in the trustees, who are authorised to sue or defend any action in any Court of law or equity concerning the property of the society. A branch or "court" of the Ancient Order of Foresters' Friendly Society was itself established as a friendly society under the Act—its rules providing for the election of its officers and for the administration of its affairs by the "court," subject to the laws of the Order. In consequence of the "court" having failed to comply with a decision of a superior judicatory, the Executive council of the Order, acting in accordance with their laws, suspended the "court," and subsequently granted a new "dispensation" in favour of a minority of its members, authorising them to assume the name and number of the suspended "court." The majority continued to meet as if there had been no suspension, and elected trustees, who raised an action against trustees elected under the new dispensation, to have it found that the pursuers had right to the custody of the money, securities, &c. belonging to the "court," and for delivery of the same. *Held*, after a proof, that the pursuers had not instructed a title to sue (*diss.* Lord Gifford, who held that while the Executive council could cut off the "court" from the Order, it could not disincorporate the "court" as a friendly society).

THIS action was raised by Alexander Simpson and two others, as trustees of Court Royal Archer, No. 1544, Ancient Order of Foresters' Friendly Society," in order to have it declared that they possessed that character, and as such were entitled to the custody of the monies, securities, and documents belonging to that society, and it concluded against John Ramsay and two others "alleging themselves, but erroneously, to be the trustees of the said friendly society" for delivery of those monies, securities, or documents, or, in the event of failure, for payment of £1500. 2D DIVISION. Lord Mure. I.

The pursuers set forth the dates of their appointments as trustees, and founded upon the 18th and 19th sections of the Friendly Societies Act, 1855, by which all the real and personal estate belonging to any friendly society is vested in the trustees, and the trustees are authorised to sue or defend any action in any Court of law or equity concerning the property of the society.

The defence consisted of a denial that the pursuers were the trustees of Court Royal Archer, No. 1544, Ancient Order of Foresters' Friendly Society, Greenock; and in their statement of facts the defenders entered into an explanation of certain proceedings, the result of which was, as they alleged, that they (the defenders) were the trustees of the society under the laws of the order.

The defenders pleaded;—No title to sue.

The Lord Ordinary allowed the parties a proof, from which the following facts appeared:—The Ancient Order of Foresters was a very numerous body, having a widespread ramification over the country, which conducted its business by means of "districts," each district containing a

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number of branches or "courts." Some "courts," however, were attached to the order without belonging to any district. Each court elected its officers, and generally managed its affairs, subject to the general laws of the order, by which an elaborate system of representative government and machinery for settling disputes that might occur in a court were provided.* The bye-laws of Court Royal Archer, No. 1544, which were certified by the registrar of friendly societies, and in which the society was designed as an auxiliary branch of the Greenock district of the Ancient Order of Foresters' Friendly Society, set out with the provision that the whole of the objects and rules of the court should be in conformity with and subject to the rules of the Greenock district branch, and the general laws of the Ancient Order of Foresters' Friendly Society. The rules of the Greenock district and the general laws of the order were also certified under the Friendly Societies Act. The court administered its own sick fund. Another fund, the funeral fund, was administered by the district, who collected the funeral money from the different courts, and paid out the funeral allowances when required.

The circumstances which led to the present action are thus stated by the Lord Ordinary in the note appended to his interlocutor of 24th April 1874:—"In the autumn of 1869 a dispute arose between the members of the society relative to the election of surgeon, which led to an appeal, on the part of the minority, to the 'arbitration committee,' being the first court of appeal constituted by the laws of the society. That appeal was dismissed by the arbitration committee, upon which an appeal was taken to the 'district arbitration committee' of the order, being the next court of appeal, and whose decision is, by rule 88, section 4, of the general laws of the order, declared to be binding until reversed or altered upon an appeal to the 'county arbitration committee.' Under this appeal to the district court the parties, now respectively represented by the pursuers and defenders, appear to have been fully heard, after which a decision was pronounced, reversing the decision of the 'arbitration committee,' finding that the party who had been elected surgeon had no legal right to the office, and appointing the decision to be complied with not later than the 18th of April 1870. This decision was pronounced on the 2d of April, and was not appealed against. But at a meeting of the society, held on the 15th of April, a motion to comply without qualification with the district arbitration committee's decision having been put, an amendment to comply with the decision 'by paying a fine of two pounds,' and reserving the right to appeal to the county arbitration court was put and carried.

"This resolution of the society to comply to a certain extent only, and under reservation of the right to appeal, having been communicated to the officials of the 'district arbitration committee,' was not considered by them to be a compliance with their decision; and a notice to that effect having been forwarded to the executive council of the order, they, on the 19th of May, in terms, it is said, of No. 44 of the general laws of the order,† suspended the society from all the rights, privileges, and

* The constitution of the order, so far as bearing on the present case, is fully explained in the opinion of the Lord Justice-Clerk.

† No. 44 of the general laws provides,—"That should any court in a district neglect or refuse to comply with a decision of the district meeting, or of the district arbitration committee, or with the rules of the district, for a longer period than allowed by such decisions or rules, or neglect to notify to the district officers their compliance therewith within the space of two days after their first meeting subsequent to receiving from the district secretary notice of

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benefits appertaining to the said district, and the Ancient Order of Foresters; and intimation of this suspension was duly made to the society on the 30th of May thereafter. Now, the effect of this, as contended for on the part of the defenders, was to deprive the whole members of the court suspended of the privileges of membership, and of their right and power to act as a court of the Ancient Order of Foresters, until the suspension was recalled; and it is distinctly shewn upon the evidence that it was while this suspension was in operation that the pursuers other than James Dewar were nominated trustees.

"Following upon this suspension, an application appears to have been made by some of those members of the society who had been all along willing to comply unqualifiedly with the decision of the district court to the executive council of the order for authority to carry on the society. Upon this a new dispensation was issued on the 31st of July 1870, authorising the defender, John Ramsay, and certain other parties, to hold a court of Ancient Foresters at Greenock, under the title of 'Court Royal Archer, No. 1544,'* and which, it is alleged, they have since accordingly done. And it further appears from the evidence that at the date of the suspension and new dispensation, the monies, securities, and documents, of which the pursuers seek to enforce recovery, were in the possession of the late John Love, one of the then trustees of the society, who, after the issuing of the new dispensation, was re-elected a trustee along with the defenders James Inglis and Alexander Miln, and that, since Mr Love's death, those securities and documents have been in the possession of the defenders.

"After the issuing of this new dispensation those of the society who took the same view of their rights and position as the pursuers continued to meet separately; and on the 16th of February 1871, at a meeting called for considering the question, a motion was unanimously carried to 'comply with the district arbitration committee's decision of 2d April 1870, and request that our suspension be raised according to law.' Upon this a certificate of compliance was immediately forwarded by the 'district officers' to the 'executive council,' requesting that the suspension might be raised, and the suspended members of 'Court Royal Archer, No. 1544,' restored to all the rights and privileges of the order;

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such decisions or breach of rules, notice of such neglect or refusal shall be forwarded to the executive council, signed by a majority of the district officers, with the district seal attached, when the executive council shall immediately forward to such court or courts their suspensions, sealed with the seal of the order. Such suspension to take effect from the date of the notice forwarded by the district. . . . . That any court, courts, or district, remaining under suspension for a period of eighteen calendar months, shall, at the expiration of such time, be expelled the order, and shall not again be reinstated, except by an application to, and the sanction of, a subsequent high court, notice of the intention of such application to be given to the executive council, in accordance with the 25th law."

* No. 80, sec. 1, of the general laws provides for the case of a loyal minority in a court which has been suspended or expelled for non-compliance with the decision of a court of appeal, one of the clauses being as follows:—"Or in the event of any members voting in the minority, as above, so desiring it, they shall be recognised by the executive council as the same court to which they formerly belonged, under a new dispensation bearing the same number, which the executive council shall have power to grant in such cases, and the granting of which renewed dispensation shall thereby abrogate and cancel all powers and authority conveyed in any dispensation which may have been granted bearing the same number."

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and on the 21st of February a letter of reinstatement was issued by the executive council, and forwarded to the district officers, cancelling the suspension, and providing 'that Court 1544 comprising the minority previously reinstated, and the majority now reinstated, will be henceforth recognised as held under the dispensation granted by the executive council on the 20th July 1870.'

"Notwithstanding this reinstatement of the pursuers and those who acted with them, and official reunion of the various portions of the original society, the parties appear to have continued to meet separately, as they were not able to agree as to the precise terms upon which they were to meet together; and they have differed, among other things, as to which of them is entitled to the custody of the monies, books, and documents to which the present action relates."

The Lord Ordinary, on 24th April 1874, pronounced this interlocutor:—"Finds that the case, as disclosed in evidence, resolves into and depends upon questions as to which the jurisdiction of this Court is excluded: Therefore dismisses the action, and decerns: Finds the defenders entitled to expenses," &c.*

The pursuers reclaimed.

Argued for the pursuers;—They were willing to assume that the executive council had acted regularly, and that the effect of the suspension was to deprive Court Royal Archer of the privileges of Forestry, and cut it off from the order. But a most important question remained, whether the proceedings of the executive council had the effect of annihilating the court as a friendly society, and depriving it of the funds which its

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* "NOTE.— . . . . . Looking at the whole matter, therefore, in a general point of view, the question thus raised as to the books and documents is a dispute between different portions of the society, for which the rules of the society do not appear to have prescribed any particular mode of settlement, and falls therefore, it is thought, within the provisions of the 41st section of the 18th and 19th Vict., cap. 63, by which an exclusive jurisdiction is conferred on Sheriffs of counties in such matters—Davie v. Colinton Friendly Society, Nov. 10, 1870, 9 Macph. 96.[1] And when the grounds upon which the proceedings relating to the suspension and new dispensation are challenged, as maintained in argument by the pursuers before the Lord Ordinary, are examined, they appear to him to raise points as to which the jurisdiction of this Court is also excluded. For the main questions raised were—1. Whether the deliverance of the district court of arbitration of the 2d of April 1870 was a sound deliverance; 2. Whether the district court was wrong in holding that the resolution of the 15th of April 1870 was not a proper compliance with their decision of the 2d of April; 3. Whether the suspension following upon the certificate of non-compliance was legal, and issued according to the rules of the society; 4. Whether the new dispensation was properly issued, and within the power of the executive committee to grant; and 5. Whether the mode in which the district officers were authorised to reinstate the pursuers was one which the pursuers were bound to comply with. Now, these propositions, with the exception perhaps of the first and second of them, appear to the Lord Ordinary to raise questions for the settlement of which no special provision is made by the rules of the society, and which, therefore, the Sheriff of the county is alone competent to deal with; while for the first of them a mode of final settlement appears to be prescribed by the rules, viz., an appeal to the 'county arbitration committee,' because, subject to such appeal, the decision of the district arbitration committee is declared to be binding—Rule 88, sec. 4.

"On these grounds, the Lord Ordinary has come to the conclusion that he has not jurisdiction to dispose of this case, and he has therefore dismissed the action."

[1] 43 Scot. Jur. 54.

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members had contributed. Assuming that the pursuers had been validly expelled the order, this was not a dispute between members of the order, but between members of the order and third parties, and therefore the jurisdiction of the Court of Session was not excluded. The amount of funds held by the various courts of the order was extremely large, and it would be a most serious thing to hold that a small body of men, sitting somewhere in England, could by a stroke of their pen deprive any court of its funds, and transfer them to another body,—it might be to a minority of the same court, or it might be to entire strangers. Such a power was not easily presumed. A difficulty was raised in consequence of the pursuers suing under the name and number of a court of the Ancient Order of Foresters, but it was merely verbal. It might be that the defenders were entitled to prevent the pursuers using that name and number, but they could not prevent them suing for their own property.

Argued for the defenders;—The plea of no title to sue was not a mere technical objection to the pursuers' designation. The property of Court Royal Archer, No. 1544, was vested in the trustees elected under the rules, with which the general laws of the order were expressly incorporated. Apart from the rules the pursuers could have no corporate character; they were merely three individuals; and when these rules were examined it was seen that the defenders, and not the pursuers, were the trustees elected under the rules.

At advising,—

LORD JUSTICE-CLERK.—In this case the Lord Ordinary has stated the facts on which the dispute turns so much in detail, and so clearly, that it will not be necessary for me to resume them at any length.

The question has arisen out of certain proceedings of a friendly society, which calls itself, or was called, Court Royal Archer, No. 1544, an auxiliary branch of the Greenock district of the Ancient Order of Free Foresters. The society itself is the Ancient Order of Foresters, a very large association, having a widespread ramification over the country, and conducting its business by districts, and these districts are subdivided into what are termed subordinate courts. The district with which the Court Royal Archer, No. 1544, was connected, was the Greenock district. The High Court of Foresters—the general body—are registered as a friendly society, and their rules, which go into great detail and provide for a very large organisation, are certified by the registrar of friendly societies. These rules, being the rules of the main body, are for objects sufficiently described in the first provision,—"The name of this society shall be the Ancient Order of Foresters' Friendly Society, having for its objects the establishment of branches or courts, as provided for in laws . . . , also the establishment of districts, as provided in laws . . . , with a view to the following:—That of the members by an initiation fee, and weekly, monthly, or quarterly contributions, securing a weekly allowance in sickness, and a sum at death for themselves, wives, and children, also endowments for wives and children of members. The sums to be received and allowed to be left to the option of the courts, as provided for in law . . . , and districts, as provided for in laws . . . ." Then it goes on—"to provide a fund for the support and protection of those members who vote in the minority of any court that may break up or secede from the order, and who may not be able to enter any other court; by the sale of dispensations, laws, &c., to provide a fund for pay-

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ing the expenses of the general management; also for the purpose of providing widows' and orphans' funds for the relief of the widows and orphans of deceased members, &c."

Now, these are the objects of the general association, to be attained by the operation of the districts and the courts, which are the subordinate branches of the general association; and the first rule in regard to the constitution of the order is this,—"That this order shall consist of a high court, colonial high courts, district courts, and subordinate courts, each governed by its own officers." That is the general aspect of the association itself, and these rules, which provide, as I have said, for a large organisation and government, all depending upon the general body for their effect and operation, are certified by the registrar of friendly societies. The districts are provided for specially as well as the courts in the detailed rules of the general body, but they have also their separate rules, certified by the registrar.

The rules and regulations of the Greenock district to which this Court Royal Archer belongs are in process, and the first rule is this,—"That this district shall be called the Greenock district, which shall consist of an unlimited number of courts, having for its object the establishment of a fund for the interment of its members, &c., these objects to be carried out in strict conformity with and subject to the general rules of the Ancient Order of Foresters, as registered under the Friendly Societies Act."

Then again come the rules of Court Royal Archer, No. 1544, which is one of the courts belonging to the Greenock district. These rules also are certified by the registrar, and the first rule is this,—"That this court shall be called Court Royal Archer, No. 1544, and shall form an auxiliary branch of the Greenock district of the Ancient Order of Foresters' Friendly Society, and shall have for its object the raising of funds, &c. The whole of the objects and rules of this court shall be in conformity with and subject to the rules of the Greenock district branch and the general laws of the Ancient Order of Foresters' Friendly Society." So that this constitutes a very complete system of government, a complete constitution, by which the subordinate courts, which is the name they bear in the rules of the high court, are attached, first, to the district which has a jurisdiction over them, and again in the ultimate result to the high court.

Now, a dispute arose, which is fully detailed in the note of the Lord Ordinary and into which I do not intend to go at any length, in the year 1869, in this Court Royal Archer, No. 1544. It was a dispute about the appointment or election of a surgeon, who was one of the necessary officials to be elected under the rules. The dispute went from the court to the district authorities, and from the district authorities to the high court. The result was that the action of the majority of Court Royal Archer was overthrown, and they were ordered to reverse their decision and to act upon the opposite view. This they neglected to do, and accordingly they were, in terms of the rules, in May 1870, suspended as a court. And being so suspended, in July 1870 the general body under the provisions of the rules, gave a new dispensation in favour of the minority of Court Royal Archer, No. 1544, allowing them to assume both the number and the title which had formerly been assumed by the others, and substantially placing them on the footing on which the suspended court had been.

In 1872 Mr Love, who was one of the minority, and who at the time the suspension had possession of the whole books and papers and documents debt as the treasurer of Court Royal Archer, died. He had retained possessi

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of these documents during the whole of that period by the authority of the new dispensation, as the treasurer of the society under this designation. On his death these books and papers were handed by his widow to Mr Ramsay, who was elected to succeed Mr Love on the day of his death. Whether that was or was not a legal proceeding depends entirely on the amount of authority which Mr Love and the persons under the new dispensation were entitled to exercise. And that being done, the present pursuers brought this action to have it found and declared that the funds of Court Royal Archer, No. 1544, belonged to them, and to have the persons who have the custody of these books ordained to deliver them up to them.

The Lord Ordinary has decided that he has no jurisdiction to consider this matter, because, being a dispute between members of this friendly society, it falls under the jurisdiction clause which makes the Sheriff the ultimate tribunal by which these disputes are to be decided.

But from the way in which the case has been presented to us there is a preliminary question. If these members are not members of the friendly society, —if the parties are not members of the same friendly society within the meaning of the Act,—if they or either of them are not Ancient Foresters,—it would rather seem that this is not a dispute between members of the society, but between the society and third parties.

Now, it has been pleaded to us, on the part of the respondents in the reclaiming note, that the persons who now sue are not members of the association of Ancient Foresters at all; and on the other hand, it has been rather suggested on the part of the pursuers, in order to avoid this question of jurisdiction, that they do not claim to be members of the society of Ancient Foresters, but that they do claim to have a right to the funds and books and papers which are the object of the action. And, accordingly, we have thought it right to hear the parties fully on the first plea in law, viz. that the pursuers have no title to sue this action, and in the view that I take of the case it seems to me that it will become unnecessary to consider the question of jurisdiction which the Lord Ordinary has decided. I must say, at the same time, that in one aspect of the statement which is made for the pursuers I think the Lord Ordinary was quite warranted in taking the view that the question of jurisdiction properly arose, seeing that he might fairly read this record as presented on the part of the Court Royal Archer, No. 1544, and embracing a dispute between members of that body.

Now, the objection to the title is this: It is not an objection to the designation of the pursuers, or to the way in which the title is described, but the objection I take to be that the pursuers do not possess the title on which alone they can pretend to sue this action. In other words they are not "trustees of Court Royal Archer, No. 1544, an auxiliary court of the Greenock district of the Ancient Order of Foresters' Friendly Society." It is not that they describe themselves that inaccurately; it is that they do not possess that character.

Now, the first question is, is that sound in point of law? That depends entirely upon the effect, in the first place, of the suspension, and, in the second place, of the new dispensation which has been granted to the defenders. In regard to the suspension, I do not mean to go into the question whether it was legal or illegal,—for this reason, that I do not find that any relevant statement has been made to impeach the legality of the suspension itself. The court of appeal went legally and regularly to work in reversing the judgment of the

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Court Royal Archer about the surgeon. There can be no doubt that they were ordered to retrace their steps. There can be no doubt that they declined to retrace their steps, and that they were properly and legally suspended under the general rules, and I did not hear, on the part of the pursuers, any ground suggested on which we could refuse to give effect to the suspension. On the contrary, I rather gathered that the pursuers were willing to take the argument on the footing that the suspension was in itself legal and regular. At all events, I have seen no reason to come to any other conclusion. And that being so, what is the effect of it? The effect of it is regulated by law 44, which provides, "that any court, courts, or district remaining under suspension for a period of eighteen calendar months shall, at the expiration of such time, be expelled the order," and that they shall not be reinstated excepting upon particular conditions. Therefore the pursuers of this action have been expelled the Order of Ancient Foresters, and the question is whether, if expelled the order of Ancient Foresters, they can state themselves as trustees of Court Royal Archer, No. 1544. Now, Court Royal Archer, No. 1544, is a friendly society, registered with rules certified by the registrar, providing that they shall be an auxiliary branch of the Ancient Order of Foresters, and that their whole proceedings shall be subject to the general rules of that body. I think that is the simplest of all questions. These trustees, as long as they were trustees under these rules in connection with that body, were by law vested in the whole funds and property of the Court Royal Archer. But the moment they ceased to be members of that general body they ceased to have any corporate capacity at all. And consequently the persons who sue this action have no right whatever to represent Court Royal Archer, a subordinate court of the Ancient Order of Foresters, seeing that they do not belong to the Ancient Order of Foresters, but have been expelled from that body. It seems to me that this is quite sufficient for the solution of this case, for these three persons have in truth been elected, as appears upon the record, since the suspension. I do not know whether it is since the expulsion or not, but it does not much signify. The main thing is, that their authority to sue as trustees, and as vested in the property of Court Royal Archer, depends entirely upon their position as a subordinate court of the Ancient Foresters, from which body, as I have said, they now stand expelled. These books and papers belong to Court Royal Archer, No. 1544, and can only be vested in the trustees legally elected, belonging to the ancient body of Foresters and members of the subordinate court No. 1544.

But then it was argued to us with very great ability,—and it is this question which gives the present case the great importance which unquestionably it possesses,—it was said, that may be quite true in regard to the organisation and in regard to the general constitution of the body; we are not entitled to appeal; we are not entitled to the benefit of the organisation; but we are entitled to those funds which were contributed by ourselves, and to that extent we are a separate association, entitled to sue and to vindicate our right to those funds. Now, I do not see any ground on which that can be maintained to the effect of this action. Setting aside for the present the very important fact that the funeral fund can only be administered through the general body, it would have required a very different action from the present to have established any such position. But I cannot see that the pursuers have any such position which they could possibly establish by any form of action. They have no right to represent a voluntary association; they have no existence whatever excepting

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as a subordinate court. These three pursuers have no *persona standi*, excepting under their set of rules which alone can make them trustees, and alone vest them with funds. It would, indeed, in any view, be a very singular way of giving effect to the general interests of contributors whom they profess to represent, to allow them,—who, apparently, now only represent the minority of the original subscribers,—to carry off these papers and funds in which truly a majority of the original members have the main interest. No equitable interest could be protected by such a course. But I am very clearly of opinion, first, that this is not an action raised on the footing that the association is a separate association apart from their rules; and, in the second place, I am of opinion that these three pursuers could under no circumstances, or at all events could not in the present circumstances, under any title, vindicate the property which they want to recover from the defenders. It has been said that it is very hard that this property should be carried off from those by whom the funds were contributed, but I have no idea that the funds are in any risk whatever of being so diverted. It appears to me that however this dispute about custody is decided this one thing is clear, that the funds are dedicated to specific objects, from which they cannot be diverted, and that whether the defenders succeed in retaining the books or the pursuers in getting possession of them, the beneficiaries under that trust remain substantially the same. How that is to be worked out is a totally different matter. I think it unnecessary for the purposes of this action to decide what the effect of the new dispensation which was granted was, although I entertain an opinion on that subject. I shall only say that it may turn out that the new dispensation, in entirely abrogating the old, and all the privileges it conferred, simply carried over the whole privileges and rights which had been enjoyed under the former, and that those who were elected office-bearers under the new have simply the same power and the same duty of administration which the old trustees had before they were expelled the order. I say that may turn out to be so; and it seems to me not an unlikely or an unreasonable result. But, in the second place, if that were not so, and the persons under the new dispensation were not entitled to and did not come in place of the old, the only result would be that the funds would then be destitute of the legitimate and statutory administration under the rules, and would require to be administered under some judicial authority at common law. That is not an unusual proceeding. It might be that the interposition of the Court might be necessary for that purpose, but whether that would be so, or whether the society would come to be dissolved under the rules, for which there is provision, the result would be the same, viz., that the persons who truly have the beneficial interest in the funds would necessarily be protected in whatever way their rights were given effect to. I give no countenance at all, in the opinion that I have delivered, to the notion that any one who had no interest in the funds before the suspension can attain any benefit by it. What the effect of an expulsion of a member may be on his claim on the funds is another matter altogether, into which it is not necessary for our present purpose that we should enter. And so, upon the whole matter, my opinion is that the three persons who sue this action have no title whatever to make the demand which they have made, and that, consequently, we should dismiss the action on that ground.

LORD NEAVES.—I agree in the views stated by your Lordship. The history

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and progress of this case is somewhat singular. Looking at the summons, it seems intended to complain of what has been done by the superior body, and to hold that as ineffectual, so that the pursuers shall be held as still in the full enjoyment of the ancient status that belonged to them, notwithstanding the attempts first to suspend, and then to exclude them from the general body. When the case was presented in that aspect, the proper interlocutor was that which the Lord Ordinary pronounced, viz., that it sought a reversal of that which could not be taken cognisance of by this Court, but must be reviewed before the Sheriff, in terms of the statute. But with great ingenuity, when the case came here, that plea of jurisdiction was elided in this way. The pursuers now say,—"We do not complain of expulsion, we have been well suspended and well expelled, but we stand on a basis of our own as an independent friendly society, which has nothing to do with the Ancient Foresters. No doubt, we are going under their name, and taking the No. 1544, and calling ourselves Ancient Foresters, but, in truth, we are very modern Foresters, and were only set up the other day. We do not ask the Court to revoke anything that has been done. We acquiesce in our position, but still we make this claim." Now, that is another aspect of the case, and in that aspect we are obliged to deal with it. If the pursuers are not the Ancient Order of Foresters, No. 1544, but are No. 1 of a new friendly society, we get into this other difficulty, where is your status as connected with the previous state of things? You were well suspended and well expelled, and you have set up in business for yourselves, what then have you to do with the past?

It must be remembered that all this matter with regard to friendly societies is the creature of statute, because at common law no body of this kind has a status or *persona* at all. They cannot be looked at except as individuals. Now, we may say to the pursuers, where is your statutory character as a friendly society? You are not registered in that way as an independent body. The bye-laws of 1870 set forth that you are an auxiliary branch, and the registrar certifies "that the foregoing rules of the Court Royal Archer, No. 1544, an auxiliary branch of the Greenock district of the Ancient Order of Foresters at Greenock," &c. That was certified by the registrar, not knowing the facts that had taken place. Now, is this body a friendly society in itself? If it is, it is of modern origin, and how does it possess that corporate capacity which alone gives it a continuity of existence? I cannot say that it has any such position. If it is a new society started in 1870, what has it to do with the old books, or with the old funds, as far as administration is concerned? I concur in what your Lordship has said, that the beneficial interests of individuals is a totally different matter, but, in so far as regards status and *persona*, this body must bring itself to be identical with the old body to whom these books originally belonged, and the parties now disclaim any attempt to prove that. That being the case, I see no *persona* or status that it has at all.

It is said, as to the pursuers suing as they do under the old name,—"We merely call ourselves by that name, we merely pass under the old name, we are entitled to take up any old name, or any name whatever, and to be registered under any name as a friendly society." But will it give you a title to the books of an old society now held by the genuine body because you have taken up that name? That will never do. Incorporation in one form or other is essential to continuity of existence. There is no other means by which it can be attained—by which the rights of a former generation of people can be

communicated to others in a case of this kind without that incorporation that gives them perpetuity or continuity of existence. Now, this is a serious matter, because it cannot be doubted that very great importance is attached to these regulations, and to the law as now altered in this matter. The Legislature obviously conceives that this organisation, when regularly carried out and properly conducted, is of great importance. But then it appears to the Legislature, and to the parties themselves establishing it, to depend upon a certain strictness of subordination, which must be rigidly enforced, so that any one who chooses, or any number of individuals who choose, to hive off in that way cannot claim identity with those who remain behind. When one considers the great objects that such societies have in view it is plain that it would destroy the usefulness of them altogether if they could split and split down, and then carry off proportions of the funds, and disconnect the past with the future, or connect themselves with the past and future without real identity. It is the future payment that may make the past of any avail, and it is on the general completeness of the arrangements both as an insurance office and otherwise that the value of this institution depends. It does a great deal of good, I have no doubt, in many ways. Charity, brotherly good-feeling, and a certain sense of honour and pride in the body may be nurtured in this way, and everything should be done to perpetuate these elements, but then we must conserve the laws, and adopt the precautions which have been laid down by the Legislature. On the whole it appears to me that the pursuers have no status or *persona* whatever, and that this action cannot be maintained.

What the beneficial interest of individuals may be we have no occasion to enter upon just now. The present point is not the individual benefit. How that is to be settled may be a nice question. What we have to consider is the possession of the documents and funds, and the administration connected therewith, which can only belong to the representatives of the ancient and enduring body, which is still going on. I am inclined to think that the new dispensation places the new body in the position of the old; but it is not necessary to determine that here. It is sufficient, I think, as far as regards status and *persona*, and right to administer the funds of this society, that the pursuers have admitted themselves out of Court by what they have done, and by now declaring that they acquiesce, and consequently do not invoke any jurisdiction to upset what has been done. Upon these grounds I am clearly of opinion with your Lordship. At the same time I cannot help saying that those who hold these books, and who administer the funds, ought to be carefully on their guard, and well advised that they do not prejudice any individual beneficial rights that have been created by the state of things up to the time that this question arose.

LORD ORMIDALE concurred.

LORD GIFFORD.—I have found this question to be attended with very great nicety and difficulty, and I am sorry to have the misfortune to come to a somewhat different conclusion from the majority of your Lordships. It partially reconciles me to the conclusion which the Court has reached, and the judgment which is now to be pronounced, that I understand all your Lordships to be of opinion, and to hold, that you are not deciding any substantial right of property here—that if there are beneficial rights in the accumulated

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funds of this society, money in the bank, the result of many years' accumulation, or other property—heritable it may be, or moveable—to which the Court Royal Archer was entitled, no decision is pronounced as to whom that property now belongs to beneficially, or who are entitled to share in it. Still the question which is raised by this action seems to me to be one of very great importance, and as I differ from the conclusion to which your Lordships have come, I shall mention in a very few sentences the grounds of my difficulty. It appears to me that according to the laws of this society—I mean the whole three sets of laws, for the Court Royal Archer, No. 1544, has a set of laws of its own which are separately registered by the registrar of friendly societies, and which no doubt embodied the other two sets of laws, that of the District Foresters of Greenock, and that of the Ancient General Order of Foresters—looking to these three sets of rules, I think the Court Royal Archer, No. 1544, was a separate and independent corporation. I think it was a distinct society, which had the power to hold property, which could sue or be sued, and which could exercise all the functions of a friendly society independent either of the district society of Greenock, or of the Ancient Order of Foresters—the general and very large body over all the kingdom. And therefore, while no doubt it was affiliated, and had a certain connection with the general order, I cannot hold that the general order was the only friendly society. The friendly society was the Court Royal Archer, No. 1544. We are not here in a question with either the district or with the general order. The whole question before us relates to Court Royal Archer Friendly Society bearing that name, No. 1544.

Now, a dispute arose among the members of this society, and under the rules an appeal was taken, which ultimately resulted in the executive council suspending the Court Royal Archer Friendly Society. But it appears to me that that suspension did not disincorporate the society. It was still a friendly society; it was still entitled to do certain acts, every act, in short, which a friendly society could do, and to enjoy all the privileges, excepting those acts and privileges which resulted from its connection with the general body. It was an affiliated society, the affiliation of which was for a time suspended, but that did not kill the child or put an end to it altogether; still less—and that is the point where my difficulty becomes greatest—still less did it deprive it of its property and put the whole funds (and it may be very large funds) into the hands either of the district of Greenock, or of the Ancient Order in Leeds, or wherever else it may be. It was a suspended friendly society, suspended from connection with the general body, but still existing, still holding its own property, and capable of exercising and making good its separate and independent rights. Supposing a question had arisen regarding its own property—its society hall for instance, for it might hold heritable property—supposing such a question had arisen at the time of its suspension, could it be held that it had no *locus standi*? Could it not have protected its property? Could it not have bought more property notwithstanding its suspension? No doubt it had not during suspension the privileges of a connected society, but still it was a society.

Now, that state of matters goes on for some time, and a considerable period elapses, the period fixed by the general rules, which make the suspension final, and then a new dispensation is issued, and it is said that that transferred the whole rights of the original Court Royal Archer, No. 1544, to a continued body, I do not say (for they disclaim that) to a new body, but to a continued body of Court Royal Archer, No. 1544, which was created under the new dispensation

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of 21st July 1870. Now, this raises a question of considerable difficulty, and I have carefully looked at the laws to see whether the general body—the high court or the district court—in any case whatever, had power over the separate property of the individual court, so that they could either transfer it to a different court or create a new body giving it such continuity as to take over the property of the old. I do not find in the laws any power of that kind. I do not think the high court was ever intended to be vested with the power to take the property of any individual court, and hand it over either to a new body under the same name, or to any other body under a different name. In truth, the power of issuing dispensations is not a power of incorporation. That is a power which the Legislature alone can give. The meaning of the dispensation is not a statement by the Ancient Order that they are creating a new body —a new friendly society having a statutory title. It just means this, that they allow any number, viz., in the present case three individuals, and any number who may associate with them, to incorporate themselves under the statute as a new body. That is all. Now, they have so incorporated themselves, at least it is held so. But that does not affect this question of property. It is said that one of the parties has now the majority, but I do not think anything turns upon that. The question regarding the property of the old Court Royal Archer, No. 1544, which has been accumulating for twenty years, cannot be affected by a dispensation which the general court issues to other members, it may be the minority, it may be, for aught I know, strangers, who are to incorporate themselves, in virtue of that dispensation, in connection with the general body.

A difficulty no doubt arises in this case, that the view I am taking would import that there were two friendly societies having the same name, Court Royal Archer, No. 1544, but that is a technical difficulty which I cannot help, and which I do not think incapacitates this Court from determining or entering on the question, for I am speaking just now to the question of title to sue. If I can find that the pursuers of this action, setting themselves forth as trustees of a friendly society, registered in conformity with law, have really that standing, then I think we are bound to go on to the merits of the case, and not to throw out this action as an action brought by a party who has no title. Even were we to hold that the title which the pursuers claim, Court Royal Archer, No. 1544, is a title to which they had no right, that would not destroy the title to sue. They would still be a body holding property. It would not annul their infeftment supposing they were infeft. It would not make it impossible for them to sue a removing against their tenants, if they had any tenants. In short, I cannot think that the suspension, or the new dispensation either, had the effect of disincorporating the old body which was incorporated by registration, and transferring all their rights to a new body consisting of those who incorporate themselves under the new dispensation. The new dispensation bears that the Ancient Order of Foresters "give our consent, approbation, and authority, to our well-beloved brothers, &c., or those who may hereafter legally succeed them," to hold a regular court. The words of the dispensation seem to confer, it may be, the old name, but the old name on substantially a new body, for Ramsay, and Pearson, and Reid were certainly not Court Royal Archer, No. 1544, at the date when the new dispensation was issued, and those who united themselves with them would not one of them originally be members of the Court Royal Archer, No. 1544. Therefore, the difficulty about having two friendly societies bearing the same name is just an awkwardness, but does not

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affect the substantial question between the parties. And accordingly, as I read the laws, provision is actually made in the general laws for a district society seceding from the general body, and still continuing to be a society. For the very first regulation under the general laws is this, that one of the purposes of the general society shall be to provide a fund for the support and protection of those members who vote in the minority of any court that may break up, that is, that may dissolve itself, or that may secede from the order. So that it contemplates a court seceding from the order, meaning, as I understand, a court still, that is, a friendly society still, though no longer one of the friendly societies in connection with the order. The impression which I have formed on a consideration of this case is that, in a question of title to sue, the parties here are right enough, and that therefore we must proceed with the merits. And that brings us to the second question, viz., Is the dispute which has arisen a dispute which under the laws must be referred to arbiters, or a dispute which, there being no such provision in the rules, must go the Sheriff? If I were to go into that I would feel inclined to hold that it is not such a dispute as must go either to arbiters (and none of the parties maintain that) or to the Sheriff. I think it is a question regarding the accumulated property of an old friendly society, which (I do not say whether rightly or wrongly, or how it has happened) has been cut off from the general body, but which, so far as its property is concerned, is still in existence, and entitled to appeal to the Court regarding it. And therefore, I feel very great difficulty in respect of the considerations which I have pointed out; but the result of the opinion in which I have the misfortune to find myself in a minority of one, and which, therefore, I cannot entertain with very great confidence, is that we must go on with this case, and decide it on its merits. It is not one of those cases sent to the Sheriff by the statute; then it must necessarily be entertained in this Court, and we must consider the merits; and a consideration of the merits might result in this, that the original purpose for which this fund was subscribed having expired or come to an end, the fund must be divided rateably (for I can conceive a result of that kind), among the beneficiaries. I do not dwell upon that, but the result at which I have arrived is that we should sustain the title to sue, and proceed to consider the merits of the case.

THIS interlocutor was pronounced:—"Recall the interlocutor complained of: Sustain the first plea for the defenders: Find that the pursuers have no title to sue, and therefore dismiss the action, and decern: Find the defenders entitled to expenses," &c.

M'CAUL & ARMSTRONG, S.S.C.—WILLIAM ARCHIBALD, S.S.C.—Agents.

JOHN ADAM AND JOHN SPOWART, Petitioners and Respondents.—*Balfour.*
JAMES MOIR Junior (Clerk to the Commissioners of Police of Alloa), Respondent and Appellant.—*Asher—Moncreiff.*

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Sheriff—Appeal—Statute 25 and 26 Vict. c. 101, Police and Improvement Act, 1862, secs. 135, 396, and 397—Nuisance.—The Police and Improvement Act 1862, sec. 135, gives power to the commissioners to erect public urinals, "but so that such erection shall not become a nuisance," and declares that "any householder (*i.e.* any male occupier of lands and premises of the requisite yearly value) who thinks himself aggrieved thereby may appeal to the Sheriff in manner after provided." The only subsequent provisions as to appeal are contained in the 396th and 397th sections, the former of which allows appeal against an order of the commissioners "within seven days next after the making of any such order," and the latter renders the Sheriff's judgment on such appeal final.

Held that a petition at the instance of the proprietor of a house in a burgh praying for the removal as a nuisance of a urinal erected by the police commissioners was competent at common law.

2D DIVISION. Sheriff of Clackmannan. I.

JOHN ADAM and John Spowart, owner and tenant respectively of two shops and a dwelling-house in Candle Street, Alloa, presented a petition to the Sheriff of Clackmannan against the clerk to the commissioners of police of the burgh of Alloa, complaining of the erection by the commissioners on 20th August 1874 of a public urinal in Candle Street, opposite or nearly opposite to the entrance of the above mentioned premises, and craving an order on the commissioners to remove the urinal and to restore the street to its former condition. The petition set forth as the grounds of the application that the urinal was erected without the petitioners' knowledge, and without the commissioners giving them or the factor for the property any notice of their intention to erect it, or offering to make compensation to them, or either of them, for any injury which might be thereby occasioned to them. No notice of any kind was given of the commissioners' intention to erect the urinal, and it was erected by them illegally without authority, without following out the order prescribed by the "General Police and Improvement (Scotland) Act, 1862," and contrary to the provisions of that Act. The urinal was and would be and become a nuisance to the public, and more especially to the petitioners. It would interrupt the public traffic in Candle Street, which was already too narrow for the same. It darkened their premises, being placed opposite or nearly opposite to one of the windows of one of the shops. It was otherwise offensive to them and to the customers frequenting the shops, and it would prevent carts and other carriages from coming to or drawing up at the doors of the shops.

The respondent stated in defence this preliminary plea;—(1) The action is incompetent, no appeal having been taken as provided for by the Police Act.*

* The Police and Improvement (Scotland) Act, 1862, 25 and 26 Vict. c. 101, enacts, section 135,—"The commissioners may erect such public water-closets, privies, and urinals within the burgh, and in such situations as they think fit, and may defray the expense thereof, and of keeping the same in good order, and may make compensation for any injury occasioned to any person by the erection thereof, out of the police assessment, but so that such erection shall not become a nuisance, and any householder who thinks himself aggrieved thereby may appeal to the Sheriff in manner after provided."

Sec. 396.—"Any person liable to pay or to contribute towards the expense of any of the works aforesaid, or otherwise aggrieved by any order of the commissioners relating thereto, may at any time within seven days next after the

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The Sheriff-substitute (Bennet Clark), on 28th September 1874, pronounced this interlocutor:—"Having heard parties' procurators on the closed record, and the respondent's objection to the competency of the petition, repels said objection, and finds that the petition is competent; and, before farther answer, allows the parties a proof of their respective averments on record," &c.

The respondent appealed.

On the order of the Sheriff (Monro) the clerk to the commissioners put in a minute stating that the resolution of the commissioners to erect the urinal in question was contained in a minute of meeting, of date 27th April 1874, which bore that the meeting was specially called on the requisition of two individual commissioners, and that it was resolved thereat, *inter alia*, to erect urinals in certain streets, and to remit to the improvement committee to fix the exact sites. The respondent's minute also stated that the meetings of the commissioners were all open to the public and to newspaper reporters, but that no notice was given of the resolution come to to erect the urinal in question. It did not state that any public notice was given of the meeting of the 27th April 1874, or of the object for which it was called.

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making of any such order, give notice in writing to the commissioners that he intends to appeal against such order to the Sheriff, and, along with such notice, he shall give a statement in writing of the grounds of the appeal; and if within four days next after giving such notice the party grant bond to the Sheriff, with two sufficient cautioners, to the satisfaction of the Sheriff, to abide the order of the Sheriff, and pay such costs as shall be awarded by the Sheriff thereupon, the work so appealed against shall not be begun until after the judgment of the Sheriff upon such appeal," &c.

Sec. 397.—"And in respect to appeal as to all other matters and things which the commissioners are by the police provisions of the Act empowered to do or perform or to authorise to be done or performed, and the cost attending which falls by this Act to be provided for by way of private improvement assessment (see section 103), the commissioners shall, where not otherwise hereby directed, give notice of their intention to do or perform or to authorise to be done or performed such matter or thing, either by public advertisement in some newspaper circulating in the burgh or in the county in which the burgh is situated, or by posting handbills in conspicuous places in the burgh, or by notice in writing to be transmitted through the post-office or delivered personally or at their dwelling-houses, to the individuals having interest, as the commissioners shall think proper, and it shall be lawful for any person whose property shall be taken or affected, and who shall consider himself injured or aggrieved in respect of such other matters or things by this Act so directed to be done or performed and provided for, to appeal to the Sheriff from any order made or notice given by the commissioners in respect of such matters or things in the manner and to the effect herein last of all provided and directed, and if such matter or thing shall not be made the subject of appeal to the Sheriff or being appealed shall be allowed by him, the commissioners may proceed with the same, and levy the assessments in reference thereto authorised by this Act, provided always that all such appeals provided for in this Act, the immediately preceding clause, and all other appeals to the Sheriff allowed by this Act not otherwise provided for, shall be disposed of summarily, and the decision of the Sheriff shall in all cases be final and conclusive, and not subject to review by suspension, reduction, or advocation, or in any manner of way."

Sec. 3.—(Interpretation clause) . . . . "The word 'householder' shall mean a male occupier of lands or premises of the yearly value of £10 or upwards in all burghs, except in populous places containing less than one thousand inhabitants, and in populous places containing less than that number of inhabitants it shall mean a male occupier of lands or premises of the yearly value of £6 or upwards."

The Sheriff, on 18th October 1874, adhered to the interlocutor of the Sheriff-substitute of 28th September preceding.* No. 41.

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* "NOTE.—The complaint of the petitioners, the proprietor and tenant respectively of a shop and dwelling-house in Candle Street, Alloa, is that the urinal in question is an obstruction to the street, and specially to the access to their own premises, and is, and will be, in other respects, a nuisance; and the prayer is that it shall be removed. It is not maintained by the defenders, the magistrates of Alloa, that at common law this petition is incompetent or irrelevant. The defence is, that the act of the magistrates in placing the urinal there is within their powers under section 135 of the statute, and cannot be called in question unless by appeal under the statute; and that no appeal having been taken, there is now no remedy open to the petitioners except a claim for compensation. On the other hand, the petitioners deny that the present application is excluded by the statute."—(Quotes section 135; see note, *supra*, p. 143.) "Upon this section sundry observations occur:—(1) It does not apply to the petitioner, Mr Adam, who is only the proprietor, and resides in Leith, and does not fall within the definition of a householder in section 3. (2) The provision that any aggrieved householder may appeal to the Sheriff 'in manner after provided' is of difficult application, for the mode of appeal 'after provided' cannot be literally followed in this case. The only section providing an appeal which can be in the view of said section 135 is section 396 (section 397 being limited to cases of private improvement assessment.) Now, section 396 enacts."—(Quotes section 396; see note, *supra*, p. 144.) "Upon this section it may be observed, 1st, That the allowance to any person aggrieved by any order of the commissioners relative to works cannot override the marked omission of the owner in the 135th section, especially where he is, as here, not aggrieved by any order, but by an act done without either definite order or previous notice. 2d, That neither the owner nor the householder can be bound to give notice of an intention to appeal against an order where no order has been made (the resolution of the commissioners being merely to erect urinals in certain streets, and requesting the committee to fix the precise sites), and no notice of the intended work given; and, 3d, That the provision that the work appealed against shall not be begun until the Sheriff gives judgment is inapplicable to a case where the work is already done, and without notice. If, therefore, the provision for an appeal in the 135th section is to be carried out that must be either, on the one hand, by holding that such appeal need not comply with the various conditions precedent prescribed in the 396th section, or it must be held that a previous order and notice are by implication requisite before the erection of any privy or urinal, and that where such order and notice are neglected the commissioners lose the special protection of the appeal clauses, and become subject to the ordinary administration of justice. In the former view, the present petition may be held as an appeal under the statute, and, if necessary, a slight alteration on its title, so as to make it 'Petition of Appeal,' might make it sufficient. In the second view it is open to no objection; and, in either view, it admits of being maintained that this petition is protected by section 438, which provides that 'no jurisdiction conferred by this Act shall be held to exclude the jurisdiction of any Sheriff or Court of Guild, where the case shall, in the first instance, have been brought before or taken up by such Sheriff or Court of Guild.'

"Reverting to section 135, it is difficult to suppose that the Legislature, in authorising commissioners to put down privies and urinals 'in such situations as they think fit,' meant that they might do so free from any check or control, or any respect for the rights of others. A substantial power is given, although no such startling construction be adopted; for they are authorised to make such erections out of the public funds in their charge, and thus, if no objection arises *ab extra*, they are protected against any question as to want of power. The clause surely does not empower them to put down such conveniences within a gentleman's garden or parterre, or in the courtyard of his house, against his will. They have no power to appropriate private property, even on compensation, except under the Land Clauses Act—(see section 390). If, then, the clause

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The clerk to the commissioners appealed to the Court of Session.

Argued for the appellant;—The application of the respondents to the Sheriff was an incompetent proceeding. The Police and Improvement Act, 1862, under sections 135 and 396, provided a statutory method of appeal to the Sheriff against the erection of public urinals, &c., by the commissioners, while section 397 enacted that the Sheriff's decisions in all appeals allowed by the Act should be final, and not subject to review. The respondents had failed to take advantage of the statutory mode of appeal, and had afterwards gone to the Sheriff under his common law jurisdiction,[1] which was necessarily excluded. While the commissioners were willing to waive objections, and allow the case to proceed as a statutory appeal before the Sheriff, with the consequent finality, they objected to its being allowed to go on under his common law jurisdiction, with the possibility of appeal to the Court of Session and House of Lords.

Argued for the respondents, petitioners in the inferior Court;—The contention of the appellant proceeded on a misapprehension of the 135th section. By that section it was committed to the commissioners to judge of the necessity and expediency of erecting public urinals, &c., and of the appropriateness of the sites chosen. On this question of discretion an appeal lay to the Sheriff under the provisions of the statute. But then the powers conferred on the commissioners by section 135 of the Act were guarded by this proviso, "but so that such erection shall not become a nuisance." If the erection either was in itself, or became in the using a nuisance, the commissioners were acting beyond their powers, and there was no limit to the remedy. If there was a statutory form of appeal, remedy might be had under the statute; but whether there was or not, there was nothing to exclude a common law action.

In the present case, however, the statutory form of appeal did not apply. It was contended that it was limited by section 396 to seven days after the making of an "order" by the commissioners. If so, then it was necessarily to be presumed that notice of such order must be given, and the limitation could only apply to the case of objections to the exercise of the commissioners' discretion in making such order, not to the case of nuisance arising after the order had been carried out. It could not be that, in the latter case, the petitioners were to be left without remedy. Either, then, the limits of time contained in section 396 were inapplicable to the present case, and the petition might be read as a statutory appeal, or the method of statutory appeal was itself inapplicable, and the application to the common law jurisdiction of the Sheriff was a competent and proper course of proceeding.

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does not give unlimited and despotic power there must be a limit, and that limit is naturally furnished by the rights of others as protected by law. The withdrawal of that protection of the rights of the lieges which is afforded by the ordinary Courts of law is not to be readily implied, and not to be established except by unambiguous legislation.—See Colt v. Caledonian Railway Company, 2d July 1859, 21 D., p. 1118, per Lord Justice-Clerk Inglis. It is to be observed that while in this Act the decision of the Sheriff on appeals is declared final and unreviewable (see close of section 397), there is not,—except in the case of private improvement assessments under section 397, where careful previous notice is provided,—any declaration of finality of an act of the commissioners in the case where no appeal is taken. An appeal is an appropriate remedy where there is an order or judgment, but not where there is merely a fact or misfeasance of a party complained of; but it may be doubted whether this obvious distinction has been always kept in view by the framers of the statute."

[1] Smeaton v. Commissioners of Police of St Andrews, May 17, 1865, 3 Macph. 816, 37 Scot. Jur. 422.

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But, farther, in any event, it was only the householder, *i.e.*, according to the interpretation clause, the occupier, who was even by the terms of the 135th section limited to the statutory form of appeal. Whatever might be said, therefore, of a common law application at the instance of the tenant, it was undoubtedly good at the instance of the landlord.[1]

At advising,—

LORD NEAVES.—This case involves questions of considerable importance in more respects than one. But after a careful consideration I am not disposed to disturb the judgment arrived at by the Sheriffs.

The power conferred on the commissioners by the 135th section of the statute is one which may be exercised in a way very beneficial to the community, but at the same time very detrimental to individuals and very irritating and offensive. The power accordingly is guarded by one precaution which it is impossible to overlook. That precaution is embodied in these words,—"But so that such erection shall not become a nuisance, and any householder who thinks himself aggrieved thereby may appeal to the Sheriff in manner after provided." Now, unfortunately there is no very distinct provision "after provided" on this subject; for the Act was not framed with that caution and completeness which we would have expected in a measure of such public importance.

Now, the question is, what are we to do in the present case. No notice of the intended erection was ever given by the commissioners. It is said indeed that no notice was needed. But in the absence of notice I think it would be very difficult to find a terminus for the running of the *inducice* which gives finality to the resolutions of the commissioners. On the other hand the only person entitled to complain in the statutory manner is the householder or occupier. Still we cannot lay out of sight the provision that "the erection shall not become a nuisance." Here we have it not only alleged by the tenant or householder, but also by the proprietor, who, though not a householder in the sense of the Act, has even a more substantial interest in the property, that the erection "is and will be and become" a nuisance. This he offers to prove, and goes to the Sheriff under his common law jurisdiction—for I cannot hold this as a statutory application—and the Sheriff allows him a proof before answer. Whatever might have been the result had the householder alone presented this petition, about which I do not seek to inquire, I cannot hold it incompetent to entertain it at the instance of the proprietor, who, though he may not have the statutory qualification to complain or appeal in the manner provided by the statute, certainly had a decided interest to obtain a remedy. I do not say what is to be the precise construction of this 135th clause. I do not attempt to define the term "nuisance" there occurring. It may suffer a qualification to the effect that the erection shall merely not become a nuisance beyond what is in nature to be. But these are matters for the Sheriff's consideration on the proof when led.

I may add that I do not concur in the Sheriff-depute's view that the petition we have before us may become a means of obtaining the statutory review. I

[1] Scott v. Leith Police Commissioners, May 29, 1830, 8 S. 845, 2 Scot. Jur. 425, and March 7, 1835, 13 S. 646, 7 Scot. Jur. 317; Young v. Henderson, March 3, 1855, 27 Scot. Jur. 241; Campbell v. Leith Police Commissioners, H. of L. Feb. 28, 1870, 8 Macph. 31, 42 Scot. Jur. 310; Millar's Trustees v. Leith Police Commissioners, July 19, 1873, 11 Macph. 932, 45 Scot. Jur. 578.

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cannot understand such a hybrid form of process, which is to develop into one form or the other as the case proceeds. The questions whether the place chosen is the fittest possible, and whether the erection is a nuisance, are perfectly distinct. If the petitioners establish their averment of nuisance they place the commissioners outwith the statute altogether, for the statute does not give them power to erect a nuisance. In the circumstances I think that the Sheriff was perfectly right in allowing a proof before answer.

The LORD JUSTICE-CLERK and LORD GIFFORD concurred.

LORD ORMIDALE was absent.

THIS interlocutor was pronounced:—"Having heard counsel on the appeal, dismiss the same, and affirm the interlocutors appealed against: Remit the cause to the Sheriff to proceed with the same, and find the respondents entitled to expenses."

M'EWEN & CARMENT, W.S.—KEEGAN & WELSH, S.S.C.—Agents.

No. 42.
Nov. 24, 1874.
Laidlaw and Sons v. Wilson and Armstrong.

WILLIAM LAIDLAW AND SONS, Petitioners and Respondents.—*D.-F. Clark—Trayner.*
WILSON AND ARMSTRONG, Respondents and Appellants.—*Sol.-Gen. Watson—J. C. Smith.*

Process—Appeal—Sheriff—Jury Trial—Proof—Statutes 6 *Geo. IV., c.* 120, *sec.* 40, *and* 30 *and* 31 *Vict., c.* 100, *sec.* 73.—Where a case, appealed from the Sheriff-court for jury trial, appeared to the Court not suitable for trial by jury, a proof before answer was allowed before one of the Judges of the Division (*dies.* Lord Ormidale, who held that the case should have been remitted for proof in the Sheriff-court, so as to preclude appeal on the facts to the House of Lords).

2D DIVISION. Sheriff of Roxburghshire. I.

THIS was a petition in the Sheriff-court of Roxburghshire at the instance of William Laidlaw and Sons, manufacturers, Hawick, against Wilson and Armstrong, also manufacturers there, for the purpose of recovering certain lots of wool, or the value thereof, alleged to have been embezzled by Thomas Davidson, a warehouseman, with whom they had been deposited by the petitioners, and by him sold to the respondents.

The case involved many difficult questions of law, as of principal and agent, deposit, presumption from possession, *bona fide* purchase, *bona fide* consumption, &c., which would arise on the evidence.

The respondents appealed for jury trial in terms of 6 Geo. IV. c. 120, sec. 40, and 31 and 32 Vict., c. 100, sec. 73.

On the case appearing in the roll of the Second Division, the petitioners, the respondents in the appeal, objected to the case being sent to a jury, on the ground that in its nature it was unsuited for jury trial.

The respondents, appellants in the Court of Session, objected to the competency of sending the case to proof in that Court without a jury, and to the expediency of remitting it to the Sheriff.[1]

The petitioners and respondents replied;—The case of Dennistoun decided only that an appellant coming to this Court for jury trial was not entitled to turn round and ask a proof without a jury. Their case as respondents was different. They were brought to the Court of Session

[1] Dennistoun v. Rainey, Knox, and Company, May 16, 1871, 9 Macph. 739, 43 Scot. Jur. 408.

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against their will, and strongly objected to the case being sent to a jury. It was a case of mixed fact and law, and now that it was in this Court it would be best disposed of by a proof before a Judge without a jury.

LORD JUSTICE-CLERK.—I think there would be insuperable difficulty in framing issues so as to place this case properly before a jury. And I am of opinion, therefore, that we should allow a proof before answer, which I propose should be led before one of ourselves, and not before the Sheriff on a remit.

LORD ORMIDALE.—I desire to state the grounds on which I feel myself unable to concur with your Lordship in thinking that proof in this case should be taken before one of the Judges of this Court. In Dennistoun v. Rainey, Knox, and Company (May 16, 1871, 9 Macph. 739), referred to in the discussion, it was assumed, and rightly I think, that while it was competent for either party, on proof being allowed in the Sheriff-court, to appeal for jury trial, it was also competent for this Court, in the appeal, if they considered the case for some sufficient reason altogether untenable, to dismiss it;—or, in other words, that it was competent, on the ground of irrelevancy or other preliminary plea, to quash the proceedings without either sending it to a jury or to probation in any shape. But here neither party maintains that the case is of such a character that we can so dispose of it at once. Both parties concurred in stating that there must be investigation. One asked for a jury trial, while the other insisted for a proof before one of the Judges of this Court. Neither of them desired that the case should be sent back to the Sheriff. I am disposed to think with all your Lordships that there ought to be investigation, and that as some difficult questions of law may not unlikely arise, it may be expedient that a proof be allowed before answer rather than send the case to a jury. But, then, I very much doubt whether, having regard to the case of Dennistoun v. Rainey, Knox, and Company, the proof ought to be taken in this Court. It rather appears to me that the case ought to be sent back to the Sheriff-court to be proceeded with there. In that way, if the case should afterwards come before us, our findings on the facts proved will be conclusive, and not appealable to the House of Lords, and thus effect would be given to section 40 of the Judicature Act, 6 Geo. IV., c. 120, as explained by the Lord President in Dennistoun's case. If, on the other hand, we allow a proof here, our judgment on the facts might be taken by appeal to the House of Lords, contrary to the spirit and intention of that Act, and in opposition to the precedent we have in the case of Dennistoun. It is true that there it was the party who appealed, on the footing that it was a jury trial he wanted, who desired that the proof should be taken before a Judge in this Court; but I am unable to see how it can affect the principles on which the Court proceeded, or the statutory provisions bearing on the matter, which party is the advocator or appellant of the process to this Court. For these reasons, and as it is right that in a question of procedure uniformity of decision should be observed, I am clearly of opinion that the present case ought to be sent back to the Sheriff-court that the proof may be taken in ordinary form.

LORD JUSTICE-CLERK.—On the competency of the course which I have proposed I do not think it necessary to say much. I should be reluctant to come to the conclusion that when a case has been brought into this Court it is not competent for us to do justice between the parties by ordering what we con-

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ceive to be the most appropriate inquiry into the facts. I see nothing either in the statute or in the case of Dennistoun, which has been referred to, which leads to that conclusion. In that case the Court refused to allow the appellant the option of a jury trial, or a proof before answer in this Court. But that is no authority to compel us either to send the case to a jury or to remit it to the Sheriff, if we are satisfied that another course is more appropriate. It may be that to remit the case to the Sheriff would prevent the case going on the facts to the House of Lords. But I cannot say that, in my opinion, in a case of such mixed fact and law as this is, it is altogether an unmixed evil that the House of Lords might have both the disputed matters of fact and the questions of law before them in the event of an appeal.

LORD NEAVES.—It is not every one who remembers the circumstances which led to the passing of the Judicature Act of 1825. It was passed generally to remedy existing evils, and the 40th section was introduced to remedy one particular evil, namely, the want of finality in Sheriff-court judgments upon evidence. There then existed, and very naturally, a strong feeling against allowing cases to run the gauntlet of all the Courts below and then to be appealable to the House of Lords on questions of fact. But I think that this feeling of repugnance to cases going to the House of Lords on questions arising on proof has been considerably relaxed in later years. Had the pursuer brought his case here in the first instance we should have had to consider whether it was one for jury trial, in which case there would have been a final judgment on the facts, unless a new trial had to be granted, or whether it was one for a proof, in which case the questions of fact, as well as of law, might have been taken to the House of Lords, and they would have seen the real case out of which the questions of law arose. There has, I think, been considerable change in the feeling of the profession and of the Legislature on this matter. And if I can satisfy my mind that a case, however it may have been brought into this Court, is one that should be tried by means of a proof in this Court, I am inclined to direct that that course should be followed, there being no special and plain impediment. The case of Dennistoun was quite different, and I do not see that what we propose to do here is at all inconsistent with the decision of the other Division in that case.

LORD GIFFORD concurred.

THIS interlocutor was pronounced:—"Having heard counsel on the appeal, before answer allow both parties a proof of their respective averments, and to the petitioners a conjunct probation: Grant diligence against witnesses and havers; and appoint the proof to proceed before Lord Gifford at such time and place as his Lordship may fix."

ADAM SHIELL, S.S.C.—DAVID DOVE, S.S.C.—Agents.

No. 43.

Nov. 27, 1874. Goetze v. Aders, &c.

FRIEDRICH GOETZE AND SOHN AND OTHERS, Petitioners.—*Sol.-Gen. Watson—Trayner.*
ADERS, PREYER, AND COMPANY, Respondents.—*D.-F. Clark—Balfour.*

Bankruptcy—Foreign—Forum Competens.—The mercantile sequestration of a bankrupt in a foreign country renders a subsequent award of sequestration in Scotland incompetent.

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1ST DIVISION.
Lord Shand.
B.

THE firm of F. Goetze and Sohn, spinners at Glauchau, in Saxony, was, upon their suspension of payment, declared bankrupt by decree of the Court of the Prince and Count of Schönburg, at Glauchau, pronounced on the 2d January 1874; and on the 3d of January Richard Clauss, advocate, was appointed trustee upon the estate.

On the 6th December 1873 the firm of Messrs Aders, Preyer, and Company, of Bradford, to whom it was alleged Goetze and Sohn were indebted in the sum of £2668, 15s. 6d., had used arrestments *jurisdictionis fundandæ causa*, and had attached certain goods belonging to the alleged debtors, partly in the hands of Messrs F. Bentzen and Company, of Glasgow, partly in those of Messrs Sinclair and Mitchell of the same place.

On the 8th December 1873 action for payment of said sum had been raised in the Court of Session by Messrs Aders, Preyer, and Company, who, on the 13th January 1874, had further, on the dependence of said action, procured the arrestment of the said goods which had been attached, in the first instance, *jurisdictionis fundandæ causa* only.

On the 4th February 1874 the firm of F. Goetze and Sohn, Johann Friedrich Goetze, the only partner of that firm, and the trustee in bankruptcy, Richard Clauss, with concurrence of one of the creditors, Carl August Oberlander, a creditor of F. Goetze and Sohn, presented a petition to the Lord Ordinary, praying that, under the 13th section of the Bankruptcy (Scotland) Act, 1856, sequestration should be awarded of the entire property belonging to the firm of F. Goetze and Sohn as a company, and of Johann Friedrich Goetze, as a partner thereof or as an individual.

Aders, Preyer, and Company lodged objections to the petition, on the ground, 1st, that no jurisdiction had been founded by the arrestments; and 2d, that the prior Saxon concourse process or sequestration rendered a second sequestration incompetent.

The Lord Ordinary refused the prayer of the petition on the first of these grounds.

The petitioner reclaimed.[1]

After hearing counsel, the Court ordered a case to be prepared and laid before German counsel.

The case put the following queries:—"1. Does the sequestration in Saxony give the trustee in said sequestration a preferable or first exclusive right over the whole estate of the bankrupts, F. Goetze and Sohn, and Johann Friedrich Goetze, situated beyond, as well as within, the realm of Saxony? 2. Is the right of the trustee over the estate of the bankrupts situated beyond the realm of Saxony in any respect inferior to his right over the estate within the realm? 3. Does this right of the trustee over the estate of the bankrupts situated beyond the realm of Saxony require in any case, and if so, in what, to be completed by a supplementary sequestration or similar process before the Courts of the country in which such estate is situated?"

Professor Doctor Endemann, Jena, returned an opinion in which the answers given were as follows:—"1. According to the German bankruptcy law, as prevailing in Saxony, the institution of concourse on the firm of F. Goetze and Sohn and Johann Friedrich Goetze confers on

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[1] *Petitioners' Authorities.*—Cole v. Flammare, Aug. 4, 1772, M. 4820; Act 9 Geo. IV. c. 72, sec. 22; Joel v. Gill, June 10, 1859, 21 D. 929, 31 Scot. Jur. 511.

Respondents' Authorities.—Burns v. Monro, July 18, 1844, 6 D. 1352, 16 Scot. Jur. 583; Thomson v. Whitehead, Jan. 25, 1862, 24 D. 331, 34 Scot. Jur. 163.

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the trustee in bankruptcy a right to the property of the bankrupt situated as well without as within the realm of Saxony. This right is in itself exclusive, because it appertains to the representative of the entire body of the creditors appearing in the concourse, who alone have a right to satisfaction, and that out of the whole of the property constituting the estate in bankruptcy. 2. The right of the German trustee in bankruptcy to the property of the bankrupts beyond the realm of Saxony is in no respect weaker than his right to the property situated within the realm or within the German Empire. 3. The third query is to be negatived *in toto*. The right of the trustee in bankruptcy to the property situated beyond Saxony is not dependent on any such measure as is suggested therein."

At advising,—

LORD PRESIDENT.—This is a petition praying for sequestration of the estates of Messrs Goetze and Sohn, spinners, Glauchau, in Schönburg, Saxony, and of Johann Friedrich Goetze, the only individual partner of that firm. It is stated in the petition that the affairs of this trading firm having become embarrassed, they find it necessary to apply for sequestration. They further state, "that the affairs of the said F. Goetze and Sohn, and of the said Johann Friedrich Goetze, the only partner of said firm, having become embarrassed, they found it necessary to stop payment, and to apply for concourse process or sequestration of their estates in the Court, at Glauchau, of the Prince and Count of Schönburg, in Saxony, which was awarded on the 2d day of January 1874, and the petitioner, Richard Clauss, was appointed trustee on said estates by said Court on the 3d day of said month of January 1874."

Mr Goetze's only place of business was within the kingdom of Saxony, but he had a foreign trade and foreign correspondents. At the date of the concourse process or sequestration there were certain funds belonging to Goetze in the hands of Messrs F. Bentzen and Company, and also certain funds in the hands of Messrs Sinclair and Mitchell in Glasgow. These goods were arrested by English creditors previous to the Saxon sequestration. On the 4th of February the petition was presented to the Lord Ordinary on the Bills, and on the same date the petition was refused. The petitioner reclaimed, and at this stage of the case the arresting creditors appeared to oppose the awarding of the sequestration. We heard parties, but found it impossible to decide without knowing what their rights were under the Saxon sequestration. We were in hopes that the parties would lay before us a statement of what their rights were under the Saxon law. This led to considerable delay, and when it was found that the parties could not agree, it became necessary to have a case prepared for the opinion of German lawyers. We have now a very excellent and clear opinion of Professor Endemann. The result is to shew that the title of Clauss under the concourse or sequestration is a universal title so far as moveable estate is concerned, wheresoever the estate may be situated. The title is the same as that of a trustee in a Scottish sequestration or an assignee in an English bankruptcy.

It is not necessary, and indeed it would be improper, to give an opinion as to the effect of the arrestments. It is possible that a competition may arise between Clauss and the arresting creditors in Scotland. But the only question we have to decide is whether sequestration ought to be awarded in terms of the prayer of the petition. It does appear to be a very strange application to be made not by the bankrupt alone but also by Mr Clauss, the trustee for the creditors in Saxony. He asks that sequestration of the estates shall be awarded while he has a com-

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plete and universal title to these estates in his own person. Nothing can be clearer than that we can award no sequestration except under and in terms of the Bankrupt Act, and that no sequestration is authorised to be awarded by that statute, except a sequestration which shall affect the whole estate of the bankrupt wherever situated. If it was ever supposed that there might be a partial sequestration, the sooner such a notion is put an end to the better. Therefore, to grant the prayer of this petition would be to sequestrate over again the estates which have been already sequestrated in Saxony, and to create a title which would compete with the title of the trustee, who has been appointed in these bankruptcy proceedings. The effect of awarding this sequestration would be to lead to the appointment of a trustee in Scotland, who should be authorised to administer the entire estate of the bankrupt, and would be vested under this sequestration with a title to that estate co-extensive with the title of Mr Clauss himself. It seems to me that it is impossible to conceive anything more entirely inconsistent with well settled principles of international law. *Mobilia situm non habent* and *mobilia sequuntur personam* are maxims universally received in every civilised country, and they are therefore *juris gentium*. They are the foundation of many most important rules of international law. One of these is, that the succession to moveable estate is regulated exclusively by the law of the domicile, without reference to the place where any portion of the moveable estate may be actually situate. The practice is to allow foreign executors to come here and obtain confirmation, so as to give them a title to that portion of the moveable estate of a foreign defunct which happens to be situated in this country, and that whether the executor be an executor-nominate or an executor-at-law. So also a conveyance of moveables *inter vivos*, whether for the benefit of creditors or any other purpose, may, if made according to the forms of the country where the granter lives, and according to the law to which he is subject, receive effect in this country, will enable the assignee who possesses such a title and produces it here to ingather that portion of the moveable estate of a foreign bankrupt which is situated in this country. This general principle has been acknowledged in the law of Scotland as well as in the law of England from a very early period. But the principle goes no further than this,—to give effect to the title of the foreign assignee from its date. Therefore the title of Clauss will receive effect from its date, and entitle him to ingather that part of the bankrupt's estate situated in Scotland.

This general principle has been acknowledged in the law of Scotland from a very early date. In the leading case of Strother v. Read (M., *Forum Competens*, No. 4), "assignees under an English commission of bankruptcy were preferred to an arrester in a competition repecting the effects of an Englishman situate in Scotland." The English assignees came here after arrestments had been used, and they were preferred because their title was prior to the arrester's. There was no specialty, because at that time Scotland and England stood in the relation of foreign countries. But in case any specialty should be supposed to arise from the parties being English it is enough to mention the case of Maitland v. Hoffman (March 4, 1808, M. App. Bankrupt, No. 26), where a precisely similar judgment was pronounced, where a commission of bankruptcy issued in America was held preferable to an arrestment used in this country subsequent to its date, though prior to the date of the assignment. This goes no further than to give effect to the title from its date. There may be regulations in different countries necessary for giving preference among the creditors which can receive no effect

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extra territoriam. It is only as operating a conveyance of moveable estate that the foreign bankruptcy proceedings receive effect. In Hunter v. Palmer (Feb. 25, 1825, 3 Sh. 586) (N. E. 402), a question of this kind having arisen, an English commission of bankruptcy competing with an arresting creditor, it was maintained that by the English law all diligences were voided by a prior act of bankruptcy, and that as prior acts of bankruptcy had occurred the arrestments were not effectual. But the Court refused to give effect to this, and preferred the arresting creditors, on the ground that their title had been completed prior to the English commission of bankruptcy.

Clauss, who is seeking to have this estate sequestrated, has a title completed by the prior sequestration in Saxony. But his object is plain enough. If sequestration is awarded as on 4th February 1874 that would operate to cut down the preference obtained by Aders, Preyer, and Co. by their arrestments on 8th December 1873 as being used within sixty days of sequestration, and consequently the arresters could not prevail against the title of the trustee. This is a fair object, if possible; and we have to consider if the means are legitimate. I think that they are the reverse. It would be to subvert the principles of international law, and the decisions of the Court, which we are bound to give effect to. In the case of Royal Bank v. Scott, Smith, Stein, and Co. (20th January 1813, F. C.), the defender's firm carried on business both in London and Edinburgh, and became bankrupt in England. Subsequently to that the Royal Bank applied for sequestration here, and the application was refused because of the prior English commission of bankruptcy. It appears to me that that was a more favourable case for granting sequestration than the present. The bankrupts were Scottish traders, carrying on business in Scotland as well as in England, and it might have been possible to administer the Scotch estate here, and the English estate in England. But here the bankrupts have no connection with Scotland, except that their goods are in the hands of Scottish traders.

On this subject Lord Robertson has stated the question of law as follows:—"It is a question of great importance what is the effect in Scotland of an English commission of bankruptcy. In my opinion, the effect to be given to it in every country where the true principles of international law are understood is that it must carry the whole effects belonging to the bankrupt. It has been a principle which has been long established that moveables have no locality. They follow the person of the owner, and their condition is governed by the law of his domicile. It may be said that this is a fiction, and it is so. But it is a fiction introduced by the soundest principles of justice, and in practice has been attended with the most beneficial consequences. It has been confirmed by repeated decisions, and it is a principle which your Lordships will not now shake." "This, indeed, was settled in Scotland by the case of Strother v. Read, of which case there is nothing said. It is impossible for your Lordships to overlook the effect of the decision in which the principles I have mentioned are fully recognised by a most solemn and deliberate judgment. It is said that the jurisprudence of the country where the transactions are entered into is an essential part of the contract between debtor and creditor. This is certainly true; but what is the inference from it? It is as good in the mouth of an English creditor as a Scotch creditor, and the result would be that there would be two commissions going on *simul et semel*, with all the inextricable consequences that must follow from such a

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system. It is impossible for your Lordships to listen to this doctrine without flying in the face of the principle of law that moveables follow the person."—(The Royal Bank of Scotland v. Scott, Smith, Stein, and Company, 28th November 1812, Buchanan's Justiciary and other cases, 1800–1810, p. 329).

The result of the whole of the authorities is that we must give effect to priority in point of time, and the estate being already sequestrated and vested in the trustee by virtue of the foreign concourse process it is impossible for us to grant the prayer of this petition.

LORD DEAS.—This petition was presented on 4th February 1874, being in the ordinary form of a petition for mercantile sequestration. Two objections were taken to the granting of the prayer. 1st, That the debtor and his company were not liable to the jurisdiction of the Courts of this country. 2d, That "the prayer of the petition ought to be refused, in respect of the prior Saxon sequestration of the estates of F. Goetze and Sohn, and of the sole partner of that firm." The Lord Ordinary has dealt only with the first of these objections. But when the case came before us it appeared to the Court that a more general question was involved—whether there could be a second sequestration, when there was alleged to be an existing valid sequestration in Saxony? With a view to that question, your Lordships ordered a case to be prepared with certain queries, for the opinion of a German lawyer, and accordingly we have now before us the opinion of Professor Doctor Endemann, which I agree with your Lordship in thinking a very able and lucid opinion. Indeed, I have never seen an opinion by foreign counsel better calculated to be useful to the Court.

It is very satisfactory to find the law, which is so well stated, to be in accordance with our own. The cases which have been referred to by your Lordship are important, and lead to the same result.

That result is that an effectual sequestration was awarded in Saxony on 2d January 1874, and that we acknowledge the effect of that sequestration to be to convey the moveable estate of the bankrupt situated in this country, on the footing that a mercantile sequestration awarded in one country carries the moveable estate wherever situated.

It is difficult to see how the trustee is to get possession of the estate in this country free of the effect of the arrestments in execution which have been used to attach it. But that question is not raised by the petition, which prays for nothing but sequestration, and it is better to say nothing about it any more than about the effect of the arrestments used to found jurisdiction. The case for opinion was ordered upon the footing of determining the general question of the effect of a foreign sequestration, and I am for adhering to the interlocutor of the Lord Ordinary, on the single ground that the foreign sequestration renders sequestration in this country incompetent.

LORD ARDMILLAN.—I do not think it necessary to rest the decision of this case on the plea that jurisdiction to support the petition for sequestration has not been constituted by the arrestments used *ad fundandam jurisdictionem*. On that point I shall not express an opinion, because I think we have a ground of judgment broader and more important, and quite sufficient for disposal of the cause. I accordingly concur with your Lordships in placing the decision on the separate ground, which I think sound and most important, to which your Lordships have directed attention.

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The decisions in the case of Strothers v. Read in 1803,[1] and in the case of Selkrig in 1805,[2] and in the more recent and more serious case of Stein and Company, are of the highest authority, and really conclusive. They are recognised by Professor Bell as settling the law on the subject. Moveables have no locality which law can recognise. They follow the owner, and personal estate is held as situate where the bankrupt had a domicile, and is to be administered according to the law of the country where he is declared bankrupt. Therefore a sequestration—or other process equivalent to sequestration—in one country, if there effectually issued, must embrace and attach the whole moveable estate of the bankrupt wherever situated. A second attachment by a second sequestration of equal scope and comprehensiveness, while the first is extant and in force, is unnecessary and unreasonable, and indeed is contrary to sound principles of international law.

In my opinion the German or Saxon sequestration did in this case embrace and attach all the personal property of these debtors. We are bound, on principles of international law, to recognise it, and to give it effect, and we are therefore bound to refuse to interpose by a second sequestration.

The opinion which we have from the learned German jurist, Dr Endemann, is interesting, instructive, and important, and his exposition of the universality of the attachment by sequestration of the whole personal estate of the bankrupt, according to the principles of international law, is very valuable.

The opinion which your Lordship has now expressed is in entire accordance with the German law, and the international law explained in the opinion of Professor Endemann, and is equally in accordance with the law authoritatively settled by the Scottish decisions to which I have already referred.

I concur so entirely in your Lordship's opinion and observations that I shall not add another word.

LORD MURE concurred.

THE COURT adhered.

RONALD, RITCHIE, & ELLIS, W.S.—FRASERS, STODART, & MACKENZIE, W.S.—Agents.

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Kermack v. Kermack.

ELIZABETH KERMACK AND OTHERS, Pursuers and Respondents.—*Sol.-Gen. Watson—Balfour.*
JAMES KERMACK, Defender and Appellant.—*D.-F. Clark—Rhind.*

Prescription—Interruption—Statutes 1469, *c.* 28, 1474, *c.* 54.—*Held* that prescription of a bond may be interrupted by payments of interest, but that these cannot be proved by parole.

Observed, that the statute 1474, c. 54, made no alteration on the law introduced by the statute 1469, c. 28, with regard to the necessity of taking document upon an obligation within forty years.

Process—Abandonment of Action—A. S. 10*th July* 1839, *sec.* 61 (*Sheriff-court Procedure*)—*A. S.* 11*th July* 1828, *sec.* 115 (*Court of Session Procedure*).—The pursuer of an action, after an interlocutor was pronounced disallowing proof by parole, obtained a diligence for the recovery of writings. He allowed it to expire without using it, and then presented a minute of abandonment of the action under A. S. 10th July 1839 (Sheriff-court Procedure), sec. 61. *Held* that he was entitled to abandon.

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[1] M., *Forum Competens*, App. 4. [2] Selkrig v. Davies, 2 Dow, 230.

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1ST DIVISION.

Sheriff of Fifeshire.

M.

Opinion, that the 61st section of A. S. 10th July 1839, regulating Sheriff-court procedure, was identical in meaning with the 115th section of A. S. 11th July 1828, regulating procedure in the Court of Session.

THIS action was raised in the Sheriff-court of Fifeshire by Elizabeth and Euphemia Kermack, daughters of the deceased Charles Kermack, feuar, Ceres, against James Kermack, their brother. The summons concluded for payment of "£250 resting owing by the defender to the pursuers, being the one-half or portion payable by him of the sum of £500 sterling conceived in favour of the pursuers by disposition and settlement executed by the said Charles Kermack dated 18th day of December 1809, whereby he disponed to John Kermack and the said James Kermack, both his sons, certain heritable subjects therein described, under burden of payment to the pursuers of the said sum of £500 sterling, payable at the death of Barbara Kyd, their mother, and which sum, it is thereby provided, should bear interest from the first term of Whitsunday or Martinmas after their mother's death, which event took place in the year 1831, and which subjects the said James Kermack took under the said conveyance burdened as aforesaid, and he paid interest on his one-half of said sum to the pursuers, and in particular, he paid consecutively interest thereon for the following years as follows, viz.,—£10 on or about the 25th November 1845 for the year from Whitsunday 1843 to Whitsunday 1844, £10 on or about the 25th December 1846 for the year from Whitsunday 1844 to Whitsunday 1845, £10 on or about the 19th day of May 1848 for the year from Whitsunday 1845 to Whitsunday 1846, and £10 on or about the 13th day of April 1850 for the year from Whitsunday 1846 to Whitsunday 1847: *Item*, the sum of £265, being the interest on the said principal sum."

The defence was, (1) Denial of the statements; (2) Prescription.

Euphemia Kermack having died during the progress of the action her trustees and executors were sisted in her room.

The Sheriff-substitute (Beatson Bell) on 5th May 1874 pronounced this interlocutor:—"Before answer allows to the pursuers a proof *prout de jure* of the averments in their summons as to payment of interest; allows the defender a conjunct probation thereanent."

On appeal the Sheriff (Crichton) adhered.

The defender appealed to the Court of Session.

The defender argued;—The obligation was prescribed under the statute 1469, c. 28, the creditor not having "followed" it and "taken document" upon it within forty years. The subsequent statute, 1474, c. 54, made no difference in the law, but only explained that obligations existing in 1469 fell under the operation of the Act, if they were not litigious at that time.

In all cases in which payments to account of interest or partial payments of the principal have been held to interrupt prescription it is either expressly stated or it must be presumed that there were writings of some kind produced, such as receipts in the debtor's possession, which were held equivalent to documents taken by the creditor. There was no example of the admission of parole proof.[1] In order to discharge the debtor these payments of sums above £8, 6s. 8d. could not be proved by parole. Therefore, why should they be so for the benefit of the creditor? Even if the fact of payment was admitted it would be impossible to ascertain satisfactorily by parole testimony on what footing and on what account the payments were made.

The pursuers argued;—The words "take document" were designedly

[1] Nicolson v. L. Philorth, 1667, M. 11,233; Guthrie v. Nisbet, 1696, M. 11,257; Garden v. Rigg, 1743, M. 11,274, 1 Pat. App. 409; Wood v. Howden, Feb. 7, 1843, 5 D. 507, 15 Scot. Jur. 260.

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left out of the statute 1474, and accordingly in the cases of Nicolson, Guthrie, and Garden,[1] that was held not to be necessary. Such payments were acts of homologation, capable of being proved by parole.[2] Such payments are interpreted to shew that the creditor is following forth his right.[3] When a party entitled to receive money alleged that it was paid, he might prove the fact *prout de jure*, because no writ remained in his possession as evidence of it.[4]

At advising,—

LORD PRESIDENT.—By his deed of settlement, dated 18th December 1809, the late Charles Kermack disponed certain heritable subjects to his two sons, John and James Kermack, burdened with payment of the sums of £500 to his two daughters on the death of their mother. The mother died in 1831, when both the daughters had attained majority, so that the said sum was payable at that time. This action is raised at the instance of these daughters against James Kermack for payment of £250 of principal, "being the one-half or portion payable by him of the sum of £500," and £265 of interest.

The defence stated is prescription, the long negative prescription introduced by the statutes of James III. The reply to this defence consists in a statement that four payments of £10 each were made—one in 1845, one in 1846, one in 1848, and one in 1850, to account of interest on the debt. Those payments are said to have the effect of interrupting prescription.

The question thus raised is of some importance. It is not immaterial to observe that the payments are alleged to have been made for the interest of half-years or years, considerably bygone at the time when they were made. There is, therefore, nothing stated to shew that they were made on account of the interest due for the periods alleged, except the mere allegation in the summons. It is not stated that there are any extant receipts. It was suggested that the pursuers might take a diligence for recovery of writings, but the Solicitor-General did not appear to be inclined to take that course.

On the record as closed the Sheriff-substitute allowed the pursuers, before answer, a proof *prout de jure*, and the Sheriff on appeal has adhered to this interlocutor.

Two questions are raised—first, whether payments to account of interest will interrupt prescription; secondly, whether such payments can be proved *prout de jure*.

On the first question I confess that I do not entertain any doubt. In two cases at least it has been decided that prescription may be interrupted by such payments—Nicolson v. L. Philorth, Dec. 18, 1667 (M. 11,233), and Garden v. Rigg, Nov. 16, 1743 (M. 11,274). Stair, ii. 12, 26, founding on the authority of the case of Nicolson, states the law thus:—"So likewise payment of annual-rents within forty years interrupts prescription of bonds, and that not only as to the party paying, but payment made by the principal debtor was found to interrupt prescription as to the cautioner, who never paid nor was pursued during the space of forty years."

The reason why the payment of interest is held to interrupt prescription is

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[1] *Supra.*

[2] Ersk. Inst. iii. 3, 50; Gardiner v. Chalmers, 1636, M. 12,362; Chalmers v. L. Craigievar, 1628, M. 12,368; Ross v. Elliot, 1630, M. 12,369.

[3] Ersk. Inst. iii. 7, 38; Bell's Prin. 611-617; Napier on Prescription, 673.

[4] Dickson on Evidence, 609.

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that it indicates distinctly on the part of the creditor that he has not relinquished or abandoned his debt, but, on the contrary, means to insist on it. In that respect it stands on the same footing as partial payment of the principal. The ground on which partial payment of the principal is held to constitute interruption is well explained by Lord Kilkerran in his report of the case of Garden v. Rigg. He says,—"The reasons why partial payments interrupt prescription of the debt is that the acceptance of a receipt in part-payment of a particular debt implies an acknowledgment that such debt is a subsisting debt at the time; but an indefinite receipt of money, applying to no particular debt, is no acknowledgment of any particular debt, and therefore would not have been sustained as an interruption of either the one or the other of the debts pursued for, but for the defender's acknowledgment." Thus an acknowledgment by the debtor, or a receipt taken by him so expressed as to shew that the payment was to account of a particular debt will alone avail. A mere indefinite payment is of no avail to constitute interruption.

This leads to the inquiry whether it is competent to prove the payment of money as to account of the interest or principal of a bond otherwise than by writing. I am of opinion that the Sheriffs have come to a wrong conclusion upon this question. The provision of the statutes that the debt will prescribe unless the creditor takes document upon it, is not satisfied by a mere proof by witnesses, first, that money has passed, and, secondly, that it was intended to be applied, and was applied, either to principal or interest of the particular debt. It seems to me that the latter fact is not at all suitable to be proved by witnesses. I do not dispute that the mere payment of money may be so proved, though not for the purpose of releasing the debtor or of keeping him bound, but for collateral purposes.

I am fortified in this opinion when I observe that in all previous cases in which the plea of interruption has been sustained, there have been either receipts or a judicial admission. Thus in Nicolson v. L. Philorth there were receipts, and these were held equivalent to "document;" and in the next case, Guthrie v. Nisbet, the payments were admitted. In Garden v. Rigg the pursuer, when he pleaded interruption, relied on receipts given to the defender which he insisted he should exhibit, and the defender did exhibit them. There is no example of a proof by witnesses of partial payment or payment of interest to the effect of interrupting prescription. I cannot conceive any matter less suitable to be proved by witnesses than the application of a payment of money. I therefore think this interlocutor should be recalled. If the pursuer thinks he can recover any writings I am not disposed to refuse him a diligence.

Lord Deas.—When a debtor pleads prescription it is usual and prudent for him to say as little as possible. But when a creditor pleads interruption to prescription there is not the same reason for reticence, and he is generally anxious to give all the explanation he can which will tend to shew that his plea is well-founded. In this case, however, the statement of the creditor is certainly as meagre as possible.

The constitution of the debt is clear enough. It is contained in a *mortis causa* deed, which came into operation by the death of the granter, in 1820. The debt was, however, not payable till the death of the widow, which occurred in 1831. It is said that the only payments made were four in number, and all between 1845 and 1850. No allegation is made of any demand for payment

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before or after these years, and no explanation of this silence is offered. My opinion, however, does not depend on these circumstances, and I notice them in passing merely.

In answer to the defence that the claim has undergone the long negative prescription introduced by the statutes 1469, c. 28, and 1474, c. 54, the pursuer pleads interruption by the payments alleged, which he proposes to prove by parole testimony. It is said that, although the Act of 1469 requires the taking of document within the forty years, this requisite was purposely omitted in the Act of 1474. But, in attending to the terms of these statutes it is clear enough that the sole object of the second Act was to declare what had been left vague by the first,—that all obligations, whether made before or after the passing of the Acts, were to prescribe, and no alteration was made, or intended to be made, as to taking document on the debt. On the contrary, the words in the second statute—that "all obligations, made or to be made, that be not followed within forty years, shall prescribe,"—obviously mean, all obligations, whether made or to be made, not followed by taking document within the forty years, as mentioned in the first Act. I do not discover that in the four succeeding centuries it has ever been judicially suggested that taking document was not the test of interruption under these two statutes taken together.

What happened was, that the Court put a very liberal, perhaps rather a loose construction on what was to constitute the taking of document, by holding that, if interest had been paid for which the creditor had granted receipts, those receipts in the hands of the debtor might be regarded as documents taken by the creditor. The Judges in those days seem to have regarded the prescription as odious. Accordingly, in Nicolson v. the Laird of Philorth, 18th December 1667, M. 11,233, where the cautioner pleaded interruption in respect of payments of interest by the principal debtor, "the Lords repelled the defence" (of prescription) "in respect of the reply, and found that the ground of prescription, as to personal actions, being *odium* and *negligentia non petentis*, that it doth not militate in this case, the creditor having gotten annual rent, so that he cannot be said to be negligent."

Again, in Guthrie v. Nisbet, 6th June 1696, M. 11,257, where three consecutive discharges of interest by a factor were pleaded as interruption, "the Lords, considering this was no constitution of a debt, but the preserving it against an odious prescription," thought the factor's discharge equivalent to the principal's, "seeing the Act of Parliament requires only the taking of a document to stop prescription, and that *talis qualis insinuatio* is sufficient to interrupt."

But although the taking of document was thus favourably construed for the creditor, there is no case in which the taking of document has been dispensed with, and it may be doubted whether this loose mode of construing the words has not been seriously discountenanced by the judgment of the House of Lords, reversing the judgment of this Court in Her Majesty's Advocate v. Hay, 24th April 1758, 2 Paton's App. 266.

The judgment of the House of Lords in the previous case of Garden v. Rigg, 28th January 1748, 1 Paton (*i.e.* Craigie and Stewart) 409, is somewhat complicated, but sanctions nothing adverse to the doctrine that to interrupt the long prescription document must be taken.

It would indeed be strange if parole could be allowed in a case of this kind; for in Napier v. Campbell, 7th December 1703, M. 10,656, the judgment bears, —"The Lords found, after forty years' prescription, the party was not obliged to

give his oath, whether it was yet resting owing; and though he should confess it, yet he was not *in foro humano* liable for the debt, whatever he might be *in foro poli et conscientiæ;*" and Mr Erskine accordingly says, 3, 7, 15,—"All our lawyers are agreed that, in the long negative prescription, the creditor, barely by his silence for the whole course of prescription, is understood to have abandoned his claim, and so loseth his right of action, without the necessity of *bona fides* in the debtor. Hence, if a creditor, who has made no demand within the years of prescription, should afterwards offer to prove, by the debtor's own oath, that the debt still subsisted, even that offer would not save the debt from being extinguished by the elapsing of the forty years, though it is obvious that the debtor's consciousness of the subsistence of the debt excludes *bona fides.*"

I also find it stated in my notes of Professor Hume's Lectures that the effect of the lapse of forty years is absolute extinction of the debt, without room for reference to oath, and, in another passage, that no verbal admission, however explicit, and though offered to be proved by oath, will avail.

If, then, the question depended on these statutes alone, I should be of opinion that the answer of prescription, so far as yet appears, is conclusive. But I rather think the statute 1617, c. 12, although not pleaded in defence, may be also applicable. Though the main object of that statute was to introduce the positive prescription, it is well known that it also extended the negative. It enacts "that all actions competent of the law upon heritable bonds, reversions, contracts, or others whatsoever, either already made or to be made, shall be pursued within the space of forty years after the date of the same, except the saids reversions be incorporate within the body of the infeftments used and produced by the possessor of the saids lands," &c. The action is brought upon the deed already mentioned. The burden is not said to be incorporated in the body of any infeftment; and I am not prepared to say that in this state of the facts the statute is inapplicable. It is not, however, necessary to go into this at present, because the older statutes are sufficient for the defender's purpose.

I am, in any view, clearly of opinion that the proposed parole proof is incompetent.

LORD MURE.—The question is whether the operation of the Act 1469, c. 28, regulating the long negative prescription, can be held to have been interrupted by payment of interest or of part of the capital within the forty years, and whether such payments may be proved by parole testimony.

If we were called on to consider this question for the first time I should have been disposed to hold that under the words of the statute the debts did not subsist, unless there had been some proceeding by action and "taking document" in the shape of some renewal of the obligation, in order to shew that the debts were still due. We have been referred, however, to a number of cases from 1667 to the end of last century, which are said to have decided that something short of this is sufficient to interrupt prescription, that the mere fact of payment of interest or partial payment of the principal is enough, and that the fact may be proved by parole.

As to the first proposition, I have no difficulty in coming to the conclusion that in these cases such payments have been held to constitute interruption. But I think the observation of the appellant's counsel was substantially correct, that in all the cases quoted there were either admissions of the payments or documents produced in the form of receipts, and that when there were no ad-

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missions, these documents were held tantamount to the creditor taking document upon his debt. This was expressly the ground of decision in the case of Nicolson, as the words of the report bear, and also in Garden v. Rigg. But in the present case nothing has been produced which can be held to be an equivalent for "taking document," and I concur with your Lordships in thinking that proof *prout de jure* is incompetent.

LORD ARDMILLAN was absent when the case was argued.

THIS interlocutor was pronounced:—"Recall the interlocutors of the Sheriff-substitute and the Sheriff, dated the 5th May and 25th and 30th June 1874: Find the proof allowed by these interlocutors to be incompetent, but allow the pursuers (respondents) to lodge a specification of any documents which they desire to recover by diligence: Find the appellant entitled to expenses since the date of the Sheriff-substitute's interlocutor of 5th May 1874 in the inferior Court, and also the expenses in this Court," &c.

The pursuer took a diligence for the recovery of writings but did not use it. After it had expired he presented a minute of abandonment under the 61st section of A. S. 10th July 1839,* regulating Sheriff-court procedure.

The defender objected. He argued;—The interlocutors limiting the mode of proof and granting a diligence which had expired without anything being recovered under it necessarily led to absolvitor, and the clause in A. S. 1839 was the same in meaning as the 115th section of A. S. 11th July 1828,† regulating procedure in the Court of Session.

The Court were of opinion that the clause in A. S. 1839 was the same in meaning as that in A. S. 1828, but held that there was no interlocutor either of absolvitor or leading by necessary inference to absolvitor, and they sustained the minute of abandonment.

CHAS. S. TAYLOR, S.S.C.—D. CRAWFORD & J. Y. GUTHRIE, S.S.C.—Agents.

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Dec. 4, 1874.
Mitchell v. Scott's Trustees.

WILLIAM MITCHELL, Pursuer.—*Sol.-Gen. Watson—Strachan.*
ROBERT CURRER AND OTHERS (Oliver Scott's Trustees), Defenders.—*Balfour—Keir.*

Writ—Testing-Clause—Writer's Name—Statutes 1593, *cap.* 179, *and* 1681, *cap.* 5.—In an offer to sell heritable subjects, which was not holograph, the writer was mentioned in the body of the writing as "Mr John Smith, who

* "It shall be competent to the pursuer, before any interlocutor of absolvitor is pronounced, to enter on the record an abandonment of the cause, on paying full expenses to the defender, and to bring a new action, if otherwise competent."

† "And whereas it is enacted by section 10 of the Act [6 Geo. IV. c., 120 Judicature Act, 1825], that the pursuer shall have it in his power to abandon the cause on paying full expenses to the defender, and to bring a new action if otherwise competent, it is declared that this applies only to the case of the pursuer abandoning his cause before an interlocutor has been pronounced assoilzieing the defender in whole or in part, or leading by necessary inference to such absolvitor, after which it shall not be competent for him to do so, in regard to that part of the cause decided by said interlocutor, either expressly or by necessary inference; reserving, however, to him any remedy by a new action which may be competent to him under subsisting regulations."

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will prepare the disposition," and was only designed in the testing-clause as "the said John Smith." *Held* that the writer of the offer was not duly designed, and that the offer was therefore improbative, although in the acceptance, which was written on the same paper as the offer, allusion was made to "the said John Smith as agent for both parties."

Agent and Client—Mandate—Sale—Homologation.—A law-agent employed to sell certain heritable subjects got from the seller an improbative offer of the subjects at a certain price. He then, in the presence and with the consent of an intending purchaser, wrote on the same paper with the offer a modified acceptance of the offer, which was signed by the purchaser, but was not tested. He thereafter wrote a docquet on the paper containing the offer and acceptance, whereby he stated that he, as agent for both parties, accepted and confirmed "the foregoing agreement," and acknowledged having received 1s. from the purchaser to account of the price. *Held*, after considering a proof as to the nature of his employment by the parties, that as there was no evidence of such special authority having been given him as to entitle him to make the contract for the parties his confirmation of the missives was of no effect, and that the agreement could not be enforced.

Observations as to the nature of the authority necessary to entitle an agent to confirm such missives.

Question, Whether it is competent for one man acting for two persons to conclude a contract between them?

2D DIVISION. Lord Mure. I.

On 19th March 1873 Mr William Mitchell, ironfounder, Camelon, raised this action against the trustees of the late Mr Oliver Scott, stocking-maker, Grahamston, concluding (1) for declarator that Mr Scott had sold to him certain heritable subjects in Grahamston in August 1871 at the price of £540, and (2) for implement, and (3) for damages.

Mr Scott's trustees lodged defences.

The missives and circumstances upon which Mitchell relied as constituting the alleged sale were, as appeared from the condescendence and proof, as follows:—

In August 1871 Mr Scott instructed Messrs Smith and Allan, writers in Falkirk, to advertise the heritable subjects in dispute for sale.* Mr Mitchell, after inspecting the subjects, communicated with Messrs Smith and Allan, with a view to purchasing them, and offered to them £540 as the price he was willing to give for the subjects.† Mr John Smith, one

* The nature of Mr Smith's employment by Mr Scott were thus stated by Mr Scott's widow in her cross-examination:—"(Q.) Did you give the advertisement to Messrs Smith and Allan with your own hand? (A.) No. I think it would be sent to them by letter. (Q.) Did you see Mr Smith about that time as well? (A.) I think Mr Smith had not been down in our house for eighteen months before the advertisement. (Q.) Did he come down after it? (A.) Yes, when he wrote the missives; but not until then. (Q.) Had he been acting as agent for your husband previously? (A.) Yes. (A.) Then you left it to Mr Smith, or Messrs Smith and Allan, to carry out the transaction, and to sell the property? (A.) Yes. (Q.) I suppose you were satisfied that that would be the best thing for you to do? (A.) Yes. (Q.) They were to get as good a price for it as possible? (A.) Yes. (Q.) To sell it on favourable terms? (A.) Yes. (Q) You meant to leave all that to them? (A.) Yes, the whole. (Q.) They were to settle the price, and to carry out the transaction? (A.) They were to carry out the transaction. (Q.) They had your full authority to do that at the time? (A.) Yes."

† Mr Mitchell described his employment of Mr Smith as follows in his evidence:—"(Q.) Did you, at that time, employ Mr John Smith as your agent in connection with this matter? (A.) I employed him thus far, to get the business settled at once, and I was ready to pay the money next day, if it was convenient for him. (Q.) Did you authorise Mr Smith to carry out the transaction

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of the partners of the firm, on 21st August 1871, went to Mr Scott, who was confined to bed, and wrote out the following missive offer, which was duly signed by Mr Scott in presence of Mr Smith and Mr Scott's wife:—"Mr William Mitchell, ironfounder, Camelon.—Alma Villa, 21st August 1871. Sir,—I hereby make offer to sell to you the houses and pertinents . . . at the price of five hundred and forty pounds (£540)," with entry to one of the houses at Martinmas, and to the other at Whitsunday. "You will take the title as it at present stands, and Mr John Smith will prepare the disposition in favour of you and Mrs Mitchell in the terms of destination to be furnished by you. I will pay the half of his account for the disposition, and the price can be paid to me when the disposition is signed and delivered to you, but under deduction of interest of the price at the rate of four per cent per annum from the date of payment till Whitsunday next, when you are to get entry to the larger house, but adding to the price six pounds five shillings for your occupation between Martinmas and Whitsunday. In witness whereof, I, Oliver Scott, sometime stocking manufacturer, and now residing at Alma Villa, Grahamston, have subscribed this offer, written by the said John Smith, at Grahamston, the twenty-first day of August, eighteen hundred and seventy-one years, before these witnesses, Elizabeth Scott, my wife, and the said John Smith. OLIVER SCOTT. Elizabeth Scott, witness; John Smith, witness."

Mr Smith, on the same day, went to Mr Mitchell, and, after some conversation, wrote out on the same paper the following qualified acceptance of the above offer:—"Camelon, 21st August 1871.—Mr Oliver Scott, sometime stocking manufacturer, Alma Villa, Grahamston. Sir,—I have received your offer (prefixed), and accept thereof, with the following addition and alteration, which can be accepted by the said John Smith, as agent for both parties, in order to bind the bargain, viz.:— . . . . my entry to both houses to be as at Whitsunday next, till which time I am neither to occupy nor pay rent. You have received herewith one shilling of the price as earnest that the purchase by me has been concluded by me on the foregoing terms. In witness whereof I subscribe this acceptance, place and date before mentioned. WILLIAM MITCHELL."

This acceptance was signed by Mr Mitchell, but was not tested. Mr Smith duly received the shilling referred to in the writing, and afterwards

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on your behalf? (A.) Of course I did, when I was going to pay him. (Q.) But did you authorise him as your agent to carry out the transaction on your behalf? (A.) Yes. (Q.) Did you authorise him to complete the agreement for you? (A.) Yes; to make out the papers. I was ready to pay the money the moment the papers were completed. (Q.) Didn't you employ Mr Smith to act as your agent in the matter? (A.) I did. (Q.) What did you employ him to do? Was there not another document written out after that—the document on the other page of No. 6 of process? (A.) Yes; that was written out in my house that same night. (Q.) That is the indorsation beginning 'As agent for the before-named parties,' &c.? (A.) Yes. (Q.) That was written by Mr Smith at that time in your house? (A.) Yes. (Q.) Did you authorise Mr Smith to write that as your agent? (A.) After I gave him 1s. he wrote that as my agent to settle the business; and the moment he made out the papers I was willing to pay the money, and I am willing to do so yet. (Q.) Then after that was signed you handed him 1s.? (A.) Yes; I handed it to my wife first, and she handed it back to me, and I handed it to Mr Smith. (Q.) The documents which had then been written were left with you? (A.) Yes. (Q.) Was it then arranged that Mr Smith should prepare a disposition in your favour? (A.) Yes. (Q.) Was that arranged before these documents were signed? (A.) It was in the papers that he should do that, and I employed him to do it."

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gave it Mrs Scott. Mr Smith then, in Mr Mitchell's house, appended the following docquet to the paper containing the above offer and acceptance:—"Camelon, 21st August 1871.—As agent for the before-named parties, I accept and confirm the foregoing agreement, and acknowledge to have received one shilling to account of the price on behalf of Mr Scott. JOHN SMITH."

The writings were then left with Mitchell, but nothing followed upon these as between Scott and Mitchell, although Mitchell frequently applied to Mr Smith and pressed him to get the matter carried through.

Mr Smith extended a disposition of the subjects by Scott to Mitchell in September, but it was never signed by Scott, as he was too ill to attend to business. Mr Scott continued unwell and unfit to transact business, and eventually died on 22d August 1872, leaving a trust-disposition in which Mr Currer and others, the defenders, were appointed his trustees.

Mr Smith died in April 1873, before the proof, which was not led till June 1874.

The defenders pleaded, *inter alia*;—(2) The action cannot be maintained, in respect that the missives alleged to constitute the contract of purchase and sale between the pursuer and Mr Scott are not holograph nor tested in terms of the statutes. (3) *Separatim*, no concluded contract was ever entered into, in respect that the material alterations upon the terms of Mr Scott's alleged offer, expressed in the pursuer's alleged acceptance, were never accepted or adopted by Mr Scott, or by any one having his authority.

The Lord Ordinary pronounced this interlocutor:—"Finds that the missive offer of the late Oliver Scott, founded on by the pursuer, is defective in the statutory solemnities, and that the acceptance of the said offer is neither tested nor holograph of the pursuer: Sustains the second plea in law for the defenders, and assoilzies them from the conclusions of the action, and decerns: Finds the pursuer liable in expenses, subject to modification, of which appoints an account to be given in, and remits, &c."*

* "NOTE.—The testing-clause of the missive offer, which is quoted in the third article of the condescendence, bears to be written by 'the said John Smith,' who is also one of the witnesses; but, on referring to the body of the writ, the writer is simply mentioned as 'Mr John Smith.' He is not, therefore, designed; and although it may be conjectured, from its being stated that he is to prepare the disposition to follow upon the missive that he was a professional agent, that, according to the rules laid down in the cases of Percy v. Caldwell, 25th November 1808, F. C., Lockhart, 16th February 1815, F. C., and Callender, December 17, 1863, is not a mode of construction which can be adopted as sufficient to supply the requirements of the statutes. The offer is therefore null under the Act 1681, c. 5, and cannot of itself be made the foundation of the claim raised under the present action.

"But it was contended on the part of the pursuer that the objection was obviated by the description given of Mr Smith in the acceptance of the offer, and also in the document signed by Mr Smith which is annexed to the acceptance, in both of which he is described as 'agent for both parties;' and it was also argued, upon the authority of the case of Callender, that this *notandum* was an adoption or homologation of the defective offer. The Lord Ordinary, however, has not been able to see his way to give effect to either of these pleas.

"For, in the first place, as to the acceptance, it is not holograph; so, that, even assuming the designation contained in it to be sufficient, which is a point not free from doubt, it cannot, it is thought, be read as supplying the statutory defect in the offer. It is not, moreover, a part of the offer, but the writing of another party. And the Lord Ordinary is not aware of any authority for

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The pursuer reclaimed.

Argued for him;—The offer here was not void under the Act 1681, cap. 5. It was quite easy to see who the "said John Smith" in the testing-clause was. It was the "Mr John Smith" who was to prepare the disposition. If there had been any uncertainty, it was quite cleared up by the docquet appended to the same paper in which he was spoken of as "agent for both parties." Only Mr John Smith, of the firm of Allan and Smith, could satisfy this designation. The person meant was more clearly defined than in the case of Callender.[1]

Even if the offer were informal and improbative, Mr Smith was employed by both parties to carry through this transaction, and consequently, although the missives were not in themselves probative and binding writings, he could confirm them, and did confirm them, by means of the holograph docquet which he appended to the paper on which the improbative missives were written. It was competent so to confirm informal writings. Authority to purchase or sell land was a mandate to act fully for the mandant.[2]

Counsel for the defenders were not called upon for a reply.

LORD ORMIDALE.—The counsel for the reclaimer has with great ability endeavoured to satisfy the Court that the Lord Ordinary's interlocutor should be

holding that a separate writing of this description, not engrossed by reference into the writ, the validity of which is in question, as was the case with the rental in the case of Callender, can be founded upon as explanatory of the defect in the writ under challenge. To hold that it could would, in the opinion of the Lord Ordinary, amount substantially to admitting a condescendence in support of the offer, which is expressly excluded by the statute. And the same observation applies to the writing of Mr Smith annexed to the acceptance, which, though holograph, is no part of the offer.

"But the question remains, whether that writing can be held to amount to such an adoption and corroboration, on the part of the late Mr Scott, of the defective offer as must have the effect of precluding Mr Scott, or the defenders as his trustees, from challenging the transaction. The Lord Ordinary does not think that it can. It is not the writ of Mr Scott, and the Lord Ordinary doubts whether the passage in Mr Erskine (iii. 3, 47), which is generally relied on in such questions, can be held to afford any sanction to acts of homologation by any one other than the party himself whose writ is defective. It is not, as the Lord Ordinary conceives, within the ordinary powers and duties of a law-agent himself to execute the writings by which a sale of his client's property is carried through. Nothing, in the opinion of the Lord Ordinary, short of express, and, as he is disposed to think, written authority, to that effect, of which there are examples in the style books, ought to be held as sufficient to bind a client in such transactions; and the Lord Ordinary does not think that there is evidence of any such authority having been given in the present case.

"On the question of expenses, the Lord Ordinary has found the pursuer liable, only subject to modification, because the statutory objection to the designation of the writer of the missive offer, in respect of which the case has now been disposed of, was not raised till after the whole proof had been led. It is covered, no doubt, by the plea in law which the Lord Ordinary has sustained, but it is nowhere specifically stated in the record, and was not mooted at the discussion which led to the record being amended before the proof was allowed. Had it been so raised, the Lord Ordinary would have considered it right to deal with it before a general proof was allowed, and the expense of that proof would, in all probability, have been saved."

[1] Callender v. Callender's Trustees, Dec. 17, 1863, 2 Macph. 291, 36 Scot. Jur. 140.

[2] Corbet v. Douglas and Jarvie, March 5, 1808, Hume's Dec. 346; Boswell v. Selkrig, March 9, 1811, Hume's Dec. 350.

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recalled, and that there was here a good completed transaction of purchase and sale. I am, however, quite unable to come to that conclusion.

It was maintained, in the first place, as regards the Lord Ordinary's finding, that there was not a sufficient statutory designation of the writer of the offer of purchase, that there was at least quite a sufficient identification, if not designation of Mr Smith as the writer of that document, and that nothing more was requisite. It appears to me that there is neither designation or identification of Mr Smith. The mere incidental notice of Mr John Smith as "writer" is clearly not enough, seeing that there is no sufficient identification of any such individual as the writer of the offer. This is a much weaker case for the reclaimer than that of Callender v. Callender's Trustees,[1] cited by his counsel, where the writer was designed as "factor," and yet that was held to be insufficient, and the difficulty only got over in a manner and in respect of strong pregnant acts of adoption which have no place in the circumstances of the present case.

But it is said that the defective offer and acceptance,—the acceptance being equally liable to objection as to statutory solemnities,—were by a third writing or docquet confirmed by Mr Smith, as acting for and with the authority of both the seller and purchaser, and so validated and made obligatory. I am not satisfied, however, that Mr Smith had the requisite authority to confirm the offer and acceptance, or that there is any reliable proof to that effect. On this point, as well as the validity of the offer and acceptance taken by themselves, the case of Goldston v. Young[2] is very instructive. In that case the seller of heritable property went to a party who intended to purchase, and wrote out with his own hand what bore to be an offer by that party, which the latter subscribed and the seller accepted. The seller then brought an action for implement of the contract thus validly completed, as he thought, but it was held by the Court that the offer was defective, inasmuch as the statutory solemnities were wholly awanting as regarded the alleged offer, the same being neither tested in terms of law or holograph of the party by whom it bore to be made.

Without entering into further detail, I am quite satisfied that, 1st, the offer and acceptance here in question are in themselves defective and invalid; and, 2d, that their invalidity has not been cured by the alleged confirmatory document, or anything else that seems to have occurred. I have only to add that I am not prepared to say that it was absolutely incompetent for Mr Smith so to have acted as to bind both parties, provided he had clear and unquestionable authority to do so. At the same time it must not be overlooked that the Court will always deprecate the acting of the same agent for two parties having conflicting interests, and will very jealously and scrupulously examine his powers. But without determining any such point, it is enough to say that in the present instance Mr Smith's powers so to act for seller and purchaser have not been instructed.

I have no hesitation, therefore, in the circumstances of this case, in proposing that the interlocutor of the Lord Ordinary reclaimed against should be adhered to.

LORD NEAVES.—I concur.

We have heard a very able argument, which has helped us very much in a case of considerable nicety and novelty.

One point in the case, and perhaps the main one, relates to the validity of

[1] *Supra*, p. 166. [2] Dec. 8, 1868, 7 Macph. 188, 41 Scot. Jur. 122.

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this transaction, whereby Smith holds that he concluded a contract by means of what is called a confirmatory document. Without this docquet by Smith there could clearly be no contract, as the offer was not well met by the acceptance, and there never was a *consensus* between the seller and buyer. Can it then be said that this confirmatory document is valid? No doubt in the preliminary stages of a purchase or transaction it is quite competent for one and the same agent to act for both parties. As regards preliminaries it may often be the wisest and most economical course. But then can binding documents be concluded, such as a bilateral contract, by one man either in writing or without? I doubt whether delivery in such a case would not be necessary. Though delivery in the ordinary case of deeds jointly executed is presumed, it would be difficult to say that when it comes to be a question of a concluded contract each party should not interpone his individual consent.

It would be strange if an agent could say, "I hereby, as agent for A, offer this property at £100, and I hereby, as agent for B, accept of it at £95," and then, as agent for A, agree to the modified acceptance, and by paying himself a shilling, as agent for A, conclude a bargain binding on A and B.

If such a transaction is to be competent the whole surrounding circumstances must be such as completely to justify it, and there must be no doubt as to the authority and consent of the principals to the result. The question then comes to be, is that the case here? The offer is signed by one of the principals, the agent then goes and gets only a modified acceptance from the other, to which modification he accedes without going back to the principal offerer. There is no presumption that the agent had authority to step forward in this way and supersede his principal, after that principal had personally made an offer that had not been accepted.

I therefore think that we ought to adhere to the Lord Ordinary's interlocutor.

Lord Gifford.—This case arises under the old law, and must be looked at by the light of the old statutes, and decisions regarding deeds.

The first question is, whether the original offer is or is not a probative writ, or is it defective in respect it does not contain the designation of the writer, John Smith? On this point I am of opinion, with your Lordships, that there is no sufficient designation of the writer of the deed. No doubt very slight indications have been held sufficient, but here there is no designation at all. All that is said is, that John Smith will prepare the disposition, but that does not tell who John Smith was; anybody can prepare a disposition, whether a professional man or not; and so I think that there is not here a designation conformable to the requirements of the statute.

Secondly, the acceptance is admittedly not holograph, and accordingly it is not a probative writ, and consequently the missive offer and acceptance do not *per se* constitute a concluded and binding agreement.

But the counsel for the pursuer maintains that both these documents, although not binding by themselves, are made into a complete and binding agreement, legally obligatory on both parties, by the docquet subsequently added by Mr Smith. There can be no doubt whatever that defects of this nature in writs, that is, defects in the statutory solemnities, can be removed by a duly executed writ or docquet, granted either by the parties themselves, or by their authorised agents. That proposition is not disputed. It is possible also that the authority of the agent may competently be proved by parole.

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Then it is said that Mr John Smith was agent for both parties, and by his holograph docquet converted the imperfect missives into a completed agreement, both by supplying the want of statutory solemnities, and by acceding to a conditional acceptance.

But the argument here must go the length that Mr Smith could make the contract for both parties, and that he was authorised by both parties to do so. I grant that one agent may act for two parties in many cases, and quite rightly so,—for example, in conducting negotiations with a view to a sale or bargain, or in carrying out a bargain already made by the parties themselves. Even in such cases the position of an agent for both parties with adverse interests is a delicate one, but he has no power to make a new contract between his two constituents, and I have the gravest doubt whether it can be held competent or possible to appoint an agent with general powers to contract for both parties,—to make a contract on both sides,—to contract himself as agent for one party with himself as agent for another party. The two characters are incompatible and inconsistent. The agent must make the best terms he can for A, and then at the same moment he must secure the best terms he can for the opposite party B. He must deal at arm's length with himself. In short, he, a single person, must make a bilateral contract.

But even if such anomalous powers were possible, it would need wonderfully explicit authority to create such powers in one agent. It must come up to this, that both the parties appointed an arbiter to make a contract for them, not to act as agent, but as arbiter,—not to carry out the rights of his two clients, but to fix at his own pleasure what their rights should be. Now, it seems to me quite plain on this proof that Smith never was in such a position as that. He never was authorised to make a bargain of sale for both parties. He could not address a missive offer to himself, and then himself accept it, without communicating either offer or acceptance to either of his clients, and, in point of fact, he never supposed he had such powers. Accordingly, he went to his constituent, the seller, to get the offer signed, and the moment he did that he ceased to be entitled to alter the offer. The acceptance was in quite different terms from the offer, and although £6 is not a great sum, still the whole price was not large, and the deduction might have made all the difference. I am clearly of opinion, on the proof, that Mr Smith had no power to accede to the condition in the acceptance,—to make a new bargain,—to reduce the price even by £6, and the result is that there never was *consensus in idem*. On both grounds therefore, looking at the missives as they stand, as improbative and not binding, and being of opinion, on the proof, that Mr Smith had no authority to bind Mr Scott, I come to the conclusion that no contract was made which could be enforced in a Court of law.

LORD JUSTICE-CLERK.—This is a somewhat delicate and difficult case, but I concur with the proposed judgment.

The first objection to the missives on the statutory ground has, I think, been rightly decided by the Lord Ordinary, although, looking to the authorities, the point is somewhat narrow.

The clear ground on which it is impossible to sustain the transaction, apart from the statutory objection, is that there never was a completed contract. The seller never agreed to the conditions in the acceptance.

It may be that a case is possible where such a transaction as this might be

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sustained, where the agent is clearly employed and authorised by both parties. But it is quite clear Smith never thought he had power to make the whole contract.

I think we should adhere to the Lord Ordinary's interlocutor.

THE COURT adhered.

MORTON, NEILSON, & SMART, W.S.—J. & A. PEDDIE, W.S.—Agents.

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Dec. 8, 1874. Larkin v. M'Grady.

EDWARD LARKIN, Pursuer and Claimant.—*A. Blair.*
EDWARD M'GRADY, Respondent.—*Balfour—Pearson.*

Insanity—Process—Cognition—Title to Pursue.—The cousin-german, not being the nearest agnate, or the heir at law, or one of the next of kin of a person alleged to be insane, purchased a brieve of insanity. Objection to his title to pursue *repelled.*

Observed, that although the nearest agnate had not come forward to pursue the cognition, he might, after the person was cognosced, and the brieve retoured to Chancery, come forward and claim the office of tutor.

Process—Cognition.—At the trial of a brieve of insanity an objection was taken to the pursuer's title to pursue the cognition. The presiding Judge reserved the question for the consideration of the Court, and allowed the trial to proceed. *Held* that the procedure was competent.

Insanity—Brieve.—The Act of Sederunt of 3d December 1868, sec. 6, directs that after the trial of a brieve of insanity, if the whole heads of the brieve are not affirmed by the jury in favour of the person claiming as nearest agnate, then the formal writing made out and subscribed by the clerk shall bear that the brieve and claim are not proven. At the trial of a brieve of insanity at the instance of a person who was not and did not claim as nearest agnate the jury returned a verdict cognoscing in terms of the brieve, and finding that the pursuer was not the nearest agnate, and that another person named was the nearest agnate. It was contended that a verdict of not proven should be recorded, in respect that the heads of the brieve had not been affirmed "in favour of the claimant as nearest agnate." *Held* that the clause in the Act of Sederunt applied only to a case in which the purchaser of the brieve claimed as nearest agnate.

1ST DIVISION. B.

A brieve in Chancery was presented to the Lord President to inquire "whether Edward M'Grady, residing in Hamilton, is insane, who is his nearest agnate, and whether such agnate is of lawful age?"

Edward Larkin, miner, who claimed the office of curator, was pursuer, and appearance was made for M'Grady.

The case came to be tried before the Lord President and a special jury on 23d November 1874. "Counsel for the claimant, having in his opening address to the jury, admitted that the claimant was not the nearest male agnate, but only the younger brother of the nearest male agnate, and that he was neither the heir nor one of the next of kin:

"Counsel for the respondent contended;—(1) That the claimant had no title to purchase the brieve, and the jury ought therefore to be discharged, or directed to find a verdict of not proven. (2) In respect of the above admission, and of the provision of section 6 of Act of Sederunt, 3d December 1868, no other verdict than one of not proven could be returned. The Lord President allowed the trial to proceed, reserving the effect of the above objections for the consideration of the Court. Whereupon the counsel for the respondent excepted to the course adopted by the Lord President of allowing the trial to proceed reserving the effect of the above objections."

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The verdict of the jury was in the following terms:—"The jury 'cognosce' in terms of the brieve; but find that Edward Larkin is not the nearest agnate, neither is he the heir at law or next of kin of Edward M'Grady; and that Patrick Larkin, miner, Hamilton, is the nearest agnate, and is of full age."

The case came before the First Division on a bill of exceptions for the respondent.

He argued;—(1) The claimant had no title, not being the heir or one of the next of kin. The action was not an *actio popularis*, but confined to the nearest relations.[1] (2) The verdict should have been "not proven," as required by the 6th section of A. S. 3d December 1868.[2] (3) The whole heads of the brieve were not affirmed in favour of the claimant, but the contrary.

The pursuer argued;—The right of purchasing a brieve of cognition was not limited to the nearest agnate. Any one having interest might come forward. The practice was as the authorities shewed. If the nearest agnate came forward, the Court would probably appoint him tutor-at-law, but if not, the Court would appoint either the pursuer of the action or any one else they pleased to be tutor-dative.[3]

LORD DEAS.—The ground of this bill of exceptions is that the presiding Judge allowed the trial to proceed, reserving for the consideration of the Court the effect of the two objections stated by the respondents. I am clearly of opinion that the course which your Lordship followed was right and regular.

The other Judges concurred.

The Court disallowed the bill of exceptions.

LORD PRESIDENT.—Your Lordships having disallowed the bill of exceptions, we have now to dispose of the verdict of the jury. The respondents object to its being retoured to Chancery as an answer to the brieve, on two grounds. They say that the party called in these proceedings, the claimant, had no right to purchase the brieve; and, secondly, that in respect of the provisions of section 6th of the Act of Sederunt, 3d December 1868, the verdict ought to have been one of not proven.

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[1] Statute 1585, c. 18; Balf. Pract. 433; Stair, 1, 6, 25; Fraser, Parent and Child, 536; Stark v. Stark, 1746, M. 6291; Bryce v. Graham, Jan. 25, 1828, 6 S. 425.

[2] A. S. Dec. 3, 1868 (proceeding on Court of Session Act, 1868, 31 and 32 Vict. c. 101), sec. 6, is in these terms,—"When the jury return their verdict affirming the whole heads of the brieve it shall be noted 'cognosce,' but when the jury do not affirm the whole heads of the brieve the verdict shall be noted generally 'not cognosce,' unless there be any special finding regarding the person claiming in the character of nearest agnate (in which case the clerk shall make such note as the presiding Judge shall direct), and the jury shall then be discharged. And it shall be the duty of the clerk thereafter to make out and subscribe a formal writing embodying the verdict and answering the different heads of the brieve, which shall be retoured to Chancery, if the several heads of the brieve are affirmed but not otherwise," and if the whole heads of the brieve are not affirmed in favour of the person claiming as nearest agnate, then the formal writing, made out and subscribed by the clerk, shall bear that the brieve and claim are not proven.

[3] Inglis, 1701, 4 B. S. 517; Moncrieff v. Maxwell, 1710, M. 6286; Ld. Reay v. Anderson, 1800, M. 16,385; M'Allister, June 7, 1798, 6 S. 440, Note.

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1. I am of opinion that the result of the authorities is that such a brieve may be purchased by a person who is not the nearest male agnate, if he is a near relation. It is not necessary for us to determine what degree of propinquity will suffice. But I think it clear that a person who is at once a cousin-german of the person whose sanity is in question, and the immediate younger brother of the nearest agnate, who, failing him, would become the nearest agnate, is within the category of near relations.

2. As to the second point, no doubt the terms of the 6th section create at first sight a little difficulty. The respondents contend that, under the last clause of the section, a formal writing should be made out and recorded to the effect that the brieve and claim are not proven, in respect that "the whole heads of the brieve are not affirmed by the jury in favour of the person claiming as nearest agnate."

But it is to be observed that the person who appears as claimant in this cognition does not claim in the character of nearest agnate. So that the provision of the 6th section does not in terms apply to this case. It is indeed abundantly clear that it was not intended to apply to a case of this kind, but to a brieve pursued by the nearest agnate, or by a person alleging himself to possess that character. And what is meant is that if he fails on any one of the three heads a verdict of not proven is to be recorded. That is quite right. If he fails on the first head, then the man is not insane. If he fails on the second, the pursuer is not what he represents himself to be. And if he fails on the third, he is not of full age. The verdict, therefore, ought to be one of not proven. But is this a verdict of not proven? I apprehend not. The jury cognosce in terms of the brieve. They find, secondly, that Patrick Larkin is the nearest agnate. Thirdly, they find that he is of full age, and therefore capable of taking the office of tutor, and he can do so still, when this brieve is retoured to Chancery, if he is so inclined. If he is not inclined to take the office, an application may be made for an appointment of tutor-dative under 19 and 20 Vict. c. 56, sec. 19, or for the appointment of a *curator bonis*.

The Act of Sederunt was not intended to destroy a title which was otherwise good.

The clerk will therefore make out a formal writing embodying the verdict, and answering the different heads of the brieve, and that will be retoured to Chancery.

LORDS DEAS and MURE concurred.

LORD ARDMILLAN was absent.

ON the matter of expenses this interlocutor was pronounced:—"The Lords, having heard counsel as to the expenses incurred in this cognition, find the pursuer entitled to his expenses, including those caused by the bill of exceptions, and remit to the Auditor to tax the amount of the said expenses, and report: Find that the expenses of the defender (respondent) in these proceedings will form a proper charge on his estate, as the said expenses shall be taxed by the Auditor on the principle of taxation as between agent and client," &c.

JOHN LATTA, S.S.C.—MORTON, NEILSON, & SMART, W.S.—Agents.

JOHN GAIRDNER, Pursuer and Appellant.—*D.-F. Clark—Gloag.*
J. AND T. YOUNG, Defenders and Respondents.—*M'Laren—Asher.*

No. 47.

Dec. 10, 1874.
Gairdner v. Youngs.

Proof—Conjunct Probation—Proof in Replication.—The defender in an action on an account stated a contra account, and pleaded compensation. Proof was allowed to both parties "of their respective averments in so far as not expressly admitted on record, and to the pursuer a conjunct probation." Evidence was led by both parties, and then the pursuer led his conjunct proof, in which he went minutely into various objections to the defender's contra account raised by him on record, but which he had not touched in his proof in chief. *Held* that the defender was entitled to a proof in replication.

Observed (*per* Lord President) that it was the duty of the pursuer in his proof in chief to lead evidence on all the points raised by him on record.

1st DIVISION. Sheriff of Ayrshire. M.

JOHN GAIRDNER, wood merchant, Newton-on-Ayr, raised an action in the Sheriff-court of Ayrshire against Messrs J. and T. Young, engineers, also at Newton-on-Ayr, to obtain payment for an account of wood furnished.

The defenders admitted that the account sued for was due and resting owing by them, with the exception of a small sum of £1, 10s. 7½d., which they averred that the pursuer had agreed by writing under his own hand to deduct as an overcharge. But they claimed payment of a contra account due by the pursuer to them for machinery and other articles furnished, and pleaded compensation.

The pursuer, in answer to the defenders' statement of facts, objected to the various items of the defenders' contra account, on the ground of badness of material and workmanship, and overcharge, and in respect to the most important item, on the ground of the inefficiency of the article in working.

The Sheriff (N. C. Campbell), on appeal, allowed both parties a proof of their respective averments, in so far as not expressly admitted on record, and to the pursuer a conjunct probation, and remitted to the Sheriff-substitute.

The pursuer, his account generally being admitted, tendered himself as a witness merely to explain the circumstances connected with the allowance of a deduction averred by the defenders, and then closed his proof in chief.

The defenders thereupon adduced two persons in their own employment, and two men of skill, and examined them generally as to the quality of the articles furnished, and the reasonableness of their charges, and closed their proof.

The pursuer then led his conjunct proof, adduced eight witnesses, and entered with great minuteness into proof of his objection to the defenders' contra account.

On the pursuer's conjunct proof being closed the defenders moved for a proof in replication, which the Sheriff allowed on the particular points specified, and by the witnesses named in a minute put into process.

After the defenders' proof in replication was led the Sheriff found generally in favour of the defenders in the action.

The pursuer appealed to the Court of Session.

LORD PRESIDENT.—The first thing to be determined in this case is whether proof in replication was properly allowed to the defender. I cannot say that this process has been well conducted. From first to last the proceedings have been faulty, and the blame attaches equally to all parties concerned. The original allowance of proof was made in the interlocutor of the Sheriff-principal of 4th

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June 1869, which "allows both parties a proof of their respective averments, in so far as not expressly admitted on record, and to the pursuer a conjunct probation." It seems to me that under that order for proof it was the duty of the pursuer to lead evidence on all the points raised by him on record. He was not entitled to confine himself to the particulars of his own account. He had raised the question, whether the defender had overcharged the items contained in his contra account, and if he did not lead proof of his averments on this point he was really leaving that proof till his own anticipated conjunct proof came to be led. Such a method of conducting his case was quite unjustifiable. It was depriving the defender of any reply to his proof of the real matter in dispute between them. The pursuer was quite wrong in not entering upon this subject in his proof in chief. Very naturally the defender was not particularly careful in leading evidence on this point, for he had nothing to meet but the pursuer's averments on record, which had not yet been supported. He contented himself with adducing two of his own people and two men of skill. But then comes the pursuer's conjunct probation, in which, for the first time, he enters on a very large question, judged at least by the mass of evidence. He goes minutely into a question of overcharge, and assails not only the material and the workmanship, as well as the price of the article supplied by the defender, but also the efficiency of the article when put in use. And then, according to the terms of the Sheriff's interlocutor, the proof should have ended. But the Sheriff very naturally said, "Looking to the way in which the pursuer has conducted his proof, he has exposed the defender to a great disadvantage, and a proof in replication must therefore be allowed." I cannot say that he was wrong in this conclusion. It was very wrong that the case should ever have come into such a position as to require a proof in replication. But under the circumstances I think the Sheriff did right to grant it.

We must therefore enter on a consideration of all the evidence that has been led.

LORD DEAS, LORD ARDMILLAN, and LORD ORMIDALE concurred.

ON a consideration of the evidence the Court refused the appeal.

FYFE, MILLER, FYFE, & IRELAND, S.S.C.—MILLER, ALLARDICE, ROBSON, & INNES, W.S.—Agents.

No. 48. Dec. 12, 1874. Stevenson v. Magistrates of Rutherglen and Others.

REV. W. F. STEVENSON (Minister of the Parish of Rutherglen), Objector.—*Sol.-Gen. Watson—Gloag.*

THE PROVOST, MAGISTRATES, AND TOWN-COUNCIL of Rutherglen, Respondents.—*Balfour—Alison.*

MRS ROSALIE W. WARDROP AND OTHERS (Henry Wardrop's Trustees), Respondents.—*Balfour—Alison.*

JOHN PINKERTON, Respondent.—*Balfour—Alison.*

Teinds, valuation of.—A decree of valuation in 1634 bore to value the teinds of certain lands belonging to a burgh, which had hitherto been paid in rental bolls. *Held* that there was no presumption that the teinds of the burgh green, which formed part of the lands, and which, though capable of cultivation was presumably in pasture at the date of the valuation, had not been included in the conversion into rental bolls, and were not therefore included in the valuation.

Observations (*per* Lord Justice-Clerk) on the case of Orwell, March 8, 1867, 5 Macph. 557, 39 Scot. Jur. 271.

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Teinds—Valuation—Proof—Onus.—A decree of valuation dated in 1634 bore to value the teinds of the lands of A, with the exception of a certain ten shilling land, which through lapse of time it had become impossible to identify. In a locality in 1874 the proprietor of a portion of the lands of A founded upon the valuation as embracing his lands. *Held*, in the absence of evidence as to the situation of the ten shilling land, that in the first instance the onus lay upon the minister to shew that the heritor's lands fell within the exception, but that in the circumstances that onus had been discharged.

2D DIVISION.
Lord Shand.
Teind Clerk.

IN the locality of Rutherglen a scheme of locality and state of teinds was framed by the common agent which did not shew sufficient free teind to meet the augmentation. The minister, the Rev. W. F. Stevenson, objected, on the ground, *inter alia*, "that there were certain lands in the parish from which the objector draws no stipend, and which are not entered in the state of teinds or locality. In particular, the following lands are in this condition :—

"(1) The lands of Ellisbank, belonging to Wardrop's Trustees, and possessed by Mr Aitkenhead at a rent of £30, ...	£30	0	0
"(2) The lands of Gooseberry Hall,* belonging to John Pinkerton, at a yearly rent, it is believed, of .	30	0	0
"(3) The ground called the Green, belonging to the burgh, of which the estimated rental is . .	128	0	0

"The teinds of the said lands fall to be localled on in the scheme of locality."

A decree of valuation dated 18th June 1634 was produced, which was obtained at the instance of Sir William Hamilton of Elliston, titular and tacksman of the teinds, both parsonage and vicarage, of the parish of Rutherglen, against the provost and bailies of the burgh as representing the burgh, and against the remanent heritors and feuars within the same. By this decree the Lords Commissioners "find and declair that the parsonage teyndis of the lands of Rutherglen, called the Kingis Lands, estimat to ane ten pund land or yrby, pertaining to the inhabitantis of Rutherglen for the maist part, by and attor ane ten shilling land thereof, perteining to the said persewar heretably, is worthe, and that the samen may be worthe and pay yearlie in constant rent, sax chalderies victual, quhairof four chalderis quhyt aittis, and twa chalderis beir, and the burrow ruids estimat to ane three pund land, including certain parcells or ackeris pertaining to the said persewar, with some common land or loningis, fourtie bolls victual, half meil half beir, and the said Lords decernit and ordainit the said six chalders victuall of the qualitie foresaid, and fortie bolls victuall, half meill half beir, to continue and be repute and haldin as the just, treu, and constant worthe and rent of the said thertein pund land, excludeing the said persewaris ten shilling land of the Kingis Lands, and including his aikers of the burgh ruidis or common landis yearly, communibus annis, in all time coming, deducing always of the said whole parsonage teynds his Matie's ease, extending to ane-fifth part yroff, because ye treu worthe of the saids parsonage teynds

* The lands of Gooseberry Hall were admitted to consist of four parcels, which came to be united in the hand of the respondent Mr John Pinkerton, viz., (1) the lands of Alleys, acquired from Walter Campbell of Shawfield on 4th May 1790; (2) a small piece of ground acquired from the magistrates of of Rutherglen on 1st June 1796; (3) the lands called Flatters, acquired from John Gray of Scotstown on 5th May 1806; and (4) the lands called the Nine Riggs, acquired from Walter Buchanan and Robert Macfarlane in August 1813 and June 1814.

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of the landis and aikeris rexive above written, being referrit to the said persewaris probation, and having the sole and onlie prerogative to prove, conform to the Act of Parliament, the samen being all led teyndis, he producit ane number of famous witnesses, wha sufficientlie proved the said parsonage teynds to be as is particularly above written, with deductione always of ane fifth part for his Matie's ease, conforme to the said Act of Parliament, and therefoir the saids Lordis decernit and ordainit in manner foresaid, and sicklyke ordains lres. gif need beis to be direct hereupon in form as effeiris."

On this valuation a surrender was made by the provost and magistrates as representing the burgh and the remanent heritors in 1836, and sustained by Lord Ordinary Cockburn on 21st January 1837.

The question which arose between the parties was whether the three parcels of land belonging to the several respondents, and mentioned in article 5 of the objections, were or were not included in the valuation, and the teinds thereof surrendered.

The Lord Ordinary, Shand, on 6th March 1874, allowed the parties a proof of their respective averments on record in reference to these particular lands and the teinds thereof, the objector to lead in the proof.

The following was the import of the proof, both parole and documentary, which was led on the subject of the burgh green:—The green of Rutherglen was situated on the south bank of the river Clyde, and extended to about 36 acres. The return which the burgh got from it during the last twenty years had ranged from about £150 to about £60; but this income was derived not from agricultural uses, but from other purposes to which the land had been applied. The green in its natural state was arable, and the soil of such a quality as to be well suited for producing cereal crops; it was not reclaimed moor-land, or other naturally sterile land, made arable by artificial operations, but at the date of the valuation of 1634 the land was the same in character and quality as at present. From the older documents in process it appeared that the green, though always fitted for producing crops, was used as pasture land, and was pastured by the burgesses, many of whom were proprietors of small properties called "burgh roods," or parts of what had been the "common lands," or other property originally acquired from the burgh, and who paid a small annual rent to the magistrates for the privilege of pasturing their cattle on the green, and probably also on the other land belonging to the burgh. From a minute of council, however, dated 1653, quoted in Ure's History of Rutherglen, published in 1793, and from other evidence, including parole testimony, it appeared that the green was occasionally under crop, possibly for some years after 1653, and at any rate occasionally from 1763 to the present time. The inference drawn by the Lord Ordinary from the evidence as a whole was that at the date of the decree of valuation the green was in pasture, but that at the same time the proof did not exclude the notion that the green might have been even at that early date cropped from time to time, and that it was always quite suitable for cultivation. Though the pursuer of the valuation, Sir William Hamilton, had right to the vicarage as well as to the parsonage teinds, and in the subsumption of the summons of valuation the defenders were called to see that the teinds, "both parsonage and vicarage," should be valued by the Court, yet the decree included parsonage teinds only in its operative words. There was, however, no indication on the face of the decree that the teinds of any kind of any part of the lands mentioned had been excepted from the valuation, nor was there any reservation for after valuation of vicarage teinds of the green, or any indication that there were other teinds leviable than those

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which were valued. The decree was acted on from its date down to the present time, and during that period no stipend was ever allocated upon the green. It was proved by a number of documents that the thirteen pound land, being the ten pound land called the king's land, and the three pound land made up of the burgh roods and certain parcels of land and common lands or loanings, had from a period antecedent to the date of the decree, and from its date until the present time, been regarded as equivalent to the burgage land, *i.e.*, the land within the boundaries of the burgh. The parties who signed the objector's presentation were the heritors of the thirteen pound land, and their right to do so under a conveyance of the patronage, dated in June 1734, by Mr Campbell of Shawfield, who had acquired right to the titularity from Sir William Hamilton, was settled in the case of Brown v. Johnston, 9th June 1830, 8 S. 899. The reference to the teinds as being "all led teinds," which occurred in that part of the decree referring to the proof adduced by the titular, did not conclusively shew that the titular drew the *ipsa corpora* of the teinds, but was explained by the fact that there had been a constant use of payment of the teind of the whole lands at a certain agreed-on rate in rental bolls, or a conversion of rental bolls into money. Besides the fact that a portion of the teind was stated in meal, which was inconsistent with the notion of the teind having been drawn directly from the lands, the documents recovered from the burgh records shewed that Sir William Hamilton, the titular, was in use to draw a certain gross amount of teind for the whole thirteen pound land, so far as not in his own possession, from the magistrates and council, for themselves and on behalf of the other heritors, and that the magistrates, in their turn, received the proportions of the teind payable by each heritor.

The Lord Ordinary, on 3d September 1874, pronounced this interlocutor:—"Repels the objections for the minister in regard to the green of Rutherglen belonging to the burgh; and finds that the green was included in the lands the teinds whereof were valued by the decree of valuation obtained at the instance of Sir William Hamilton of Ellieston, Knight, dated 18th June 1634, founded on by the respondents, and that the teinds so valued were surrendered in 1836 by minute of surrender lodged in the process of locality then in dependence, and which was sustained by interlocutor of 21st January 1837: Sustains the objections for the minister in regard to the teinds of the lands of Ellisbank and the lands of Gooseberry Hall respectively: Finds that the proprietors of these lands have failed to prove their averments that the teinds thereof were valued by the said decree of valuation of 1634, and that the teinds of these lands are therefore liable in stipend, and remits to the clerk to rectify the locality accordingly: Finds the objector liable in expenses to the respondents, the magistrates and council of the burgh of Rutherglen, and finds him entitled to expenses against Wardrop's trustees and John Pinkerton in the question between him and them respectively: Allows accounts of these expenses to be given in."*

* "NOTE.—The question between the parties is, whether the teinds of (1) the green of the burgh of Rutherglen, belonging to the burgh; (2) the lands of Ellisbank, belonging to Wardrop's trustees; and (3) the lands of Gooseberry Hall belonging to John Pinkerton, were valued by the decree of valuation of 1634, mentioned in the preceding interlocutor. The whole of these lands are situated within the burgh, and hitherto no stipend has been specially allocated on them. . . .

"The question raised, like others, as to the scope and effect of old decrees of valuation which have occurred for decision, are attended with considerable difficulty; but after consideration of the special terms of the decree, with the light

No. 48. Against this interlocutor both the minister, on the one hand, and Wardrop's trustees and John Pinkerton, on the other, reclaimed.

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of the evidence, consisting mainly of ancient deeds and minutes of council and other documents, I am of opinion that the decree of valuation must be held to apply to the green of Rutherglen, but that the proprietors of the other lands have failed to shew that it includes the properties belonging to them."

(His Lordship here went at length into the evidence relating to the green.)

"2. In regard to the lands of Ellisbank and Gooseberry Hall. . . . The heritors, Wardrop's trustees, and Mr Pinkerton, allege that the lands now belonging to them respectively belonged to Sir William Hamilton at the date of the decree in 1634, and this is admitted by the minister. . . . The question between the parties is, whether the respondents' lands formed part of 'the parcells or ackeris' which were valued, or part of the ten shilling lands of the king's lands which were not valued.

"The decree is open to the observation that its terms are not such as of themselves to identify and distinguish the lands then belonging to Sir William Hamilton which were valued from those which were not.

"Some parcels or acres of land is an expression which does not identify any lands, but the parcels or acres are mentioned as having been part of 'the burrow ruids,' and if the respondents could shew by their titles, or otherwise by satisfactory evidence, that their lands had been part of the burgh roods, and so part of the three pound land, they would be entitled to have the present question decided in their favour. There has been no reference to anything contained in the titles which marks the lands as having been burgh roods, and the evidence otherwise is not sufficient, in my opinion, to prove that they were so. On the contrary, I rather think the preponderance of the evidence is to an opposite effect.

"In the ordinary case, it lies on the owner of the lands to discharge the onus of shewing that his teinds have been valued. The production of a decree expressed in such terms as fairly to include the lands may shift the onus to the objector; but in the present case the decree alone cannot be accepted as having that effect, for, according to its terms, part of Sir William Hamilton's lands was the subject of valuation, another part was excluded, and from the decree alone it cannot be gathered within which category the respondents' lands fall. It may be unfortunate for the respondents as heritors interested that this is so, but their predecessor alone is to blame for the omission to have the decree so expressed as to identify the lands which were the subject of valuation.

"The decree, therefore, does not shift the onus from the heritors. The question remains, and it is one of difficulty, whether the decree, combined with the usage which has followed, under which the lands have hitherto been free from any allocation of stipend, is sufficient to do so. In the present case, the teinds, having been those of the titular's own lands, would only be localled on so long as they remained in this position, after the other teinds of the parish had been exhausted. This would account for the fact that no stipend was allocated on the lands in earlier schemes of locality, and might lead to the lands being omitted in later schemes, even after they had become liable. In the particular circumstances of the present case I am not prepared to hold that with a decree, the terms of which are so loosely expressed as the present, the usage is sufficient to entitle the heritor, from usage alone, to succeed in his contention that his teinds are valued. It rather appears to me that in order to bring his lands within that part of the decree which is here founded on he must either shew that his lands are part of the burgh roods, or otherwise point out other lands within the burgh unvalued, which have been localled on, or are liable to be localled on, as the ten shilling lands of the king's lands which belonged to Sir William Hamilton.

"I am of opinion that the respondents have not adduced evidence sufficient to instruct either of these points. I presume the titles of the particular lands throw no light on this subject from the terms of the descriptions there used, because no argument to that effect was maintained; and while the burgh

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It was argued for the minister;—(1) Though the green might be contained within the words of the valuation it was not valued, inasmuch as it was in pasture and not teindable at the date of the valuation. Further, the valuation was by rental bolls, and bore to be of parsonage teinds only. Such valuation could only cover those parts of the land valued which were actually producing crop at the date of the valuation; therefore, as the green was not producing crop it was not included in the valuation.[1] (2) As it was proved that the lands of Ellisbank and Gooseberry Hall belonged to Sir William Hamilton at the date of the valuation the inference was that they formed part of the excepted ten shilling lands, and the onus of proving that they did not fell upon the heritors, and they had failed to discharge it.

Argued for the provost and magistrates as representing the burgh;—Though the green might have been under pasture at the date of the valuation, it was, at that date, capable of cultivation, and therefore teindable; and as it was clearly included within the limits of the valuation, it must be held to have been valued.[2]

Argued for Wardrop's trustees and John Pinkerton;—In the circumstances of the case, the onus of proving that the lands were not valued fell upon the minister, and he had failed to discharge himself of it.[3]

At advising,—

LORD JUSTICE-CLERK.—The questions which arise for our decision in this case are, first, whether the green of Rutherglen is included in the valuation of 1634 and the surrender of 1836; and, secondly, whether certain small portions of land situated within the burgh of Rutherglen are so included.

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roods, consisting of small portions of land in the hands of other heritors, are not at a great distance from the respondents' lands in question, yet I think the fair inference from the meagre evidence adduced is rather to the effect that the lands in question formed part of the king's lands, on which an old castle belonging to the family of Sir William Hamilton had stood, than that they are part of the burgh roods. It was urged for the respondents that most of the adjoining lands paid stipend in meal and bear, being the kind of victual in which the burgh roods were valued, and not oats and bear, the victual in which the king's lands stand valued; but it was pointed out by the objector that the king's lands and burgh roods run into each other at various points, as some of the heritors pay partly in the one quality of victual, and partly in the other.

"It is proved by extracts from the sasine records that Sir William Hamilton, at the date of the decree, was possessed of other lands than those belonging to the respondents, and particularly of lands lying in or near East Croft and at Wardlawhill; and as the lands of Eastcroft and Wardlawhill pay stipend in meal and bear, and are included in the surrender of 1836, it was argued by the objector that the inference to be drawn is that these lands are the burgh roods or acres which belonged to Sir William Hamilton, and were valued by the rental under the name of parcels or acres. There appears to me to be reason for this view, and at least that it affords sufficient grounds for requiring some more distinct evidence from the heritors than they have adduced in support of their contention, that their lands are the parts of the burgh roods referred to."

[1] Richmond v. Common Agent in Locality of Orwell, March 8, 1867, 5 Macph. 557, 39 Scot. Jur. 271; Plummer v. Common Agent in Locality of Selkirk, Dec. 21, 1867, 6 Macph. 124 and 128, 40 Scot. Jur. 70; Houston v. Common Agent in Locality of Haddington, Jan. 17, 1868, 6 Macph. 235, 40 Scot. Jur. 139.

[2] Lord Glenlyon v. Clark, Nov. 15, 1842, 5 D. 69, 15 Scot. Jur. 4; Learmonth v. City of Edinburgh, June 1, 1859, 21 D. 890, 31 Scot. Jur. 491; Earl of Moray v. M'Diarmid, Nov. 16, 1869, 8 Macph. 142, 42 Scot. Jur. 274.

[3] Minister of Banchory-Devenick v. The Heritors, June 22, 1871, 9 Macph. H. of L. 121, 43 Scot. Jur. 428.

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The Lord Ordinary has very clearly explained the general circumstances under which these two questions arise, and I shall not attempt to deal with the very complicated details on which we had so full an argument, but shall content myself with indicating the principles which should regulate our decision, and the result of their application to the facts before us. The parsonage teinds of the burgh of Rutherglen were, with the limitation I shall immediately refer to, valued in 1634 at the instance of the titular, Sir William Hamilton of Shawfield. It appears from the valuation, and is consistent with the general history of the burgh administration, that at the date of the valuation the teinds had been converted into rental bolls, and were in use to be collected by the magistrates of the burgh. I infer, from the fact that in a locality of 1650 the stipend was directly laid upon the magistrates, that they held some kind of right from the titular at that time by way of tack or otherwise. It seems also clear from the titles and documents in process that this burgh territory which was the subject of valuation was broken into a great variety of small holdings or pendicles of land which are described in the different titles as roods or rigs or acres or gardens belonging to the inhabitants of Rutherglen, or patches of land or other description such as one might expect in the case of ground parcelled out among the burgesses of the burgh. From a paper in the locality of 1805 I find that Mr Farie of Farm stated that he was in possession of twenty-five or twenty-six acres situate in a great many different parts of the burgh territory. The titular, as I have said, was Sir William Hamilton of Shawfield, whose estate was acquired by Campbell of Shawfield, including the patronage and the right to the teinds, and in 1730 or thereabouts he conveyed to the magistrates the whole parsonage teinds of the burgh territory, and afterwards the patronage, stipulating for an immunity from teind in respect of the lands which he himself retained. He afterwards obtained a private Act of Parliament in 1789, authorising him to sell so much of the estate of Shawfield as should pay off the debts therein specified by judicial sale, and in the sales which followed the different lots had a certain proportion of teinds specifically allocated on them, and some were left entirely free. I have stated these additional facts, because they seem to throw some light on the questions which we are now to consider.

In regard to the green of Rutherglen, at present a piece of grass land of thirty-six acres, I concur with the Lord Ordinary in holding that it was included in the valuation of 1634. It was unquestionably embraced in the burgh territory, because the thirteen pound land specified in the valuation represents the land which the burgh held of the Crown under very ancient charters for payment of thirteen pounds Scots, and as the green is unquestionably in the land so held, it was necessarily included in the words of the valuation. If the minister contends that, notwithstanding the words of the valuation, it was, in point of fact, not valued, I think it lies with him to establish that proposition; and it was contended to us that he had done so, on the following grounds:—It was said that in 1634 the green was in pasture, and was not then considered a teindable subject, and that as the valuation was not one of stock and teind together, but assumed the rental bolls which the heritors had been in use to pay as the criterion of value, it must be held, on the authority of the case of Orwell, that the green was not then valued. But I think the argument, though able, embraced several fallacies. In the first place, it is quite certain that the green was a teindable subject—that is to say, was capable of cultivation as arable land, the proof of which is, that for a considerable period during last

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century it was used for that purpose. And it has been found in several cases that land, although never known to have been so cultivated, yet susceptible of cultivation, was teindable. In the second place, and this seems to be conclusive, it is manifest from the terms of the valuation itself that the rental bolls, although representing a conversion of the teinds, were paid in respect of land which from time to time might not be used for crop. Indeed, it seems certain that many of the pendicles of which I have spoken must have been in this situation, and the valuation includes in terms "some common lands or loanings," sufficiently proving the truth of this assertion. Thus, even if it had been proved, which is far from being the case, that these thirty-six acres had never been under crop prior to 1634, I should have thought this fact wholly immaterial.

I need only farther add on this head that the case of Orwell affords no ground for the general proposition maintained for the minister, that where the valuation is made by rental bolls under the alternative permitted by the king's commission, the state of the land at the date of the valuation determines whether it is included or not in the valuation. As these rental bolls represent an ancient conversion the state of the lands when it was accepted as the valuation cannot possibly shew for what lands the rental was originally payable. The passage in Lord Benholme's opinion bears no such signification. It only means this, that where specific prestations had been previously in use to be paid as in lieu of the teind exigible these could not be held to comprehend subjects which from their nature could not have been actually under crop before, while, when stock and teind are valued together, and a fifth of the rent assumed as the value, the case might be different. The case of Orwell seems a very clear one. The question was whether the teinds of a share of an undivided commonty were to be held as included in the valuation of certain specific lands. It was doubtful enough whether the heritor had any right in the commonty at the date of the valuation, but it seems quite certain that prior to its division the commonty could not have been a subject from which parsonage teinds were payable. The fact that the common green of Rutherglen has never been allocated on for stipend tells neither one way nor other in this question of valuation. The fact plainly arose from the magistrates being from the first the collectors and ultimately the titulars of the teinds.

In regard to the second question which has been raised it stands somewhat differently. Holding that the valuation included all the burgh territory, it nevertheless did so with one specific exception, and that was certain ten shilling lands then belonging to Sir William Hamilton, the titular. I cannot read the valuation otherwise. Whether these ten shilling lands had been valued before, or whether the titular did not care to value subjects in his own hands, we have no means of ascertaining. The fact, however, remains, that while the minister has got by the surrender the full amount of the specific valuation, he has obtained no teind whatever in respect of these ten shilling lands, and is to that extent deprived of his right. The question is whether the deficiency must be made up by the lands in question.

I am quite satisfied that the task of identifying these lands is entirely hopeless, nor do I care to engage in the attempt to weigh the probabilities of this matter. The question must be solved by deciding on whom the burden of proof is laid. The general rule is that an heritor must prove that his lands are embraced in the valuation, but I am of opinion that, in the first instance, that onus is sufficiently sustained in this case by an heritor who shews that his lands are

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within the territory, and that if the minister alleges they are within the exception, that cannot be presumed but must be proved,—otherwise the valuation would be entirely useless to any heritor who could not prove the negative. Holding, however, that it lies with the minister to give *prima facie* evidence that the lands in question were within the exception, I think he sustains that burden sufficiently by shewing that these lands were the property of Sir William Hamilton at the date of the valuation and have not hitherto been localled on for stipend, and therefore I am prepared to concur in the view of the Lord Ordinary as far as relates to the lands of Gooseberry Hall or Ninerigs and those belonging to Wardrop's trustees, seeing it is certain that these were derived from Sir William Hamilton. It is not unreasonable to hold that it lies with Sir William Hamilton's successors to shew that their lands are not excepted from the valuation, and this, I think, they have entirely failed to do. In regard to the two other pendicles of land, which appear to have been derived from the burgh and from the Duke of Hamilton, I think the claim of the minister cannot be sustained. The only element which would have weighed with me against this result is the immemorial non-payment of stipend, which may possibly have originated from the stipulation made by the titular in 1730, and the distribution of the stipend over the lots sold under the Act of Parliament of 1789. But until now the minister never had an interest to challenge this state of things, and holding, as he has always done, the magistrates as his paymasters, he could not have been expected to do so.

Lord Neaves concurred.

Lord Ormidale.—I have come to the same result. The difficulties in the case have arisen from the lapse of time since the decree of valuation in 1634. Owing to that great lapse of time it is not surprising that it should be found impossible to arrive at a conclusion which can be said to be absolutely right.

It did occur to me, on the first view of the case, that the onus of proof ought to be laid entirely upon the minister. But when it was explained that until he obtained the present augmentation he had no interest to raise the disputed questions I came to see that it was right the onus should, in the first instance at least, be laid on the heritors to shew that their lands were covered by the valuation.

Founding, however, on the case of Banchory-Devenick, the heritors maintained that the minister was bound even from the outset to shew that there were unexhausted teinds, and out of what lands. But the circumstances in the Banchory-Devenick case were quite different from what occur here. The successive ministers of that parish had for many years acted and transacted on the footing that the whole teinds were exhausted, and had accordingly, on that footing, applied for and obtained the benefit of the Small Stipend Act. Therefore, in that case, when the minister ultimately came to ask for an augmentation and offered to prove that there were unexhausted teinds, the Court, while they granted an augmentation, did so only on the footing of his undertaking to shew that there were lands out of which teinds were due. No such onus, however, was laid upon the minister in the present case when he was found entitled to an augmentation. I am therefore of opinion that the principle of the Banchory-Devenick case does not apply, and that, in accordance with the ordinary rule, the onus is, to begin with, on the objecting heritors. But the onus may shift, and, without going into a repetition of details, I think your Lordship in the chair has made a correct discrimination in this respect.

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According, then, to the proposed judgment, in which I concur, there will be an adherence, with a slight variation, to the judgment of the Lord Ordinary, who has manifestly bestowed great pains on the case, and explained in a note very clearly and satisfactorily the grounds upon which he has proceeded.

LORD GIFFORD.—To a large extent the question here is one of fact and not of law. It is whether the lands in dispute are or are not included in the lands the teinds of which are valued by the decree of valuation of 1634. If there had been no exception in the decree of valuation I apprehend that a question could hardly have arisen. The lands valued are described as the ten pound king's lands, belonging to the inhabitants of the burgh of Rutherglen, excepting the ten shilling land thereof belonging to Sir William Hamilton, the titular, and the three pound lands, consisting of the burgh roods, some parcels of land belonging to Sir William Hamilton, and some common lands or loanings. The whole lands amount to about 1000 or 1200 acres. The parsonage teinds of these lands are declared to be of a certain constant value, and there is no dispute that it is a good and valid valuation. But unfortunately the exception of the ten shilling land of Sir William Hamilton is introduced without any description or specification of where this ten shilling land is situated; and the difficulty now is to discover, after more than two centuries have elapsed, what Sir William Hamilton's ten shilling land really was. The exception is the cause of additional perplexity, inasmuch as Sir William Hamilton was at the date of the valuation proprietor of two sets of lands, viz., of burgh lands, which were included in the valuation, and of this ten shilling land, which was excluded from the valuation; and the question is, whether the lands belonging to Wardrop's trustees and Mr Pinkerton are part of the lands excepted or of those included in the valuation.

The burgh green stands in a different position. It certainly is included in the lands valued and in the decree of valuation. But then the minister says he will undertake to prove that, at the date of the valuation, the green was not a teindable subject, and therefore could not be valued. It is impossible to allow the minister, after this lapse of time, to come forward and try to upset the valuation by extraneous evidence. Where the valuation distinctly includes certain lands it is impossible now to allow it to be overcome by a proof as to the mode in which these lands were possessed at or before the date of the decree. I am inclined to think, therefore, that the proof is really incompetent. But whether competent or not the minister has failed to instruct his averments. Whether the green was in pasture or not in 1634 it was always capable of bearing corns, and, in this sense, it was always a teindable subject. It is expresly included in the decree of valuation, and it cannot be shewn that its teinds were not included in the value fixed.

The other two subjects, the properties of Wardrop's trustees and Mr Pinkerton, stand in a different position. The question is, are these lands part of Sir William Hamilton's ten shilling king's lands or part of his burgh lands? Now, here the actual tracing of the particular parcels of land is impossible. We have had conjectures suggested to us more or less ingenious. But they are only conjectures, and cannot safely lead us to a definite conclusion. It is a hopeless task, and consequently the question of onus or presumption becomes of importance. I agree with your Lordship that, in accordance with a long train of decisions, the onus here lies, in the first place, on the heritors. They must

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shew that their lands and teinds are valued by a valid decree of valuation applicable thereto. But this is an onus which, in the varying circumstances of each case, may be easily shifted. I think the onus in this case first shifted when the decree of valuation was produced and founded on by the heritors. The decree proves that the whole thirteen pound lands of Rutherglen are valued excepting the ten shilling land belonging to Sir William Hamilton, and this throws the onus on the minister to prove that the lands now in dispute fall under the exception. But when the minister shewed that the heritors' lands had descended to them from Sir William Hamilton, the onus, I think, shifted back to the heritors to shew that they were not part of Sir William Hamilton's excepted ten shilling king's lands, but part of his other lands, which, in the valuation, are coupled with the burgh acres. This, I think, the heritors have failed to do; and I therefore agree with the Lord Ordinary in giving the minister the benefit of the presumption so far as regards the lands which are traced to have belonged to Sir William Hamilton. As to lands not in this position they must be held as included in the valuation.

THIS interlocutor was pronounced:—"Recall the said interlocutor, and in lieu thereof repel the objections for the minister in regard to the green of Rutherglen belonging to the burgh, and find that the green was included in the lands the teinds whereof were valued by the decree of valuation obtained at the instance of Sir William Hamilton of Ellieston, Knight, dated 18th June 1634, founded on by the respondents, and that the teinds so valued were surrendered in 1836 by minute of surrender lodged in the process of locality then in dependence, and which was sustained by interlocutor of 21st January 1837: Repel the objections for the minister in reference to those parts of the lands of Gooseberry Hall which were acquired from the magistrates of Rutherglen on 1st June 1796, and the lands called Flatters, acquired from John Gray of Scotstown on 5th May 1806; as to which two parcels of land find that they are not shewn to have been part of Sir William Hamilton's lands, and must therefore be held to be part of the lands the teinds of which are valued by the said decree of 1634: Sustain the objections for the minister in regard to the teinds of the lands of Ellisbank and the lands of Gooseberry Hall, except the two portions above mentioned: Find that the proprietors of these lands have failed to prove their averments that the teinds thereof were valued by the said decree of valuation of 1634, and that the teinds of these lands are therefore liable in stipend, and remit to the clerk to rectify the locality in accordance with this interlocutor: Find the objector, the minister, liable in expenses to the respondents, the magistrates and council of the burgh of Rutherglen, and find him entitled to expenses against Wardrop's trustees: *Quoad ultra*, in the question between the minister and John Pinkerton, find no expenses due to or by either party," &c.

GEORGE BURN, W.S.—W. & J. COOK, W.S.—Agents.

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Maclaren v. Bradly.

JOHN FISHER MACLAREN, Pursuer.—*R. V. Campbell.*
MRS ANNIE CAMPBELL MORRISON OR LACY OR BRADLY, and HUSBAND, Defenders.—*Rhind.*

Indefinite Payment—Triennial Prescription.—In an action for payment of the balance due on a tradesman's account, for goods furnished and cash advanced, the triennial prescription was pleaded. *Held* that as indefinite payments by the debtor credited in the account fell to be applied in extinction of the items on the debit side of the account in the order of date, and as the items left unpaid consisted entirely of cash advances, the triennial prescription did not apply.

1ST DIVISION. Ld. Mackenzie. B.

JOHN FISHER MACLAREN raised this action on 25th July 1874 against Mrs A. Campbell Morrison or Lacy or Bradly and her husband, for payment of £30, 5s. 6d. sterling, being the balance of an account due by the defenders to the pursuer as assignee or indorsee of Messrs James Muirhead and Sons, watchmakers and jewellers in Glasgow. The account contained charges for goods furnished at various dates from June 25, 1869, to July 20, 1869, amounting to £173, 14s. 6d., and for cash advances from August 30, 1869, to November 4, 1869, amounting to £40, 11s.

The account credited the following payments by the defenders :—

1869.				
Nov. 15.	By cash,	£50	0	0
1870.				
Jan. 5.	„ cash,	80	0	0
July 18.	„ cash,	40	0	0
	„ watch,	14	0	0
		£184	0	0

and brought out a balance unpaid of £30, 5s. 6d.

The defenders pleaded ;—(2) Prescription.

The Lord Ordinary pronounced an interlocutor in which he found 'that the provisions of the statute 1579, c. 83, apply to the furnishings of goods and to the work charged for in the account libelled on: *Quoad ultra* allows the parties a proof of their respective averments in terms of The Evidence (Scotland) Act, 1866,' and appoints the proof to be led before the Lord Ordinary on a day to be afterwards fixed."

The pursuer reclaimed, and argued that he was entitled to apply the payments to the first part of the account,[1] and that the items left unpaid consisted entirely of cash advances.

At advising,—

LORD PRESIDENT.—(After stating the facts).—I am clearly of opinion that the statute 1579, c. 83, does not apply to cash advances. When an account consists partly of cash advances and partly of goods furnished the cash advances are exempted from the triennial prescription. This was decided in the case of Keir v. Magistrates of Kirkwall, 15th June 1827 (5 S. 802, N. E. 742), and there are other cases to the same effect.

The pursuer or his authors, Muirhead and Sons, have acknowledged that they have received from the defender £184, partly in goods and partly in cash, and they have credited the defender with that amount. The pursuer maintains that

[1] Bell's Pr., sec. 563 ; 2 Bell's Com. 535 (M'Laren ed.) 428 ; Hotson v. Threshie, Feb. 28, 1833, 11 Sh. 482 ; Paterson v. Strachan, Hume, Notes, p. 480 ; Boys' Trustees v. Hamilton, June 30, 1829, 7 S. 815 ; Lang v. Brown, Dec. 2, 1859, 22 D. 113, 32 Scot. Jur. 64.

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these payments are to be held as extinguishing the earlier items consisting of goods furnished. The result would be to extinguish the items for goods furnished, and also some of the cash advances, leaving only £30, 5s. 6d. still outstanding. The sums sued for thus consist only of cash advanced, to which the triennial prescription does not apply. I think the pursuer is right in his contention. The principle was well illustrated and explained in the case of Lang v. Brown, decided 2d December 189 (22 D. 113).

I am therefore of opinion that we ought to recall the Lord Ordinary's interlocutor, and that the plea of the triennial prescription should be repelled, and the case remitted back to the Lord Ordinary.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor reclaimed against: Repel the first, second, and third pleas in law for the defenders, and remit to the Lord Ordinary to allow the pursuer a proof in common form."

JOHN LATTA, S.S.C.—JAMES Y. PULLAR, S.S.C.—Agents.

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Dec. 16, 1874.
Bethune v. Morgan.

SIR JOHN TROTTER BETHUNE, Baronet, Pursuer.—*D.-F. Clark—Pearson.*
WILLIAM MORGAN, Defender.—*Sol.-Gen. Watson—Campbell Smith.*

Lease—Executor.—A tenant under an agricultural lease in favour of himself and his heirs, in which he bound himself, his heirs and executors, to pay the rent, died before the expiration of the lease. The heir declined to take up the lease, and the executor also refused to do so.

Question, whether the executor was liable for any loss the landlord might sustain through non-implement of the contract.

Held, by Lord Gifford (Ordinary), that the executor was liable.

1ST DIVISION, with three consulted Judges. Lord Gifford. M.

THE following narrative is taken from the opinion of the Lord President:—"The late Thomas Morgan, whose brother and executor William Morgan, is the defender in this action, was tenant of the pursuer, Sir John Bethune, in the farms of North and South Cassingray, under a lease in favour of himself and his heirs for nineteen years from the term of Martinmas 1858. By that lease he bound and obliged himself, and his heirs, executors, and representatives whomsoever, to pay to the pursuer yearly the sum of £850 sterling in name of tack-duty. The clause is in general terms and in the usual style. The deceased Thomas Morgan continued in possession of these farms until his death on 9th November 1871, and upon that event the defender, as his executor, entered upon the possession and management of the farms, and continued there till Martinmas 1873, for the purpose of realising for the executry estate that portion of the produce of the farms which belonged to the executry. But after this had been accomplished the defender intimated to the landlord his intention to remove, having no title as lessee and no intention of carrying on the farms even if the landlord had desired him to do so. The pursuer, on the other hand, avers that he was willing that the defender should possess the farms under the lease, but this the defender refused to do. The landlord now brings this action, concluding for a sum of £935, 12s. 6d. against the executor, as damages incurred by the landlord in respect of non-implement of the contract of lease. The heir of the deceased tenant refused to take up the lease, and there being no other heritable estate left by the tenant, there was no formal renunciation of the succession, but the refusal to take up the lease is, in practical effect

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such a renunciation. There could be no doubt that the heir was quite entitled to refuse to take up the lease.

"The defences which are stated against this action by the executor are (second plea)—'The defender, having broken no contract, nor otherwise injured the pursuer, is not liable to pay damages to him;' and (third plea)—'An executor, not being bound to fulfil all the personal engagements of the defunct, is not bound to pay damages for non-fulfilment of a contract when the contract bound the deceased to a defined course of personal conduct, and when that conduct became impossible through death or any other inevitable cause.'"

The Lord Ordinary, on 16th July 1874, pronounced this interlocutor:—"Finds that, according to the true meaning and effect of the lease between the pursuer on the one part and the late Thomas Morgan on the other part, the obligation to pay the rent therein stipulated is validly and effectually constituted, not only against the deceased Thomas Morgan, the original tenant, and against his heir-at-law representing him, but also against the executor of the said deceased Thomas Morgan, and that *in valorem* and to the extent of the executry-estate: Finds accordingly that the defender, as executor of the deceased Thomas Morgan, and to the extent of the executry-estate, is liable to the pursuer in the rents of the subjects let by the said lease, and that down to the expiry of the lease, subject always to deduction of all sums realised by or available to the pursuer from reletting the subjects of the said lease or otherwise, in consequence of the defender and the heir-at-law having declined to take up the said lease; and with these findings, and before farther answer, allows both parties a proof of their respective averments under the 'Evidence (Scotland) Act, 1866,' and appoints the case to be enrolled that a diet of proof may be fixed; meantime reserves all questions of expenses, and grants leave to reclaim."*

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* "NOTE.—The abstract question whether or not the defender, as executor of the late Thomas Morgan, was liable to the pursuer either for rent or for any of the prestations under the lease, was fully and anxiously argued at the debate, and both parties concurred in asking a judgment upon this question of law, as a decision thereof in favour of the defender would put an end to the litigation. The Lord Ordinary thinks this request reasonable, and he has, accordingly, decided the question argued.

"The defender is the executor of the late Thomas Morgan, and, admittedly, he is liable in the obligations of the said Thomas Morgan *in valorem* of the executry estate. Thomas Morgan, at the time of his death, was tenant of the farms of North and South Cassingray under a nineteen years' lease commencing at Martinmas 1858. The question is,—Whether the defender as executor (the heir-at-law having declined to take up the lease, and there being no other heritable succession), is liable to the pursuer either for the rent, or for any of the other prestations in the lease?

"The defender ingeniously maintained that, as the lease was destined to heirs only, as the defender, as the executor, could not claim as of right the succession to the lease, and as it had been expressly found that the defender is not personally bound to take up the lease, so he cannot be made liable either for the rent or for any of the other prestations in the lease, or for damages for the breach thereof.

"The question was said at the bar to be a new one, and the Lord Ordinary is not aware of any decided case precisely applicable. But, upon principle, he has not found much difficulty in repelling the defender's plea, and finding him liable in *valorem* of the late tenant's personal estate.

"(1) The terms of the lease itself are almost conclusive of the question. No doubt the destination in the lease is taken simply to the tenant 'and his heirs;' all assignees, legal and voluntary, are expressly excluded. But then, when the

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The defender reclaimed.

The pursuer added in the Inner-House a plea of *res judicata*. The case was heard before the First Division, with three Judges of the Second Division.

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tenant comes to bind himself to pay rent, he binds his executors as well as his heirs. The words are—'And, on the other part, the said Thomas Morgan binds and obliges himself, and his heirs, executors, and representatives whomsoever, to make payment to the said Sir John Trotter Bethune,' &c., 'yearly of the sum of £850 sterling,' &c. The meaning of this is not doubtful. It is that the tenant's whole estate, personal as well as heritable, is subjected to, and rendered liable in, payment of the rent due to the landlord. It may be that the heritable estate is primarily liable, although there is no discussion as between heir and executor. It may be that the executor, forced to pay, may have relief against the heir or the heritable succession, but surely when the tenant expressly binds his 'executors and representatives whomsoever,' these words can only mean that his personal estate is to be liable to the landlord. This is *pars contractus*. The parties have said so, and the law will enforce it. The defender's contention would lead to this, that, although the tenant had left a free personal estate of thousands or millions, the landlord would have no claim thereon for the deficiency of his rent. This contention seems quite inadmissible.

"It is true the executor cannot claim the lease as of right, nor probably could he be compelled to take it up and to cultivate the land, at least unless there be express stipulations to this effect, but this does not affect the express liability which the deceased tenant has constituted against his executor. Probably also, if the heir renounced the lease, and the landlord insisted against the executor, equity would require him, as a condition of so insisting, to receive the executor as tenant. But no question of this kind arises here. The landlord has all along been perfectly willing to receive the defender as tenant, and in the litigation which has already taken place between the parties, he tried to compel the defender and the heir-at-law, Mr James Peattie Morgan, to take up the lease. In this attempt, however, the present pursuer was unsuccessful. Both the heir-at-law and the present defender stated that they would have nothing to do with the lease, and would not become tenants therein. It by no means follows, however, that because the present defender cannot be compelled to take the lease therefore he is not liable as the late tenant's executor for what the late tenant has expressly bound him to pay.

"(2) The question now at issue seems almost to be *res judicata* in the previous litigation between the parties." (His Lordship here referred to the proceedings in the previous action, narrated in the Lord President's opinion.) "It is difficult to resist the conclusion that this finding, pronounced *in foro contentioso* between the same parties, and relative to the same matter, is final and binding against the present defender. At the same time, the Lord Ordinary would be unwilling to rely exclusively upon *res judicata*, if the pursuer's case were not otherwise founded in justice and on principle.

"(3) Various difficulties were ingeniously raised by the defender, none of which, however, appear sufficient to avoid the conclusion now reached. For example, the defender maintained that this is an action of damages for breach of contract; but as it has been found that the defender was not bound to take up the lease, there could be no damages for breach of a contract which was never binding on the defender. But the defender's proposition is too broad, for it often happens that damages are exigible where specific performance cannot be enforced,—for example, in all the higher contracts of service. The Court will not enforce specific implement against a clerk or partner, but he will be liable in damages if the contract is not specifically fulfilled. The true answer, however, is that the present is not an action of damages strictly or properly so called. It is an action for liquidated rent expressly covenanted to be paid, and all that the defender can claim is, that the landlord shall deduct whatever he can fairly make from the subject which has been thrown back upon his hands.

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LORD PRESIDENT.—The question raised upon this record is a very important one, and one of very general interest, and it amounts just to this, Where, upon the death of a tenant under a current lease, his heir refuses to take up his lease, is the landlord entitled to come upon the executor for damages for non-fulfilment of the contract for the remaining term of the lease?

The first plea which is maintained on the part of the pursuer is that this question has been already determined between these parties, and that the matter is *res judicata*; and that undoubtedly stands upon the very threshold of the case, and must be first disposed of.

Now, the case in which it is said that this question was determined between these parties is an action which was raised in the year 1872. The summons was signeted on the 6th July 1872, and was brought by this defender and by his brother, the heir of the deceased Thomas Morgan, against the landlord, and the conclusions of that action are, in the first place, on behalf of the heir, that he is not bound to implement the contract of lease,—in short, it is a declarator of immunity on his part from any of the obligations contained in the lease, by reason of his refusing to take up the succession. And then there follows a conclusion applicable to the case of the executor. The conclusion in favour of the executor is this:—"That the pursuer William Morgan jun. as executor to his late brother Thomas Morgan, or in any other character, is not bound to implement the foresaid contract of lease or to run out said contract;" and "further, that the pursuer William Morgan jun., as executor of the said Thomas Morgan, is entitled to realise the crop, stocking, and other moveable estate left by the said Thomas Morgan upon the farms of North and South Cassingray, and to sell the same by public auction at the term of Martinmas first 1872, or at the first term of Martinmas thereafter that may first occur, not less than twenty days from the date of final decree in this action, &c., always reserving the defender's right of hypothec, as also to vacate the said farms at the said term of Martinmas, as if the said lease had come to its natural termination." Now, this, again, upon

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instead of being enjoyed by the defender. The sound view is, that the landlord or lessor has two securities for his rent, viz., first, the personal obligation of the tenant and his representatives, and, second, the subject let itself and its fruits. Now, when the debtor refuses to take or enjoy the subject let, and allows the landlord to retain and make the best of it, all that he can demand is that the landlord shall deduct from the liquid rent due the utmost that he can recover from his real security.

"A farther difficulty raised by the defender was how far the landlord, who at best is only a creditor for sums to fall due during the next three years, can demand decree for a present sum, even offering, as he does, to discount interest. But this does not create any practical difficulty, and the defender himself, who says he is anxious to wind up the executry-estate, will hardly insist on keeping it up till the ish of the lease.

"As the parties are at issue as to what the landlord has realised from the lease, and whether he has duly and timeously re-let the subject, and on other points of detail, the Lord Ordinary has allowed a proof. Here again the defender demanded, as of right, a jury trial, insisting that this was an action of damages and an enumerated cause. As this is not the view the Lord Ordinary takes, and as the questions in dispute are more appropriate for a proof, the Lord Ordinary has ordered proof in common form. He has reserved expenses, but the whole expenses since closing the record should fall on the defender."

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the part of the defender, is a declarator of immunity also. He desires to have it declared that he is free from any of the obligations contained in that lease, and entitled, at the same time, to realise the crops which belong to the executry estate. The important pleas which were maintained in that action on behalf of the defender, the landlord, are the second and fourth. The second is,—"The pursuers, as representing the late tenant, being bound to implement the obligations in the lease and to carry it on to its expiry, under the penalties therein stipulated, they are not entitled to decree as concluded for." And the fourth is,—"At all events, the pursuers are not entitled to relinquish the farm, and to have decree as concluded for, without admitting their liability, and providing for the loss and damage incurred and to be incurred to the defender in respect of breach of contract." Now, it will be observed that these two pleas embrace the case of both the pursuers, but taking them as pleas directed against the case of the present defender, the executor, they amount to this, that the executor, as representing the late tenant, is bound to implement the obligations in the lease, and is not entitled to have a declarator of immunity from these obligations for the future, except upon the footing of his making good any loss and damage which the landlord has incurred in respect of non-fulfilment of the contract. The issue thus raised is said to be identical with that which is raised in the present action, or, at all events, it is said that the issue which is raised in the present action is comprehended within that which is raised by the first action. On this question of *res judicata* it certainly does not matter at all that in the one case the executor is pursuer and the landlord is defender, and in the other that the landlord is pursuer and the executor is defender, if the question raised in the two cases be the same, the parties being also the same.

Now, the interlocutor which was pronounced by Lord Shand, in so far as concerns the executor's case, is this,—"As regards the other pursuer, William Morgan jun., Finds (1st) that having completed a title as executor of his late brother, the said Thomas Morgan, and having in that character intromitted with his brother's moveable estate, he is liable, as his brother's executor, for the fulfilment of the obligations contained in said lease, or otherwise in damages for breach thereof; (2) that he has become personally responsible for the rents stipulated by said lease for the crops and years 1871-2 and 1872-3, but has not by his actings made himself personally responsible, and is not personally liable for the fulfilment of the obligations of the said lease for the period thereof which has yet to run, as maintained by the defender; (3) that the pursuer, the said William Morgan jun., is entitled to realise and dispose of the whole crop and stocking on the said farms in such manner as he may think to the best advantage, subject always to the defender's right of hypothec, and to his, the said William Morgan junior's, existing obligations as executor foresaid, and personally to the defender in terms of the preceding findings, and decerns." Now, in some respects, this is a judgment in favour of the executor. It is in his favour in so far as it finds that he is not personally responsible to the landlord for the obligations of the lease for the period yet to run, and it is in his favour also in so far as it entitles him to reap the crops for the years 1871-2 and 1872-3 without incurring any such personal obligation. But it is against him in so far as it makes him personally responsible for the rents of these two years, and again in so far as it makes him liable, as executor, for the whole obligations of the lease during the period yet to run. I think this is a very distinct and discriminating interlocutor, be it sound or unsound upon its merits. And this

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interlocutor was brought under review of the Second Division of the Court at the instance of the defender in that action, the present pursuer. He objected to the findings which were contained in that interlocutor in favour of both the pursuers. But the present defender (the executor), although that reclaiming note gave him an opportunity of bringing the findings under review in so far as they were adverse to him, did not avail himself of that opportunity, and so the interlocutor, as far as he was concerned, became final.

Now, as Lord Shand has found that the executor, William Morgan jun., as executor, and in that character specially, is liable for the whole obligations of the lease for the period yet to run, or otherwise in damages for non-fulfilment of these obligations, and as this action is brought for the purpose of recovering the damages thus arising, it does not appear to me that it is possible to dispute that that liability is a matter upon which judgment has been already pronounced —or, in other words, that so far as the liability of the present defender is concerned this is *res judicata*. I do not think there could be any better test of that than to look at the interlocutor pronounced by the Lord Ordinary in this case, which seems to me just to decide over again the question which was decided by Lord Shand; for Lord Gifford finds "that the defender, as executor of the deceased Thomas Morgan, and to the extent of the executry estate, is liable to the pursuer in the rents of the subjects let by the said lease, and that down to the expiry of the lease, subject always to deduction of all sums realised by, or available to, the pursuer from reletting the subjects of the said lease, or otherwise in consequence of the defender and the heir-at-law having declined to take up the said lease." That seems to me, as far as the executor is concerned, to be a judgment to the same effect, although in other words, with that which was pronounced by Lord Shand. I am therefore for sustaining the plea of *res judicata*.

The LORD JUSTICE-CLERK, and LORD DEAS, LORD NEAVES, LORD ARDMILLAN, LORD ORMIDALE, and LORD MURE concurred, expressly reserving their opinion on the general question.

THIS interlocutor was pronounced:—"Recall the said interlocutor reclaimed against: Sustain the plea of *res judicata*: Find, in terms of the judgment in the previous action between the same parties, that the defender having completed a title as executor of his late brother Thomas Morgan, and having in that character intromitted with his brother's moveable estate, he is liable as his brother's executor for the fulfilment of the obligations contained in the lease contracted by the pursuer and the defender's late brother, or otherwise in damages for breach thereof." The Court further remitted to the Lord Ordinary to allow a proof, and found "the pursuer entitled to expenses since the interlocutor reclaimed against, but under deduction of one-third of the taxed amount thereof," &c.

GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—WILLIAM MILNE, S.S.C.—Agents.

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MRS JESSIE STEWART HOWAT OR AULD, Pursuer.—*Sol.-Gen. Watson—J. C. Smith.*
JOHN CAMPBELL SHAIRP, Defender.—*D.-F. Clark—Lancaster.*

Reparation—Slander—Title to Sue—Executor.—A widow, two years after her husband's death, raised an action of damages as his executrix and as an individual,

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alleging that the defender, by illegally retaining a professorship in a college after his appointment to the office of principal, and by slanderous statements concerning the deceased, had prevented the patron of the professorship from implementing a written promise to appoint the deceased to the chair. *Held* (*diss.* Lord Ormidale) that the pursuer had set forth a title to sue.

Observations on the maxim of the civil law, *Actio personalis moritur cum persona.*

2D DIVISION. Lord Gifford. R.

THIS action was raised on 2d January 1874 by Mrs Auld, as executrix-dative of her husband, the late James Auld, LL.D., sometime classical master, Madras College, St Andrews, and as an individual, against John Campbell Shairp, LL.D., Principal of the United College at St Andrews. The summons concluded for payment of £5000 "in name of damages and as a *solatium.*"

The circumstances out of which the action arose were shortly as follows:—Upon the resignation of Principal Forbes, the defender, who was then Professor of Humanity in the United College at St Andrews, received from the Crown the appointment of Principal of the College. On the 17th December 1868 he intimated to the College and to the Duke of Portland, the patron of the chair of Humanity, his readiness to resign the chair of Humanity at such time as should be advantageous to the college and convenient to the Duke. Upon the suggestion of Mr James Melville, W.S., the Duke's commissioner in Scotland, and at the request of the College, Principal Shairp consented to teach the Latin classes till the end of the session. This arrangement was embodied in a minute of the College, dated 17th December 1868.

In consequence of these proceedings, applications for the office of Professor of Humanity were made to the patron by various candidates, and among others by the late Dr Auld, husband of the pursuer, then classical master in the Madras College, St Andrews. His application was dated 11th March 1869, to which he received the following reply from the Duke:—"Welbeck, 13th March 1869. Sir,—I have this morning received your letter of the 11th inst., with the testimonials, and have great pleasure in determining at once to appoint you to the chair of Humanity in the University of St Andrews, notwithstanding the previous applications for it from others for some months past, all highly recommended. I feel assured the superior claims of yourself will be generally admitted by all whose opinion is of importance, and I trust that few, if any, of your rival candidates will fail to acquiesce in the fitness of the selection. I have only further to add that I shall be obliged to you to put yourself in communication with Mr Melville of George Street, Edinburgh, my commissioner for Scotland, when the proper time arrives for completing the appointment, and to beg you in the meantime to take the best means of making it generally known that your appointment is decided upon, to relieve others from their suspense. I have the honour to be, Sir, your most obedient servant. SCOTT PORTLAND."

The pursuer averred;—(Cond. 6) "In reliance upon the appointment conferred upon him by the foresaid letter the said James Auld, on 19th March 1869, resigned his appointment, then held by him for life, as head classical master in the Madras College of St Andrews. In his letter of resignation he proposed that his retirement should take place at Whitsunday following, being the period of the termination of the United College session, when his appointment as professor would take effect." (Cond. 7) "Notwithstanding the legal disability of the principal of the said United College to hold a professorship in conjunction with his office of principal, and notwithstanding his actual resignation of the professorship of Humanity, to take effect from 15th May 1869, as embodied in the fore-

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said minute, the defender, on the expiration of the time during which it was agreed that he should continue to perform the duties of the professorship, refused to demit the same, and continued to exercise the office of professor, and to receive the emoluments pertaining to the office until after the death of the said James Auld, which took place on 11th August 1871." (Cond. 8) "In order to obtain the concurrence of the Senatus Academicus to his holding the new office of Principal and his former office of Professor of Humanity, and to prevent the Duke of Portland from issuing a presentation to the said chair of Humanity in favour of the said James Auld, the defender took repeated opportunities of slandering the said James Auld, and representing him to be a person unfit, both intellectually and morally, to fill the said chair. He made verbal statements to this effect to all the professors in the United College, and particularly to Professor Campbell, the Professor of Greek in the University, during the months of March, April, and May 1869, or about that time. Farther, in or about the months of March, April, and May 1869, the defender wrote letters to the patron, the Duke of Portland, in which he falsely and calumniously represented that the said James Auld was unfit to discharge the duties of the office to which the said patron had promised to appoint him, that he was a broken down old man incapable of the work of the chair, from age, infirmity, and ill health, and that he had obtained the promise of the appointment from the said patron through the deceitful or fraudulent use of certificates or testimonials which did not truly represent his qualifications and which had been given to him, he being fully aware of the fact of their being so given, not as *bona fide* testimony of his merits as a scholar and teacher, but out of compassion and pity, and to save him from being dismissed from the office of classical master in the Madras College, St Andrews, which he then held. The purport of some of the said letters was to some extent communicated to the said James Auld, but neither he nor the pursuer have been able to ascertain the exact terms of them. They were, however, to the effect above mentioned."*

* The letter chiefly founded on was recovered under a diligence:—"United College, St Andrews, 17 March [1869].—My Lord Duke,—I trust that my duty to the college over which I have been called to preside will be considered to justify my laying before your Grace the impression which the news of Dr Auld's proposed appointment to the Humanity chair has created in this university. It has been received with what I can call nothing short of consternation. Those interested in the United College feel that it would be one of the heaviest blows that could possibly be given to its prosperity. If Dr Auld is placed in that chair I feel sure that the reputation of the college as a place of education will receive a grievous shock, and that the number of students attending it will be greatly diminished. In making this assertion, which is my deliberate opinion, I am speaking at the same time the opinion of almost all the professors and residents in St Andrews with whom I have conversed on the subject. The grounds on which I make this statement are these: It is a well known fact here that Dr Auld, though an amiable and respectable man, has not proved himself an energetic or efficient teacher, but has notoriously failed in his present post as classical master in the Madras College, which is the name of our burgh school. In proof of this I have but to refer to the enclosed extract from the report of the Commissioners on Scottish Burgh Schools, 1868.

"If the account given in this extract describes truly his work in school among boys, how much greater will his failure be in teaching our college classes, which require much greater vigour, power of command, and scholarship. I believe that Dr Auld has forwarded to your Grace certain testimonials from some of the professors here, of whom several are now gone, one or two remain, and of these last I am myself one. Let me now inform you of the circumstances under which these were given. Six years or more ago the trustees of the Madras College

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(Cond. 9) "The said James Auld never obtained the said appointment, in consequence of the defender's said conduct and representations, and remained without employment till the date of his death, which took place in the forty-ninth year of his age, and was caused mainly by anxiety and disappointment. He sustained loss, injury, and damage, as has also the pursuer, from the defender's conduct and misrepresentations, to the extent of £5000 or thereby."

The pursuer pleaded;—(1) The defender having illegally retained possession of the said chair of Humanity, and wrongfully prevented the said James Auld from being presented thereto, and having thereby caused loss, injury, and damage to him and to the pursuer, he ought to be decerned to make reparation as concluded for. (2) The defender having slandered the said James Auld, he is liable in reparation as concluded for, with expenses."

The defender pleaded, *inter alia*;—(1) No title to sue. (2) The averments of the pursuer are irrelevant and insufficient in law to support the conclusions of the summons.

The pursuer having moved for a diligence to recover the letters containing the alleged slander, the Lord Ordinary, on 30th June 1874, pronounced the following interlocutor:—"Having heard parties' procurators upon the pursuer's motion for diligence, and also on the first and second pleas in law stated for the defender, repels said pleas, in so far as the same are insisted in as excluding the action altogether; and, before farther answer, grants diligence at the pursuer's instance for recovery of the

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became so dissatisfied with Dr Auld's teaching that they resolved to remove him from his post. Several of the professors, believing that he was being somewhat too rudely dealt with, and feeling compassion for an amiable man in danger of losing his livelihood, wrote for him testimonials expressed as strongly as they could, perhaps somewhat too strongly. The testimonials, I believe, saved Dr Auld from dismissal. This was the object with which they were written. But they were never intended to certify to his fitness for a professorial chair; and if Dr Auld has laid them before your Grace for this purpose I must be allowed to say that he had no right to do so. All the other candidates sent me their testimonials. Dr Auld did not do so, well aware that, in the interests of the college. I would not have given him any countenance in his candidature. Had I entertained any idea that his claims would have appeared to you superior to those of several of the other candidates, men of much higher scholarship and greater success as teachers, I should have felt it my duty to inform you of the real state of the case, as I now do. If it is still possible for your Grace to reconsider your decision, I know that the university would forward to you a memorial signed by almost every professor, representing how great a calamity Dr Auld's appointment would be considered, and entreating that you would make some other appointment which would be likely not only not to injure the university but might be expected to benefit it.

"In doing this the professors of the United College and of St Mary's would act not from any personal feeling against Dr Auld, towards whom personally they are friendly disposed, but simply from the conviction that his appointment would be calamitous to the welfare of the university.

"I would only add that in making this statement I have done so with much pain, but I feel that I should be wanting in my duty both to my college and to your Grace if I did not tell you what I know to be the truth of the case.—I remain, my Lord Duke, your obedient humble servant, J. C. SHAIRP."

"Extract from Government Report on the state of Education in the Burgh Schools of Scotland, vol. ii. page 76.—Dr Auld's department.—On the whole, the classical teaching resulted in the production of unsatisfactory scholars, only the two or three boys at the top of the class did well enough. The Latin prose exercise was ill done, the discipline was loose, and the boys appeared uninterested."

writings mentioned in the specification No. 8 of process, and commission No. 51.
to Mr George Watson, advocate, Edinburgh, or to Mr Stuart Grace, solicitor, St Andrews, to examine the havers and receive their exhibits, the commission to be reported within fourteen days: Appoints the pursuer to lodge issues within four days after the said diligence is reported, reserving entire the defender's pleas, so far as not now repelled: Meantime, grants leave to reclaim against this interlocutor."*

Dec. 16, 187[illegible]. Auld v. Shairp.

* "NOTE.—In this case an anxious argument was maintained on the part of the defender, Principal Shairp, in support of the first and second pleas in law stated for him. He insisted that he was entitled, without any farther proceedings whatever, and without even recovering the letters containing the alleged slander complained of, to have the action dismissed with expenses. The defender accordingly resisted the pursuer's motion for a diligence, and objected to any order for issues being pronounced.

"The defender's argument was rested mainly on the maxim '*Actio personalis moritur cum persona*,'—a personal action dies with the person. He maintained that an action of damages or for solatium for alleged slander was a personal action in the strictest sense, and that the right to raise or to insist in such an action did not transmit to the executors of the person slandered. He supported this contention by various authorities and analogies from the law of England, and also from the Roman law.

"The Lord Ordinary was much moved by the defender's argument, which he has carefully considered. If the question had been quite open, the Lord Ordinary's inclination would have been to give effect to the defence, and to dismiss the action. He thinks there is strong reason, as well as strong authority, for holding that a mere claim for solatium for bodily or mental pain, where no damages to estate or patrimonial injury can be relevantly stated or proved, is really a personal action, to which the Roman maxim applies.

"In the present state of the authorities in the law of Scotland, however, the Lord Ordinary has found himself obliged to repel the defender's pleas, and to allow the action to proceed. It will be for the jury to consider how far the alleged slander, if proved, and if no other defence is made good, has resulted in loss and injury to the present pursuer.

"In the first place, no case has been cited by the defender in which an action like the present has in Scotland been found incompetent. The Lord Ordinary is not aware of any such case, or even of any dictum in the institutional writers, directly in point, although there are expressions which may be read consistently with the defender's view. The want of any direct authority in favour of the defender's plea is a strong ground for refusing to sustain it. The case must often have occurred.

"But there seems to be authority in the law of Scotland adverse to the defender's pleas, and there are many cases in which actions of damages similar in nature to the present have been insisted in by executors or personal representatives.

"A very well known instance occurs in the celebrated case of Haggart v. Lord President Hope (final report in House of Lords, 2 Shaw's Appeal Cases, 125). This was an action of damages at the instance of an advocate against Lord President Hope for alleged slanderous censure uttered by the Lord President on the bench judicially, which censure was alleged to have been made from motives of private malice. In the course of the procedure the pursuer, Mr Haggart, died, but his trustees and executors were allowed to insist in the action. There seems to have been a question whether the trustees might not have been required to give their oath of calumny, but it was not doubted that they had a right and title to insist in the action.

"In Mein v. M'Call, 7th June 1844, 6 D. 1112, 16 Scot. Jur. 486, where the pursuer of an action of damages died during the dependence, it was found that the claim of damages was transmitted to his widow and executrix, who was entitled to insist in the action.

"In Neilson v. Rodger, 24th December 1853, 16 D. 325, 26 Scot. Jur. 156, the question was fully and carefully considered, and it was held by the Second

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Division (dissenting the Lord Justice-Clerk), that in an action for personal injury concluding for damages and solatium, where the pursuer died during the dependence of the action, her executors were entitled to insist in the action, with an issue whether the injury which the pursuer had sustained was to the injury and damage of the deceased pursuer and of the executors as representing her. The opinion of the Lord Justice-Clerk Hope, who was in the minority, is a very weighty one, but the decision is binding at all events upon the present Lord Ordinary.

"It is thought no sound distinction can be taken between an action for solatium for bodily injury and an action for solatium for slander which occasions mental suffering. Nor will the result be different in the case where the action is actually raised by the original sufferer and afterwards insisted in by his executor, from the case where the party injured dies before raising action. No doubt the fact that the deceased did not himself raise action may be of great weight with the jury, especially if any considerable interval was allowed to elapse, but this will not affect the abstract competency of the action. Reference may be made to the cases of Milne v. Gauld's Trustees, 14th January 1841, 3 D. 345, 13 Scot Jur. 151; Smith v. Stoddart, 5th July 1850, 12 D. 1185, 22 Scot Jur. 532; Gilfillan v. Monkhouse, 18th May 1824, 3 S. 23.

"But there is another element in the present case which operates strongly as a reason why the present action should be allowed to proceed, and that is, that special patrimonial damage is alleged by the pursuer, consisting not only of the loss of the late Dr Auld's former income, arising from his resignation, but also of the loss of the emoluments of the Humanity chair, from which, it is said, Dr Auld was excluded by the alleged slander complained of. It was not seriously disputed by the defender that where there has been direct patrimonial damage the action transmits to an executor. See Gordon v. Davidson (Aberdeen Bank), 26th February 1864, 2 Macph. 758, 36 Scot. Jur. 376.

"On this point of the case, however, the defender maintained that there could be no patrimonial damage, because the chair of Humanity in St Andrews, for which the late Dr Auld was a candidate, was not vacant during Dr Auld's life, having been held by the defender himself all that time, and he being under no obligation to resign. This led to an interesting argument as to how far it was legal or competent for the defender to hold at the same time the office of Principal of the United Colleges of St Salvator and St Leonards, and also the office of Professor of Humanity in the United College. On this point the Lord Ordinary has formed a pretty distinct opinion that there is no absolute illegality in the union of the two offices, it not being alleged that the discharge of the duties of the chair interfere with, or are inconsistent with, the discharge of the duties of principal. The provisions of the Act of Parliament of 1747 are not conclusive on the question, for although the statute provides that there shall be one principal and nine professors, this does not necessarily mean that one of the professors may not be appointed to and hold the office of principal. The practice both in St Andrews and in other universities seems to have sanctioned at least the occasional appointment of one of the professors to the office of principal, without involving the demission of his chair. The recommendations of the Royal Commissioners of 1826 and 1830 never had the force of law. They were never formally sanctioned or confirmed; but even these recommendations are so qualified as to imply that a principal may, in certain circumstances, also hold a professor's chair.

"It does not appear necessary, however, to pronounce any judgment upon this question; for the pursuer's case is not founded exclusively on the alleged illegality of the defender's plurality of offices, but also upon his intimation that he was ready to resign and on an alleged minute of resignation. The pursuer also relied upon the late Dr Auld's actual resignation of his life appointment of classical master in the Madras College, which resignation is said to have been made in consequence of his appointment to the professorship, which the defender stated

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so much of the interlocutor of the Lord Ordinary as repels the first and second pleas, adhere to the same in so far as it grants diligence for the recovery of writings, and appoints issues to be lodged: Of new appoints the said diligence to be reported by the first box-day, and issues to be lodged by the first sederunt-day in October, reserving all questions of expenses."

The pursuer's diligence having been executed, issues were lodged for her.

The debate was then resumed.

Argued for the defender;—By the civil law an action for slander did not transmit to the heirs of the person slandered or against the heirs of the slanderer, unless an action had been raised in which litiscontestation had taken place.[1] The same view was held by the modern civilians, and the reason assigned was, that unless an action was raised in the lifetime of the injured person there was a presumption that the injury had been forgiven.[2] By the French law, while such actions transmitted against the representatives of the wrongdoer they did not transmit to the representatives of the injured person.[3] The law of England was to the same effect as the civil law.[4] It was said upon the other side that this was not a mere claim for solatium for wounded feelings, but that the slander complained of involved special patrimonial loss to Dr Auld, viz. the loss of the emoluments of the chair of Humanity. To support this averment of patrimonial loss it was necessary for the pursuer to shew that the slander was the cause of the loss,—in other words, to shew that the chair of Humanity was vacant. Unless it was illegal in the defender to retain that chair (and the Lord Ordinary was with the defender upon this point), it was impossible for the Duke of Portland to fulfil his promise to Dr Auld, and any loss which he suffered arose not out of the defender's slander, but out of a legal act on the part of the defender, which could not found a claim of damages.

Argued for the pursuer;—Had Dr Auld survived it would have been a jury question how far Principal Shairp's statements injured Dr Auld's professional prospects. The claim, if well founded, would have given right to a sum of money. A claim for money, which it was in the power of a person to add to his estate, if successful, transmitted to his representatives.[5]

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would be vacant as from 15th May 1869. On the whole, the Lord Ordinary thinks it would be unsafe to exclude all inquiry into these matters, and to decide them as mere questions of relevancy upon the pursuer's averments.

"The result is, that, in the Lord Ordinary's opinion, the action must proceed. The usual order would be an order for issues, but the letters containing the alleged slander are not in the pursuer's possession, and as the pursuer intends to put these letters in issue, he moved for a diligence to recover them. The defender resisted this, not only on the grounds of irrelevancy above mentioned, but also on the ground that the letters were private and privileged. The Lord Ordinary has granted the diligence, but the defender's plea of privilege is of course reserved entire. It cannot well be judged of till the letters themselves are seen.

"As the defender's pleas were seriously and keenly insisted in, as excluding the action altogether, the Lord Ordinary has granted leave to reclaim."

[1] Inst. iv. 12, 1 (see iv. 4, 1); Digest, xlvii. tit. 10, secs. 13 and 28.

[2] Vinnius on the Institutes, iv. 12, 6; Voet on the Pandects, xlvii. 10, 22; Heineccius on the Pandects, xlvii. 10, 124.

[3] Pothier, Traité des Obligationes, sec. 638; Domat, i. tit. 1, sec. 10; Merlin, Repertoire, "Injure," sec. 6 (vol. vi. p. 132).

[4] Broom's Legal Maxims, p. 912; Williams on Executors, vol. ii. p. 1728 (7th ed.); Addison on Torts, p. 925 (4th ed.); Chamberlain v. Williamson, Feb. 11, 1814, 2 Maule and Selwyn, 408, see Lord Ellenborough's judgment.

[5] See cases referred to by the Lord Ordinary; also Thom v. Bridges and Macqueen, March 11, 1857, 19 D. 721, 29 Scot. Jur. 311; Davidson v. Tulloch (Aberdeen Bank case), Feb. 23, 1860 3 Macq. 783, 32 Scot. Jur. 363.

No. 51. At advising,—

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LORD NEAVES.—This case involves questions of importance and interest, and is not unattended with difficulty.

The only points we have to consider at present are raised in the first and second pleas in law for the defender, viz., 1st, "No title to sue;" and 2d, "The averments of the pursuer are irrelevant and insufficient in law to support the conclusions of the summons." These pleas have been disposed of by the Lord Ordinary's interlocutor in this manner,—"Repels said pleas in so far as the same are insisted in as excluding the action altogether." This interlocutor is brought under review by the defender, who asks us, in the first place, to sustain his first plea, for if it were to be sustained the action, as he conceives, would entirely fail. This plea, which relates to the title to pursue, is rested upon the maxim of the Roman law with regard to an *actio personalis*,—it is said that this is a personal action, and falls with the death of the person. The action brought by Mr Auld's widow is said not to lie, in consequence of Mr Auld's death.

In the first place, as regards this plea, it is not easy, in any view. to say that there is an absolute want of title to pursue, because the action is partly laid as upon damage to the pursuer individually. Whether that is relevantly laid is another matter, but certainly the pursuer here proposes to prove damage to herself. What kind of damage does not appear, and of course it is a question whether it is relevantly stated; but as long as such damage is concluded for, it is impossible to say that there is not a title to sue.

In the next place, I conceive that this plea, with reference even to the damage sustained by the late Mr Auld, is not in our law so received and recognised as to be fatal to the action. The Roman law dealt with such actions in the case of the death of a party in different ways. In the case of some actions the death of either party was fatal to the action; in others, the right of action was allowed only to the injured party against the heirs of the wrongdoer. The Roman law, as stated in the Institutes, book iv. title 12, sec. 1, is as follows:—"Non autem omnes actiones, quæ in aliquem aut ipso jure competunt, aut a Prætore dantur et in hæredem æque competunt, aut dari solent. Est enim certissima juris regula, ex maleficiis pœnales actiones in hæredem rei non competere; veluti furti, vi bonorum raptorum, injuriarum, damni injuriæ. Sed hæredibus hujusmodi actiones competunt, nec denegantur: excepta injuriarum actione." It is this exception that is now founded upon. It is plain that actions of the nature of a proper suit for a penalty cannot be insisted in after the death of the wrongdoer, but the present case relates to the death of the injured party; and the Roman law states it as a general rule that an action even upon delict may be maintained against the wrongdoer by the heir of the injured party except in one case, and that is the *injuriarum actio*. Now, is this such an action? The reason of the exception in the case of an *actio injuriarum* is thus assigned by Vinnius:—"Actio injuriarum neque hæredibus neque in hæredes datur. Quod non datur in hæredes, hoc commune habet cum ceteris pœnalibus:" it is treated as a penal action—an action for punishment—"quod hæredibus non datur, ejus proprium est, et hanc rationem habet, quod in ea non principaliter de damno farciendo, sed de contumelia vindicanda agitur, quam vindictam, si injuriam passus lite non instituta decesserit, tacite remisisse intelligitur: de quo dixi, et hinc est quod actio injuriarum in bonis nostris

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non computatur ante quam litem contestemur." Now, if that be the ground of the law, it appears to be an arbitrary and artificial one. It may be a fair question of presumption, whether, according to the circumstances of each case, a party injured by a slander or libel has acquiesced: his having made no complaint,—but gone to his grave after some time without saying anything about it,—may afford grounds, when discovered and investigated, for relieving the party from the consequences of that which had been done, but which was not apparently felt as an injury. But to make an inflexible rule that the death of the injured party shall exclude the action, and that he shall be held to have condoned or remitted it, seems a forced, and, it may be, a very false assumption. It takes into account in no way the interval of time between the injury and the death, and in that way it prevents us from forming any probable or reasonable presumption in the matter. Some authorities say that actual litiscontestation must take place before the action will pass to the sufferer's heirs and representatives. That is a view altogether inconsistent with the other presumption, because the bringing of the action ought to extinguish the presumption of condonation, though it does not get the length of litiscontestation, and is also, in my humble opinion, an artificial and unfair rule. We do not attach the same importance to litiscontestation as the Romans did, and therefore I cannot think that we should be prepared to rest our judgment upon that view.

There is an obvious distinction in principle between an action of a penal or criminal character for punishment or for vindication of the law, and an action for money reparation to a party injured, who has died at a short or a long interval. The two things are quite different. The one is brought in the public interest; the other is in the interest of the private party. Money is the universal solvent; everything can be turned into money that is either a gain or a loss; money is asked and damages are due for reparation of every possible suffering and injury that a calumny or a libel can inflict on the party affected. In that view, the alleged extinction of personal actions is evidently inapplicable, or not in accordance with sound principle. Our own law, at least on one side of the question, is stated accurately, as I conceive, by Mr Bell, who, speaking of these actions, says:—"A delict is an offence committed with an injurious, fraudulent, or criminal purpose. Criminal law looks to the prevention of delict by punishment, example, and terror, without any view to indemnification; while civil jurisprudence, looking only to indemnification, without regard to punishment or example, raises, for this purpose, by construction of law, an obligation to repair the damage occasioned by the delict." He goes on to say,—"The civil action for reparation, grounded on delict, is not, like the penal action in criminal law, confined to the delinquent. The wrongdoer's representative is liable for reparation; in which we follow the rule of the canon rather than of the civil law."[1] Now, this is stated only with regard to the wrongdoer's representatives,—the civil action of reparation transmits against the wrongdoer's representatives. But the same reason seems to be plainly applicable also to the case of the sufferer's representatives. Looking to the distinction between criminality and reparation, a civil action for reparation is not like a penal action in criminal law. If an injury is done causing damage, a civil debt immediately arises which may be sued for in a civil Court, and that action passes against the representative of the party who did the injury, just as any other action of

[1] Bell's Principles, secs. 544, 546.

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debt does. It seems to me that it must equally pass and transmit to the heir and representative of the injured party, who, unless his predecessor has forgiven it, which is not to be assumed, has acquired a right to a debt which may be enforced with all the usual diligences, arrestment on the dependence, and everything of that kind which can be used in any other action.

I observe that the Lord Ordinary has said that but for the authorities in our own law he would have been inclined to dismiss the action. I confess I have not that feeling. A person is injured by any act of wrongdoing—his character is damaged, his pecuniary affairs are affected, he loses a situation, he suffers a great deal of injury in many ways; why should that not be repaired by those that represent the actual wrongdoer, assuming always that there was wrong done? I cannot see any equity in that, and I doubt much if that is the result of the general jurisprudence of Europe.

It is particularly necessary to look at the nature of this action. I do not look upon it as an action for mere slander, or merely for the purpose of vindicating character. The statement substantially is that a line of conduct pursued by the defender, of which injurious representations were a part, but only a part, took place to the patrimonial loss and injury of the late Dr Auld, for which a debt arose to him,—a claim for reparation against the party who is said to have injured him. I cannot see how that should not transmit. Suppose a great patrimonial loss suffered—or take the special case of a situation being lost,—supposing that he had had a situation and lost it by an injurious act, partly founded upon slander, and partly otherwise,—why should his family, who partook of his fortunes, and would have succeeded indirectly to the benefit conferred, if he was in possession or was in expectation of a situation, be deprived of what might have been a just claim at his instance, and not be entitled to the benefit after his death in the same way as if he had survived litiscontestation? I cannot say that I think such a plea founded on equity or reason.

This action, in many respects may be found, when we get the length of considering the relevancy, a very difficult action to maintain on some points, for it involves very difficult questions. In particular, it seems to involve the question as to the alleged wrongful and illegal retention of the Humanity chair, which is at the bottom of the whole case. It will be a very difficult action to maintain if that contention is not well founded, and if Principal Shairp was entitled to hold the chair. The plea in law maintained by the pursuer is that the chair was vacant, but that by apparently filling it up, and by the letters written to the patron, the deceased Dr Auld was prevented from getting his appointment. The ground of action is a general line of conduct characterised as being wrongful in law, and injurious patrimonially, by occasioning the loss of one office and the giving up of another.

We have not yet got the length of relevancy, and I do not in the meantime go into that question. On the first plea we must hold the action to be relevant as laid, and consider whether, as so laid, the right has perished by the death of the injured party. Now, I cannot make up my mind to that defence even upon general principles; but I think that what I have stated is the law of Scotland. Mr Bell, in his Principles, cites two cases in the 15th volume of the Folio Faculty Col., which are deserving of attention—one of them the case of Macnaughton v. Robertson, February 17, 1809, where an action for reparation of actual patrimonial loss arising *ex delicto* was found competent against an heir *lucratus* by succeeding to the offender. And it is to be observed, as to that

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decision and some others, that what is meant is not that the particular offence had been the means of enriching the party, but that if there is a lucrative succession under which he is liable *passive*, he will be liable to repair the injury done.

There is another case in the same volume, Morrison v. Cameron, May 25, 1809, F. C., in which the rubric is, "Actions *ex delicto* pass against heirs if they are for damages, not punishment," and in a note annexed, I presume by the reporter, it is said—"The opinion of the Court was not rested on the circumstance that the action had proceeded a certain length before the death of the original defender, but on the ground stated above as in itself sufficient,"—that ground being that while criminal actions do not transmit against heirs, because their object is punishment, which could only answer its purpose by being inflicted on the delinquent himself, yet, where damages had arisen by delinquency, the right to reparation was a debt which was no more extinguished by the death of the debtor than any other debt; and I should presume also in the same way no more extinguished by the death of the creditor than any other debt; for a dying man transmits his claims, just as a man that has incurred a debt transmits his liability to his representative, if he has a representative that is passively liable. In that case it was said the pursuer, by the misconduct of somebody, had lost the benefit of his diligence, and in consequence suffered damage for which reparation was due. To this effect the action was held to transmit against the defender's representatives, and the reporter assigns this view as the ground, and not the fact that the action had proceeded a certain length, and he mentions another case of Mackenzie in which the same view was taken. The remarks made shew that, if there is any difference, there is greater difficulty in transmitting such actions against the representative of the wrongdoer, who may be wholly innocent, than there is in transmitting the right of action to the representative of the other party.

There is another well known case, the case of Neilson v. Rodger,[1] which seems to me to settle the case completely. It is a remarkable case altogether. The rubric is—"The pursuer of an action for injury sustained in the service of an employer died during the dependence of the action from the effects of the accident. Held that the right to recover damages transmitted to the executors of the deceased, and that they were entitled to carry on the action." Now, if we take the circumstance that the action having been brought was not considered to be essential, but that the question depended on the real relations subsisting between the parties, the opinions of the Judges in the case are very important. Lord Wood says,—"The claim for damages and solatium embraced by this action is one which had arisen to the original pursuer Margaret Neilson during her life, and which, by the institution of the action, she had given the best proof she did not mean to abstain from vindicating, as no doubt it was in her power to have done." Then he says,—"Upon the authorities I apprehend it cannot be denied that where a claim for damages and solatium arises on account of bodily injury, from any other cause, the right vests *ipso jure* and *ipso facto* prior to any proceeding or decree for its constitution, that it is a moveable claim,—is assignable either by positive conveyance or implied legal assignation, and that it passes to personal representatives." That was the opinion adopted by the majority of the Court. There was one opinion adverse to it, which is well worth studying, for it is rested on a ground peculiar to that action, and not at all involved in

[1] Neilson v. Rodger, Dec. 24, 1853, 16 D. 325, 26 Scot. Jur. 156.

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this,—at least not in such a way as is likely to receive any effect here. The view of the Lord Justice-Clerk, who differed from the rest of the Court, was this: The party who had been injured in her person, brought her action, and then had died of the consequences of the injury, and the reasoning of the Lord Justice-Clerk there was, not that the claim, if she had died in some other way, might not have transmitted, but that as she, the original pursuer, had died in consequence of an act that was the foundation of the act of damages, the true and full remedy arose from her death, and vested in those only who would be entitled to sue for what had happened by her death, which it would seem did not belong to them as her representatives, but to themselves in their own right, as upon an assythment; in short, that her claim, though made the subject of an action for the smaller damage of being a damaged person during life, was extinguished by the larger claim competent to her relations on account of her death,—that the one was swallowed up in the other, because the act on which the action was rested had first produced temporary illness and disablement during her life, but had ultimately had its accomplishment in bringing her to her grave. I do not know that his Lordship would have had any difficulty in the case if it had not been for that. He says,—"To me it appears essentially necessary, since death ensued from the effects of the injuries before the action came to a close, to consider whether such a claim would exclude the claim of the relatives who are entitled to compensation for the death of their relative;" and he says it could not do so, and that the temporary action brought in her lifetime would not transmit, because the supervening event had thrown it into the shade. Now, that view is not applicable to this case. The case is rested by Lord Wood on the footing I have stated, viz., that the right to damages and solatium arises *ipso jure* and *ipso facto* by the infliction of the injury, and that, being a debt, it transmits against the heir of the delinquent, in the same way as it transmits to the heir of the party who had suffered the damage.

I do not think we need go further than that authority. Other cases have been founded on which seem to support the same view. There are niceties about the respective rights of husband and wife,—about whether a husband can put a *veto* on the wife's action, or whether the husband can raise it; these are not directly raised here, but I think nothing has occurred in any of the cases to throw doubt upon the principle laid down in the case I have referred to, and in other cases, that an action for reparation is not a criminal, or a penal action but is an action for debt, which arises by the infliction of the injury, and which transmits against the heir of the party who did the wrong, and to the heir of the party who suffered the wrong. I think that is a reasonable principle established in our law. There are diversities of view taken in the canon law and in the French law, and in the English law too it may be. The English law of libel and of slander,—certainly of slander,—is different from ours, and we cannot find any safe authority there. We must look to the general principle established by our own authorities, and to the reason of the thing, and I think both reason and authority are in support of the view that we are now taking. That disposes of the first plea in law stated for the defenders.

The second plea is to the relevancy. The Lord Ordinary's interlocutor is limited, and I think properly limited, to repelling that plea in so far as the same is insisted in as excluding the action altogether. If this action is brought as an action for damage to the pursuer herself, I confess I have great difficulty in thinking that there is any relevancy, but the matters are so mixed up that a

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this stage it seems impossible to say that the whole action can be thrown out. Indeed, with reference to the whole action, there is great difficulty about its ultimate relevancy. It seems to me very doubtful whether its relevancy and sufficiency can be sustained without that preliminary and difficult question being solved, whether there was an incompatibility between the principalship and the chair of Humanity in the circumstances that are here stated. If there was that incompatibility, and if that incompatibility was radical and could not be cured by acquiescence either of the college or of the patron, then the chair was vacant, and it was erroneously filled, apparently to the exclusion of Dr Auld, supposing that he would have got the presentation if it had been open. On the other hand, if there was no incompatibility, and Principal Shairp was entitled to occupy the chair, it is difficult to say that damages could arise. Another very important question occurs, whether there was privilege. It would be very difficult to say that professors are not interested, and a principal above all, in stating *in bona fide* objections to the qualifications of any person who was proposed to be brought amongst them to be entrusted with such an important class as that of Humanity.

On these grounds, but without going further, I am prepared to affirm the Lord Ordinary's interlocutor.

Lord Ormidale.—The reclaiming note which has now to be disposed of is at the instance of the defender against an interlocutor of the Lord Ordinary repelling the defender's two first pleas in law, "so far as the same are insisted in as excluding the action altogether." The first of these pleas so repelled is that the pursuer has "no title to sue," and the other that "the averments of the pursuer are irrelevant and insufficient to support the conclusions of the summons."

In regard to the latter plea, it would be premature at present to deal with it; for if the pursuer has no title to sue the action it is unnecessary, and would be idle, to inquire whether her allegations, apart from the question of title, are relevant and sufficient or not. Whether, therefore, the pursuer is *in titulo* to sue the action is the question which must be in the first instance disposed of. Whether her statements, except in so far as it is necessary to look at them as bearing on the question of title, or, in other words, to ascertain the nature and character generally of the action, are relevant or not, is for after consideration, if her title to sue be sustained.

The pursuer's title, as stated by her, is of a twofold character; for the summons bears to be at her instance as executrix of her late husband, Dr Auld, decerning to testament-dative in her favour, and "as an individual, for all right competent to her personally in the premises." But as she has stated nothing whatever in the record in support of the latter branch of her title, and did not, as I understood, maintain her right to sue as an individual, independently of her representative character as executrix, the only question for consideration is, whether she has or has not a title to sue as the executrix of Dr Auld. That this is a very important question,—for its application to a large class of cases is obvious,—and is also one of nicety and difficulty, cannot be doubted. The Lord Ordinary himself says in the note to his interlocutor under review, that "if the question had been quite open his inclination would have been to give effect to the defence, and dismiss the action, but in the present state of the authorities in the law of Scotland he has found himself obliged to repel the defender's pleas, and to allow the action to proceed."

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In examining the authorities with reference to their bearing and effect on the present case it is essential to bear in mind that the pursuer's action now before the Court, as maintained by her, is one for solatium and damages in respect of slanderous or defamatory statements alleged to have been made by the defender of and concerning her late husband, Dr Auld; for although the pleas of the pursuer in the record are so expressed as to appear to point at a claim of damages in respect of acts and conduct of the defender, irrespective of the alleged slander, I did not understand that the action was to be insisted in except as one laid upon slander or defamation. The Solicitor-General so expressly stated in the outset of his very able address for the pursuer. And, at any rate, it is only on this assumption that any opinion has been formed and is now given.

In determining, then, whether the action is maintainable at the instance of the pursuer, it is not only necessary to keep in view that it is one for solatium and damages in respect of slander or defamation, but also that it was instituted by the pursuer upwards of two years after her husband, Dr Auld's death, although there is nothing to shew, and it is not said, that Dr Auld himself had, by raising action or otherwise, complained of the alleged injury.

In this state of matters I have, after a careful examination of the authorities, come to be of opinion, although certainly not without hesitation and difficulty, that the pursuer has no title to sue, and that the defender's plea to that effect ought to be sustained and the action dismissed.

If the action had been purely one for loss and damage to property, either heritable or moveable, sustained by the late Dr Auld, as in the case of The Representatives of Tulloch v. Davidson and Others, cited in the course of the debate, or, in the language of the civil law, an *actio rei persecutoriæ*, I should have had no doubt of the pursuer's title to sue in her representative character of executrix, and, in that view, there would not, I suppose, have been any dispute between the parties. In actions, indeed, laid upon injury to property, the claim can be sued for by or against the representatives just as any claim for an ordinary debt.

That, however, not being the nature of the present action, but, on the contrary, it being essentially one for vindication of character, where the injured party himself died without raising action or complaining in any form, the maxim, I think, applies—"*Actio personalis moritur cum persona.*" It is true that in one sense patrimonial interests are involved, and necessarily so, to some extent, even in such an action; for not only must it, like every other action of damages for slander, if successfully prosecuted to a conclusion, result in pecuniary damages, small or great, but in many such cases, and possibly in the present, if it goes on, in a substantial sum in respect of special loss or damage sustained by the late Dr Auld; but I cannot think that this is sufficient to remove the case from the class of personal actions comprehended by the maxim referred to. It is not to be forgotten that here, as in all cases of its class, the ground of action or *medium concludendi* is injury to personal character, or, in the words of Lord Stair (i. 9, 4), injury to "fame, reputation, and honour," and that it is only in virtue of that *medium concludendi*, or ground of action, supposing it to be established, that any sum of damages whatever could be awarded. That such is the ground of action or *medium* in respect of which the pursuer concludes for damages in the present case is manifest from the statements in the 6th article of her condescendence, where she expressly charges the defender with having slandered the late Dr Auld, by "representing him to be a person unfit, both intellectually and morally, to fill the said chair,"—that is, the chair of Humanity in the University

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of St Andrews. The pursuer's claim for damages and solatium therefore cannot, I think, be properly said to be, in its nature, one for property, or necessarily attached to or involving property. The claim is, at any rate, in its chief and primary object, to have such redress as will clear and vindicate character, and this can generally be accomplished as well, and frequently much better, by retractation and apology, or nominal damages, as by the recovery of a large sum of money. There may be, and not unusually are, many circumstances strictly personal to the individual injured by slander which might render it not only undesirable but positively painful and detrimental to him to make it the subject of proceedings at law or of complaint at all. It would be, therefore, as I take leave to think, unreasonable and unjust to allow such an action to be brought, after the death of the injured individual, by his legal representative, who might not be a relative at all, or one having the slightest interest in his character, feelings, or reputation, but an entire stranger, such as an executor-creditor, having no other object but to recover a sum of money. I must own my inability to arrive at a conclusion involving such consequences. And I am all the less disposed to do so when I bear in mind that, having regard to the authorities cited on the part of the defender in the course of the discussion, such an action as the present could not be maintained according to the civil law, the law of France, or the law of England. And that the principles of the civil law, as bearing on such a question as the present, have been to some extent imported into the law of Scotland, is manifest, I think, from many of the cases reported in the Dictionary under the heading "Personal and Transmissible." I acknowledge, however, that it is by the authorities of our own law that we must be mainly, or, if they are clear and unambiguous, entirely governed.

The Lord Ordinary, while he states in the note to his interlocutor that he has found no case or even dictum in the institutional writers directly in point, has referred to various decisions which he considers sufficient to support the conclusion he has arrived at. But on examining the decided cases referred to they appear to me, with much deference, to be distinguishable from the present in two important particulars,—1st, in none of them was the action one for vindication of character, or, in other words, for solatium and damages in respect of slander or defamation; and 2dly, in all of them that can be said to be of any importance the action was raised by the injured individual himself, and was a depending *lis* at the time of his death. This was so in the case of Neilson v. Rodger,[1] by which the Lord Ordinary says he has felt himself bound; and besides, the action in that case was laid on the ground of injury, not to character, but to the person, and so, for the reasons I have adverted to, might not be held to be so strictly personal as to fall with the injured individual. At the same time, I am not to deny that an action for damages and solatium, in respect of injury to the person, is in its character and features so closely resembling an action of damages and solatium for vindication of character, that I might have held myself, as the Lord Ordinary appears to have done, bound by the decision in the case of Neilson v. Rodger, although only that of a majority of one of the Divisions of the Court, had it not been for the other distinction, to which I have referred, between it and the present, created by the circumstance that the action was in dependence, and had made some progress in Court at the instance of the injured party before that party died. That this was considered an im-

[1] Neilson v. Rodger, Dec. 24, 1853, 16 D. 325, 26 Scot. Jur. 156.

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portant consideration by the Judges in that case is clear, I think, from their reported opinions. Thus, Lord Wood, who appears to have been the most decided in support of the judgment, at the outset of his opinion deemed it right to notice and explain that the object of the representatives in sisting themselves as pursuers of the depending action was "not to enforce any different or larger claim than she could have done under the summons had she survived, but strictly to follow out and in no degree to alter or enlarge the claim which, had she survived, she would under the summons be entitled to make good. The question is," said his Lordship, "is this competent or not?" Lord Murray, again, begins with the observation,—"This action was commenced by the deceased during her lifetime, and I think it may be competently carried on by her representatives." And the Lord Justice-Clerk, who dissented from the judgment, and held that the action, although raised by the injured party herself, and in dependence at the time of her death, could not be competently carried on by her representatives, remarked, in the course of his lengthened opinion, without any challenge or contradiction that I can observe,—"It was not, I think, contended that the executors could, after the death, themselves raise an action to recover solatium for the sufferings of the party herself, although such right clearly existed in her."

It appears to me, therefore, that the decision in the case of Neilson v. Rodger is not a conclusive precedent for governing the present. Supposing the action in that case, although in reality different as regards its foundation and object from the present, to be closely analogous, there would still remain the distinction that it was brought by the injured party herself, and was in dependence at her death, while here no action was brought, and no complaint of any kind was ever made by the injured party. That this is an important distinction appears sufficiently, I think, from the opinions of the Judges in Neilson v. Rodger; and it was also a feature of the civil law, and has been recognised and given effect to in the law of Scotland. It was so in Montgomery v. The Representatives of Walker, 17th July 1752, Mor. 10,360, which was an action of damages for wrongous imprisonment, and the pursuer of which having died during its dependence, the Lord Ordinary transferred it against his representatives, and found them entitled to damages, appointing them at the same time to give in a condescendence thereof. This interlocutor having been reclaimed against, the report bears that although it was remitted back to the Lord Ordinary in respect of certain allegations made by the defenders, "meantime it is not amiss to observe that on this occasion it was admitted to be a point certain that even penal actions,—meaning actions arising *ex delictu* or *quasi delictu*, such as actions of damages for slander or injury to the person,—"transmit *in hæredes ubi lis fuerit contestata cum defuncto.*" And in Calder v. The Children of Kenneth Mackenzie (No. 1 of Appendix to "Personal and Transmissible" in the Dictionary), 23d July 1776, the Lord Ordinary expressly, "in respect litis-contestation was made with the defunct," transferred the action against his representatives, and to that interlocutor the Court adhered.

The case of Haggart's Trustees v. Hope[1] was also no doubt one of damages for defamation, but it was raised by the injured party himself, and after his death taken up and prosecuted by his trustees in obedience to his express instructions to that effect. Besides, as the point now in question does not appear to have

[1] Haggart's Trustees v. Hope, 2 Shaw's App. 125.

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been raised or considered in that case, little or no aid can be derived from it. The case, again, of Mein v. M'Call,[1] likewise noticed by the Lord Ordinary, was one for damages, but on what ground does not appear from the report; nor have the session papers been preserved in the Advocates' Library. But I have obtained access to copies of the summons and defences in the case, and from them it appears that the action was one of damages for an aggravated assault, or rather a series of assaults. Keeping this in view, and that the action was in dependence in Court at the instance of the injured party at the time of his death, it cannot be held to be adverse to my opinion in the present case.

The case, however, of Smith v. Stoddart,[2] likewise referred to in the Lord Ordinary's note, although not directly in point, has, I think, an important bearing on the question now under consideration. There it was held that a claim for damages in respect of a slander uttered against a married woman was of a character so strictly personal to the injured party that it did not pass *jure mariti* to her husband, but remained with herself, and could be competently sued for by her after his death, although a question might afterwards arise as to who had right to the damages recovered. It is true that in that case the Court appear to have proceeded very much on the ground that it would be against reason and justice to prevent the pursuer clearing her character from a gross slander which had been uttered against her. But that is just the principle which I think ought to be given effect to in the present case, viz. that the right to vindicate character from slander adheres so closely to the injured party that it is for that party, and that party alone, to sue an action for reparation, it being a different question altogether who may have right to the damages, if any, that may be recovered. Such, I think, is the effect of the opinions of all the Judges in the case of Smith v. Stoddart. Lord Mackenzie, who delivered the leading opinion, at the outset, after remarking that there was a material distinction between an action for vindication of character and the case of Milne v. Gauld,[3] the soundness of the decision in which he seriously questioned, proceeded to observe, with reference to the case with which he was more immediately dealing —"It is just a conclusion for vindication of character, which the law says cannot be in the form of a declarator, but can only be by concluding for pecuniary conclusions. It cannot be said that the right to vindicate the character is one of property which passes to the husband *jure mariti*." Lord Fullerton, who concurred with Lord Mackenzie, held not only that a right to vindicate character did not pass *jure mariti*, but was from its nature not communicable at all, remarking that there were "some grounds of action strictly personal to the wife herself," and "cannot be communicable, such as sensibility to personal wrongs, personal contumely, which are absolutely confined to her, and are in their nature inalienable." The other Judges, Lord Cunninghame and the Lord President, also concurred, the latter observing that he considered the action in Milne v. Gauld to be different in character altogether.

The subsequent case of Thom v. M'Queen,[4] where it was held that a claim of damages in an action for wrongous imprisonment at the instance of an individual, who became bankrupt and was sequestrated during its dependence,

[1] Mein v. M'Call, June 7, 1844, 6 D. 1112, 16 Scot. Jur. 486.
[2] Smith v. Stoddart, July 5, 1850, 12 D. 1185, 22 Scot. Jur. 532.
[3] Milne v. Gauld's Trustees, Jan. 14, 1841, 3 D. 345, 13 Scot. Jur. 151.
[4] Thom v. Bridges and M'Queen, March 11, 1857, 19 D. 721, 29 Scot. Jur. 311.

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passed to the trustee in the sequestration, is worthy of notice for the distinction, evidently pointed at by the Lord Justice-Clerk (Inglis), between such an action and one for reparation and solatium for injured character, when he prefaced his opinion by the remark,—"I say nothing as to a question of defamation, or a case where slander is involved, but speak merely of the case before us of solatium for imprisonment."

I have now examined the authorities in the law of Scotland, so far as they were cited in argument, and so far as I have myself been able to discover any of importance bearing on the question under consideration; and having regard to their true import and effect, they appear to me to be adverse to the pursuer's title to sue the present action. I am therefore of opinion that the defender's first plea in law ought to be sustained, the interlocutor of the Lord Ordinary reclaimed against recalled, and the action dismissed.

Lord Gifford.—This case is an extremely important and an extremely interesting one; and after the best consideration that I have been able to give it, I have come to be entirely of the opinion expressed by Lord Neaves. I concur in every one of the observations which Lord Neaves has made, including the criticism which he made upon the note and interlocutor under review; for I do not think I would have expressed that note in exactly the same terms (although in substance I still adhere to it) if I had had the benefit of the extremely able and instructive argument which we have had in the Inner-House.

In the first place, I think I have, both in the interlocutor and in the note, failed sharply enough to distinguish between the two pleas with which the interlocutor deals. We must take them separately, and in their order. The question of title must be regarded separately from the question of relevancy. I have erred in mixing them together too much, both in the interlocutor, and to a certain extent in the observations contained in the note. The question of title is, Has the pursuer, upon her own shewing, a title to sue the claim which she here makes? And it is no answer to that to say that the claim is bad in law, for that is the meaning of the plea of irrelevancy. We must assume that she will make good her law when she comes to discuss the relevancy. But the plea of title is, that she is not to be heard to discuss anything, because, upon her own shewing, she has no claim to state. Upon the question of title, therefore, which has been the main question argued before us—although incidentally, and necessarily almost, reference has been made to the plea of relevancy—upon the question of title, I think the sole question has come to be, whether an action of damages for reparation for slander, as stated by the pursuer, transmits from the late Dr Auld himself, to whom undoubtedly it would have been competent, to his widow and executrix.

I concur with Lord Neaves that the action, being laid at her own instance as an individual as well as in her representative character as executrix, affords a separate ground for saying that she has a title to sue. She may have no claim in her individual character, but she certainly has a title to sue; and we can only repel her title to sue by finding that, in point of law, and assuming her statements to be all correct, she has no individual claim. But we cannot even get that length without sustaining the title to sue.

Apart from this specialty, however, and viewing the action, as it undoubtedly substantially is, an action of reparation for the injury which her husband sustained, and which she, *qua* his executrix, has sustained, I think the title to sue

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must be sustained. In the first place, this is not an action for pure solatium. I am not sure that the action, even if it had been in that character alone, would not have transmitted. But that is not the action with which we have to do. It is an action for reparation and damages, in which specific and very precise patrimonial loss is set forth by the pursuer. In considering the question of title to sue I assume—I must assume, because that is the condition of the argument—that patrimonially loss has been sustained—that a year or two's salary has been lost by the conduct of Principal Shairp, of which the pursuer complains. Of course, in my present observations, I do not in the least forejudge any of the defences which Principal Shairp has stated. For aught I know at present all these defences may be affirmed; but in considering the pursuer's title to sue I assume that the pursuer's statements are true, and that she will be able to substantiate them. Now, the loss complained of by the pursuer is undoubtedly a loss resulting substantially from slander. In that respect I agree with Lord Ormidale that it is hardly an action, looking at the pursuer's own statement, for wrongous acts so much as for wrongful words; but wrongful words may create very serious patrimonial loss, and I cannot think that there is any absolute law that has ever been admitted in Scotland that, if a person commits a verbal injury which results, it may be, in the most serious patrimonial loss to another, that other loses his action, and his estate loses it, because he may happen to die before raising an action to make his claim good. I cannot distinguish this case, which is an action based upon slander, from any other action of reparation and damages. Suppose that, instead of being an action for damages resulting from slander, it had been an action for damages resulting from personal injury,—such as was the case in Neilson v. Rodger,[1]—in both cases the pursuer's demand is for reparation to make good the loss which had been sustained from personal pain. I cannot distinguish between pain of the body and pain of the mind in principle. Solatium is due for the one as well as the other. Actual specific damage may be due for the one as well as for the other; and although there may be the element of vindication of character embraced in it that element arises only incidentally, because, as has been frequently remarked, reparation for injury to character can only be attained, apart from the old remedy of palinode, by concluding for a pecuniary sum. Now, viewing this as a case, where the pursuer here, as executrix of Dr Auld, says that the estate to which she has succeeded has been injured by the slanderous and wrongful actings of Principal Shairp, I can find no principle, either in equity or in our own law, to exclude that action at the instance of the executrix. It is true that in the Roman law an action for injury did not transmit either against the representatives of the injurer, or to the representatives of the injured. But I do not find that that principle has been adopted in our law. Even in the laws of other countries, which are fairly enough looked to in this respect, it seems to have been adopted with a measure of qualification, and I find no reason for holding that the Roman law, either as originally laid down and in force in Rome, or as modified by the common law, was ever adopted by the law of Scotland. In that respect, I would wish to modify the expression of opinion with which the note to my interlocutor commences.

If we turn to our own law, I think it quite clear that an action of reparation for personal injury transmits to representatives; and I go no further on that matter

[1] Neilson v. Rodger, December 24, 1853, 16 D. 325, 26 Scot. Jur. 156.

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than the case of Neilson v. Rodger. That was an action for personal loss, and it was held that the executors might sist themselves and carry on the action. I feel myself bound by that decision, and I cannot make a distinction between it and the present case, arising merely from the circumstance that in that case the action was raised before the original pursuer had died. Litiscontestation had not taken place, because the pursuer had died immediately after the summons was raised, and before any defences were lodged; and, therefore, if that circumstance alone were to be held to be the principle of the decision in the case of Rodger, it would be introducing a rule of the most arbitrary description, and fraught with consequences which might be exceedingly unjust. How long after the injury is sustained is the pursuer to be allowed to raise the action? If she survives two or three months and then dies without raising it, is that to cut her out? If she dies very soon after the raising of it, is that not to cut her out? Litiscontestation is out of the question as a test for the transmission, and the only principle sought to be fixed as determining this point of the case is whether there is presumed forgiveness to be inferred from the delay in raising the action.

It appears to me, however, that the forgiveness is always a question of evidence. In the present case it is said two years elapsed; but then we have this very material circumstance set forth by the pursuer, that she had not got access to the terms of the slander, and the slander was a slander committed, not in Dr Auld's presence or before his face,—assuming it to be a slander, for of course I am not saying whether there was a slander or not,—but it was a slander committed by Principal Shairp, as is alleged, secretly, behind Dr Auld's back, in a letter addressed to the patron, of which, if he knew anything, it might only be because of its being incidentally mentioned to him by somebody who knew of it. Now, the defender may have a defence on the ground that there has been condonation or forgiveness, but plainly that is not to be inferred from the mere fact of his having died before the action was raised. Unless a statutory rule had been introduced that a party who claims reparation for injury shall lose the claim if during life he does not raise an action for it, I feel myself quite unable to lay down such a principle as that. Therefore, the case of Neilson v. Rodger—that matter being out of view—is a direct authority in the present case, although there the injury was to the body, and here the injury is to the mind.

But there is the additional circumstance that in the present case we must assume that there has been separate patrimonial loss to Dr Auld's estate. That circumstance, by itself, I think, is conclusive on the question of title. It is sufficiently set forth upon the record that pecuniary loss has been sustained. It says that Dr Auld, in consequence of Principal Shairp's actings, was two years without employment—he was two years deprived, that is, of the emoluments of the chair, a presentation to which had been promised to him by the patron. There is the additional element that in consequence of Principal Shairp's intimation that he was only to teach for the remainder of that session, and then to resign as on a particular day, Dr Auld, on getting the intimation from the patron that he was to receive the presentation, resigned his position as teacher in the Madras College, and that he has not only therefore been deprived of the emoluments of the chair to which he expected to be presented, but he has been deprived of the emoluments and the situation which he then held. Now, I think it was almost conceded in argument that, although personal actions might not transmit, yet if there were pecuniary results—a claim for reparation or for

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making good pecuniary loss—they undoubtedly transmitted. Thus, even in the case of the Aberdeen Bank, where it was laid on fraud, the action was held to transmit against the representatives of the party held to be fraudulent.

As to the argument that the present action cannot transmit because it is a penal action, it appears to me that the word "penal" is used ambiguously—that it sometimes means an action *ex delicto* or *quasi ex delicto*, but brought only for the purpose of obtaining reparation or indemnity, and the expression "penal action" sometimes means an action for the purpose of inflicting punishment. Now, I demur altogether to the idea that an action *ex delicto* will not transmit when brought only to obtain reparation. The infliction of punishment is not the object or meaning of the action. An action *ex delicto* undoubtedly transmits. An action for the recovery of stolen goods is the strongest case that can be put of an action *ex delicto*. But surely it never could be contended that a man whose goods had been stolen would not have an action against the representative of the thief to recover the stolen property. That is not a penal action; it is an action *ex delicto*, for there can be no greater delict than theft; but it is not a penal action. Now, it appears to me that the present action is not a penal action. It is not an action to inflict punishment on Principal Shairp, supposing him found to be liable in all that is sought against him. It is an action to recover what the pursuer says the estate that she represents has lost by that delict or *quasi* delict. In that sense it is not a penal action at all, and it is a fallacy and a delusion to say that penal actions or actions *ex delicto* do not transmit. Penal actions do not transmit because it is impossible to punish a dead person; but when the limitation of the action is *ad civilem effectum* to recover the loss which the delict has caused, then I think that is just a debt which transmits like any other debt against the party who has become the debtor, and in favour of the representative of the party who has become the creditor. In the present state of the argument, and in the present state of the case before us, therefore, I am of opinion that the plea of want of title to sue should be simply repelled, and the action held a competent action, to be insisted in by Mrs Auld as the representative of her husband.

The next question, which is also dealt with in the interlocutor, is as to the relevancy. Now, I repelled that plea in the Outer-House, so far as insisted in as excluding the action altogether. That is not a very happy expression, but my meaning was to repel it *hoc statu*, that it might be discussed, as these questions are most conveniently discussed, along with the issues. We will then see exactly what the pursuer insists for, and what issues she proposes to take. Issues have been lodged, but we have not had any argument on the terms of them. The argument was confined to the plea of title, and therefore, before saying how far this action is relevant, or how far the pursuer is entitled to any of the issues, or some of them, which she proposes, I would prefer hearing the parties further on these issues. And I am not disposed to go further just now than simply to adhere to the interlocutor—or rather to vary the interlocutor to the effect of simply sustaining the plea of title. We have already recovered the documents, which was another object I had in view in repelling the plea of non-relevancy *hoc statu*; and I think we should appoint parties to be heard on the issues and the relevancy, and we will then see what course the case is to take. I concur with the observations made both by Lord Neaves and Lord Ormidale as to the difficulty and nicety of some of the questions which we cannot avoid seeing a-head of us—in particular, how far it was competent for Principal

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Shairp to retain the Humanity chair after becoming Principal of the college. It is quite plain that, through that question, the pursuer's claim lies to a very large extent—so much so, that she has proposed a separate issue on that point. It was pressed upon us very strongly that that is not a question in any view for a jury. Perhaps it may be reached through a jury, but it is plainly a question of law, and considerations like that—and there are some considerations of a similar kind—strongly point to the expediency, if it is competent, of trying this question in some other form than by a jury.

LORD JUSTICE-CLERK.—This is a very important case, and I must say I have found very great difficulty in coming to a conclusion upon it. We are now engaged, however, in considering only one question, viz., whether the pursuer has a title to sue this action; and to the extent of repelling that plea I concur with the opinion of Lord Neaves and Lord Gifford. But there is no doubt that although we only sustain the title in the meantime, so as to enable the action to proceed, we have to decide an abstract question of law, which, in terms, as far as I have been able to see, has never yet been the subject of direct decision,—I mean, whether it is the law of Scotland that a personal action dies with the person. If this be a personal action, and that is the law of Scotland, then of course the pursuer has no title to pursue. But I am of opinion that it is not the law of Scotland—that the brocard fails when applied in our system, both because we do not adopt the distinction between personal and real actions which prevailed in the Roman law, and also because it is not our law that an action, however personal, necessarily dies with the person. In regard to the first, there will be found in Lord Stair's Institutes, book 4, title 3, section 45, the strongest repudiation of the Roman distinction between real and personal actions; and that of itself would make it impossible to cite the Roman brocard as necessarily applicable to the law of Scotland But, in the second place, I can find no authority whatever, and no *dictum* in any one of the institutional writers, or in any decided case, to the effect that we have adopted the view of the Roman law that personal actions do not transmit, and I do not find that any of the Continental systems have adopted that law. The canon law has to so large an extent modified the views of Continental jurists on this matter that the civil law is not now regarded as an authority in that matter in any of the systems which have generally adopted the civil law as their basis. The law of England, singularly enough, does seems to coincide in result with the civil law, although the result is attributed to another principle, viz., that a personal action is not assignable or transmissible. At the same time, while it is very clearly laid down by the French authorities that a personal action may transmit against the heirs of the party doing the injury, it is the prevalent view of the Continental jurists that it does not transmit to the heirs of the party injured.

The question is, what is our law on that subject? Now, the authorities are unquestionably by no means very precise, and Lord Ormidale's very able review of them, I think, brings out the difficulty of the question in a very strong light. It is said that this is an action for vindication of character, and that there is a different rule to be applied to an action of that kind than that which would be applicable in a case of personal injury. I do not think that this is an action for vindication of character. Slander, no doubt, under the canon law, and still in England, may be the subject of penal prosecution, and, I believe, in the old Commissary Court the procurator-fiscal was wont to intervene in an action of

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that kind. The action might also with us have assumed the form of concluding for a palinode or retractation. That was a proper action of vindication of character. But if the party sued in the civil court, he did not conclude for vindication of character, but concluded for that which he desired, viz., a sum of damages in reparation of the injury; and however the injury arose, whether from injury to character, or person, or substance, is of no moment. The nature of the action is an action of damages for pecuniary reparation of an injury, and for nothing else. And, therefore, it is not a sound distinction in such a case, although quite a fair observation in a popular sense to make, that this is an action for vindication of character, as distinguished from an action of damages for reparation of a wrong. The present action, however, is an action for the reparation of a specific wrong, which is said to have been carried through and effected by means of slanderous imputation; and, in that respect, perhaps, it stands somewhat differently from an ordinary action for defamation. I see that this question may come up again in the course of the investigation of this case, and possibly may present itself in a different aspect, and therefore I wish not to indicate or express any opinion except as far as these principles are applicable to this specific plea. I can conceive considerable difficulties in holding that a pure action of defamation so transmits to executors that executors or creditors having no connection with the deceased at all, except the fact that they are executors, would be entitled to raise it after an interval of time. That is a question we need not go into. But this is an action for the specific damage suffered by Dr Auld in being excluded from the chair of Humanity by means of slanderous imputations made to the patron; and if these be a relevant ground of action, and the pursuer can bring sufficient proof of the ground of action such as would have enabled Dr Auld to have recovered damages during his lifetime, I cannot doubt that the present pursuer is entitled to insist in that action.

I have only one word to say on the cases of Smith v. Stoddart,[1] and Milne v. Gauld,[2] because I think the case of Smith v. Stoddart was pressed rather farther than the matter decided will bear, or than the Judges who decided it intended. They decided nothing but this, that where there are imputations made upon the character of a married woman, she has, whether married or a widow, a right and title to vindicate her own character. That does not conflict in any degree with the right passing to the husband to this effect, that the husband may sue for injury done to his wife—which I take to be a proposition not to be contested—or that his executors might have right to damages which the wife might recover; and one of the Judges expressly says that. I may mention for the information of parties that on turning to Voet, 47th book of the Pandects, title 10, section 6, there will be found a decision of the Dutch courts exactly applicable to that matter, coming to this, that while the husband, beyond all question, has a right to vindicate, as an injury done to himself, the character of his wife against aspersions, she also, if her character be personally involved, is entitled to sue on her own account. I have nothing further to add, except to say that the question of proof, and also the question in regard to the legal right of the principal to continue to hold this office for the purpose of excluding Dr Auld, are questions of great difficulty, and in the most part questions of law; and I concur in thinking that while we sustain the title to sue, it would be well to put the case in a position to be investigated otherwise than by sending it to a jury. But that is for

[1] Smith v. Stoddart, July 5, 1850, 12 D. 185, 22 Scot. Jur. 532.
[2] Milne v. Gauld, Jan. 14, 1841, 3 D. 345, 13 Scot. Jur. 151.

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THIS interlocutor was pronounced:—"Having heard counsel on the reclaiming note for Principal Shairp against Lord Gifford's interlocutor of 30th June 1874, adhere to said interlocutor in so far as it repels the first plea in law for the defender, and appoint parties to be further heard, and *in hoc statu* reserve all questions of expenses."

THOMAS SPALDING, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 52. WILLIAM PETRIE, Pursuer.—*Sol.-Gen. Watson—Mackintosh.*
MISS EUPHEMIA FORSYTH AND ANOTHER, Defenders.—*Asher—Paul.*

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Sale—Bona fides—Reduction.—In an action brought to reduce the title of a purchaser of heritage at the instance of a prior purchaser from the same seller, *held* that it was not necessary for the pursuer to prove fraud on the part of the second purchaser, but only such knowledge as ought to have put him on his inquiry.

2D DIVISION. Lord Craighill.* I.

ON 3d March 1874 William Petrie, residing in New Elgin, raised this action against Miss Euphemia Forsyth, Elgin, and James Stewart, a lawyer's clerk in Edinburgh, concluding (1) for reduction of a disposition of certain heritable subjects in New Elgin, executed by Miss Forsyth in favour of Stewart, dated 6th and recorded in the Register of Sasines 8th August 1873; and (2) for implement by Miss Forsyth of a contract of sale of the same subjects to the pursuer at the price of £55, alleged to have been constituted by certain letters which passed between her and her agents, on the one hand, and the agent of the pursuer on the other, in May and June 1873.

The circumstances out of which the action arose, as disclosed in the record and at the proof, were as follows:—

Petrie was the nephew of Miss Forsyth, a lady aged eighty-six, who was possessed of a house and garden in New Elgin, in part of which house Petrie and his family lived.

In August 1872 it appeared that Petrie obtained from Miss Forsyth (as she averred, under compulsion), a document, which he described as a deed of gift, whereby she made over to him the house and garden at her death, and bound herself, if she should sell it during her lifetime, to pay him the sum of £80, and also relieved him of rent and taxes during her lifetime. This document was written by the defender Stewart, who was then resident in Elgin, and was duly tested.

In February 1873 Miss Forsyth instructed Messrs Grigor and Young, her agents in Elgin, to find out on what grounds Petrie claimed the subjects. Messrs Grigor and Young accordingly wrote on 4th February a letter, to which Petrie returned no answer.

Petrie, however, forwarded this letter and the so-called deed of gift to the defender Stewart, who had, in the meantime, gone to Edinburgh, and instructed him to employ an agent to act for him. Stewart accordingly employed Mr D. L. Shand, W.S., to act as Petrie's agent in the matter.

Shortly after the date of the letter to Petrie, Miss Forsyth's agents advertised the subjects for sale, and notice of removing was served on Petrie. Thereafter on 5th March 1873 Mr Shand wrote calling Grigor and Young's attention to Petrie's claims under the deed of gift.

Mr Shand and Grigor and Young continued to correspond upon the

* The interlocutor and note were prepared by Lord Mure.—See note, p. 217.

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subject of Petrie's rights and the sale of the subjects, and during the course of the correspondence it was proposed that in order to solve the difficulties raised, Petrie should become the purchaser of the subjects at a reduced price. After various prices had been proposed and rejected by one or other of the parties Miss Forsyth wrote to Grigor and Young on 27th May as follows :—"Dear Sir,—I have considered the amended offer made by Mr Shand on behalf of his client, Mr Petrie ; and although I am willing to dispose of the property, I cannot do so at the price offered. I am, however, willing to divide the difference between the offer and the price asked by me, and accept of £55 as the purchase price, on the same arrangements as formerly intimated. Your communicating this to Mr Shand as my final determination will oblige.—I am," &c. This letter was communicated to Mr Shand, who, on 28th May, offered to give £52, 10s. This sum Miss Forsyth refused, and on 2d June Shand again wrote :—"Dear Sirs,—I am to-day in receipt of your favour of the 30th ult. It appears to be a pity to break off the whole negotiation for £2, 10s. of a difference between Miss Forsyth and my client; and I am therefore authorised to accept her offer, and to pay £55. Please, then, send me the title-deeds, that I may prepare the draft disposition." The title-deeds were accordingly forwarded to Shand.

A question then arose as to the terms of the disposition. Mr Shand was desirous that the true nature of the transaction should appear *ex facie* of the disposition, viz., that Petrie, in addition to paying £55, was waiving his claim for £80 under the deed of gift, and also that there should be a discharge of the deed of gift.

This, Miss Forsyth objected to, as she disputed her liability under the deed of gift, and on 10th June Grigor and Young wrote :—"Miss Forsyth will not agree to the deeds proposed by you, and it is needless to say more about it." While this question was still undecided, Stewart and Petrie, who, it appeared, had previously entered into some arrangement as to Stewart's father subsequently acquiring the subjects from Petrie, disagreed, and the dispute having come to Mr Shand's knowledge, he wrote to Petrie that he would no longer act as agent for him.

Mr Shand also communicated to Grigor and Young, by letter, dated 23d June, that he had ceased to act for Petrie.

On 24th June Grigor and Young wrote to Mr Shand :—"Dear Sir,—We wrote you on 10th current, to which we had no reply. Unless we have a reply in eight days we shall presume the whole matter is at an end.—Yours truly," &c.

Mr Shand having ceased to act for Petrie before he received the above letter sent it to Stewart and took no further notice of it, and nothing followed upon it. It appeared from Mr Shand's evidence that throughout the whole negotiations Stewart—who had been till May in the same office with Mr Shand—was duly informed of every letter received or written by Mr Shand on behalf of Petrie, and that on 22d July Mr Shand had told him that the bargain between Petrie and Miss Forsyth was a binding one, and that any attempt on his part to obtain the subjects from Miss Forsyth for himself would certainly "land him in the Court of Session." Stewart, however, denied that he had ever been informed that the contract was a binding and concluded one.

In August Stewart went to Elgin, and, according to his own statement, called on Miss Forsyth, and during his visit she stated that the transaction with Petrie was at an end, and asked him to buy the subjects himself. After some hesitation, but without any inquiry as to the truth of Miss Forsyth's averment about the breaking off of the bargain with Petrie, he consented to purchase the subjects at the price of £149, 10s.,

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and on 6th August he obtained a conveyance of the property. It appeared from the evidence that when Miss Forsyth heard that no answer had been sent to Grigor and Young's letter of 24th June she had remarked that "she was very glad, as she was now done with" Petrie for ever.

When this second conveyance came to Petrie's knowledge he raised this action.

Pleaded for Petrie;—(1) The pursuer having purchased the said subjects at the price of £55 from the defender Euphemia Forsyth, with entry at Whitsunday 1873, she is bound to execute and deliver to him a disposition containing all usual clauses on payment of said price. (2) The disposition to said subjects granted by the defender Forsyth in favour of the defender Stewart having been obtained by false and fraudulent representations on the part of Stewart, and without any price having been paid, ought to be reduced. (3) The said disposition in favour of Stewart having been fraudulently obtained by the latter from the defender Forsyth, after a sale by her to the pursuer, which was known to Stewart, ought to be reduced and set aside.

Pleaded for the defenders;—(1) The pursuer not being the author, or in right of the author of the deed sought to be reduced, has no title to sue. (2) The defender Miss Forsyth having, at the time of selling the subjects and granting the disposition sought to be reduced, full power to do so, the title of the defender Mr Stewart is valid and unchallengeable.

On 23d July 1873 the Lord Ordinary pronounced this interlocutor:—"Finds, 1st, That when the property in question was purchased by the defender Stewart, in August 1873, the transaction for the proposed purchase of that property, which had been carried on between the pursuer and the defender Miss Forsyth; was at an end, and was known to the defender Stewart to be so; and 2d, that the pursuer has failed to prove that the disposition granted by Miss Forsyth in favour of the other defender was obtained by false and fraudulent representations on the part of the said defender, and without any just or adequate consideration having been paid for the same: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds them entitled to expenses," &c.*

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* "NOTE.—A great deal of the evidence in this case relates to differences between the pursuer and Miss Forsyth, and to other matters, which appear to the Lord Ordinary to have no very direct bearing on the main question here at issue, viz., whether, at the date of the sale of the property to the defender Stewart, there was any subsisting transaction for the purchase of that property between the pursuer and Miss Forsyth, and some of which, as disclosed in evidence, are certainly not very creditable to the pursuer. And there is also a good deal of evidence of a contradictory and almost irreconcilable description, as to certain communications which are said to have passed between the parties, relative to some alleged wish on the part of the father of the defender Stewart to acquire that property from Miss Forsyth through the pursuer, and which also, in the opinion of the Lord Ordinary, has no very material bearing on the main questions at issue, except as affecting the credibility of the parties more immediately concerned, who give a very strange and conflicting account of the matter.

"Upon the main questions raised there appears to the Lord Ordinary to be a total failure of evidence to instruct that there was any fraudulent representations made by the defender Stewart to induce the other defender to sell him the property. It is, on the contrary, distinctly proved both by Miss Forsyth and others who were cognisant of her wishes and intentions, that she herself proposed to the defender to purchase the property, which he at first declined, but ultimately agreed to do; and that the purchase, as between them, was an

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Petrie reclaimed, and argued;—There could be no doubt in the circumstances that there had been a concluded contract of sale between Miss Forsyth and Petrie so binding that neither party could break it off. The letter of Miss Forsyth's agents could not therefore have the effect which the Lord Ordinary had given to it. That being so, and Stewart having been in the knowledge of this contract, could not be held to have been *in bona fide* in entering into the second purchase.[1] The want of *bona fides* was sufficient to entitle the pursuer to prevail.

Argued for the defenders;—The contract between Petrie and Miss Forsyth was not a completed one; it was an essential part and condition of the contract, as far as Miss Forsyth was concerned, that no mention should be made of the obligatory letter; and as Petrie's agent insisted in inserting it in the disposition, and also neglected to answer Grigor and Young's letter, the bargain must be held to have been broken off. Such certainly was the view of Miss Forsyth, and as she in accordance with that view informed Stewart that she was done with Petrie he was justified in purchasing the subjects from her. In order that such a purchase could be reduced it was necessary to prove fraud on the part of the second purchaser. Mere inadvertence and ignorance of the true legal effect of certain documents was not enough.[2]

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serous and *bona fide* transaction, made in the belief that the arrangements between the pursuer and Miss Forsyth were completely at an end. So that, in this view, the main question seems reduced to whether there were any sufficient grounds for this belief. The Lord Ordinary thinks that there were. Because, even assuming that, by the correspondence which took place between the parties up to the beginning of June 1873, there was a missive offer to sell for £55, and an acceptance, that proposal was substantially departed from on the part of the pursuer when he stipulated that the terms of the disposition should bear a different consideration from that contained in the offer. This was at once objected to by the defender, Miss Forsyth, and on the proposal as so qualified being renewed it was distinctly rejected on the 10th of June; and no farther communication having been received from the pursuer, the letter of the 24th of June was despatched, informing the pursuer's agent that unless an answer was received within eight days the agent for the latter would consider 'the whole matter at an end.' Now, no answer was received to this letter; and Mr Young, the then agent for Miss Forsyth, stated in evidence that having received no answer he considered the transaction to be at an end; and it is pretty plain that he must have informed Miss Forsyth that it was so, because, when she offered the property for sale to the defender Stewart she told him that she had done with the pursuer, as no answer had been received to the letter. In these circumstances, the defender Stewart was, it is thought, fully entitled to believe that the other defender was free to sell, as he had been made aware of the terms of the letter of the 24th of June, and that no answer had been sent to it; and the omission on the part of the pursuer's agent to communicate that letter directly to the pursuer cannot, it is thought, be held to prejudice Miss Forsyth in her right to dispose of her property.

"This case was fully heard before Lord Mure, and the prefixed interlocutor and note were prepared by his Lordship; but his removal into the Inner-House prevented them from being issued. In order to avoid the expense and delay of additional discussion both parties have agreed that I should issue the interlocutor and note without a new hearing, and on that footing I have accordingly signed them."

[1] Cases on Private Knowledge of a Prior Right, M. 1689-1696; Lang v. Dixon, June 29, 1813, F.C.; Marshall v. Hynd and another, Jan. 18, 1828, 6 Sh. 384; Morrison v. Somerville and others, Dec. 21, 1860, 23 D. 232, 33 Scot. Jur. 87.

[2] Interlocutor in Lang v. Dixon, *supra*.

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LORD JUSTICE-CLERK.—The form of this action is a reduction to set aside an alleged sale by Miss Forsyth to the defender Stewart of certain subjects, on the ground of a previous sale to the pursuer, and also for specific implement of the prior contract of sale.

The defence is, first, that there was no contract of sale between the pursuer and Miss Forsyth.

The facts bearing on this plea seem to be these:—Petrie, the pursuer, was in possession of a document granted by Miss Forsyth, which he looked upon as an obligatory deed of gift. Under this he held that the subjects in dispute were declared to belong to him on Miss Forsyth's death; or in the event of her selling them during her life she was to be liable to pay him £80, and he was also to occupy his house—a portion of the subjects—rent free during his lifetime.

Miss Forsyth, under the circumstances in which it was granted, refused to admit her liability under the obligatory document, and gave Petrie warning to quit the portion of the premises occupied by him. Petrie thereupon sent the obligatory letter to the defender Stewart, who employed Shand to act as Petrie's agent, and accordingly when the subjects were advertised for sale Mr Shand wrote on 5th March 1873 to Messrs Grigor and Young, Miss Forsyth's agents, stating that Petrie had a claim over the subjects. A correspondence followed upon this, throughout which Miss Forsyth disclaimed any liability under the document, and Petrie asserted his rights.

While matters were in that state it occurred to the agents of the parties that the difficulty might be overcome by so far departing from the provisions of the letter as that Petrie should purchase the subjects out and out at a reduced price. Various sums were named as the price, until, on 27th May, the letter founded on as the accepted offer was written. It is true that some arrangements remained to be made as to the form and details of the disposition, and other matters not essential to the contract of sale. I cannot read this letter otherwise than as a specific offer to sell at a specified price. Mr Shand, on 2d June, wrote agreeing to pay the full price asked, and suggesting that the titles be sent him in order that he might prepare the draft disposition. He also made some proposals as to the manner in which the price should be stated in the disposition.

On the first question, as to whether these two letters constitute a concluded contract of sale, I am of opinion that they did. There was an unconditional offer to sell at £55, and an unconditional acceptance at that price. Nothing remained to be done as regarded the contract of sale. The terms of the disposition and other arrangements were not part of the contract of sale, but the consequences of it.

I am further of opinion that the letter of Mr Shand on 6th June does not and was not intended to qualify the acceptance.

It was argued to us, however, that though that was the form of the contract it was not the substance of it. There was another thing to settle, and that was the discharge of Miss Forsyth's obligatory letter. I am, however, of opinion that no such thing remained over. It is true that Petrie got exactly the same advantage as if the obligatory letter had been fully acted upon, but Miss Forsyth was not willing to acknowledge and admit the obligatory letter, and wished to let matters stand as they appeared from the missives. It was for her to say whether she wished the discharge of the letter or not, and the purchaser had no interest to insist that it should be discharged.

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If we go further we see the real difficulty, and that is one having nothing to do with the contract of sale at all. Mr Shand was at first afraid that the stamp-office might object to the form of the disposition. Miss Forsyth, however, said that she would only sell on her own terms. Mr Shand suggested that it would appear very peculiar in the case of a re-sale at a full price. That suggestion, although irrelevant in the mouth of the purchaser, throws a light on another point of the case, because Mr Shand's thinking of a re-sale shews that he did understand that Petrie was to re-sell to Stewart when he got the conveyance, and hence he was desirous that the whole transaction should appear on the face of the conveyance. That, however, had nothing to do with the contract of sale, as the acceptance was unqualified. I am therefore of opinion on these two letters that there was a completed contract of sale which could be enforced by either party.

The only point now to consider is the fact that Stewart afterwards bought the subjects from Miss Forsyth. That raises a point of some difficulty.

The only answer Miss Forsyth can make to Petrie's demand to implement the contract under the conclusions of this summons is to say that she is divested in favour of a *bona fide* purchaser. Unless there be such a purchaser she must make good her previous bargain with Petrie.

Stewart's actings, I am clearly of opinion, cannot be held to have been in good faith, in the sense of having been taken in ignorance of the prior title, although they may not necessarily infer moral delinquency. It is not, however, necessary to go into nice distinctions in this matter.

The question is this, whether in the position in which Stewart stood he was entitled without communication with Petrie to complete a bargain with Miss Forsyth. There is a conflict of evidence as to the extent of his knowledge. Mr Shand's and Stewart's evidence are diametrically opposed on this point. I have, however, come to be of opinion that Mr Shand's evidence is entirely credible from beginning to end, and that nothing he did was liable to censure or remark. I am not going into the details of the matter. It is plain to me that his evidence is consistent with all the real evidence, and evidence from other quarters in the case.

It is, I think, proved that Stewart represented to Shand that an arrangement had been proposed between Petrie and Stewart that Petrie should hand over to said Stewart, in consideration of certain debts due to him, the property whenever he became proprietor of it. That some such arrangement was proposed Petrie himself says. When, then, Petrie and Stewart began to quarrel, Mr Shand not unnaturally came to the conclusion to have nothing more to do with the matter, and he accordingly wrote the letter of 23d June 1873 withdrawing from the agency. It is impossible to read the letters which passed between Petrie and Shand without coming to the conclusion that there had been some arrangement proposed.

Supposing Mr Shand's account to be true, then let us see the result. We must assume that Stewart was cognisant of all that happened up to the date of Shand's resignation of the agency. Mr Shand distinctly says in his evidence that he told him the contract between Petrie and Miss Forsyth was a binding one, and that he warned him not to try to get the property in his own or his father's name, as that would assuredly land him in the Court of Session. It thus appears that the second purchaser bought in the full knowledge that the agent employed by himself to act for the first purchaser had entered into a concluded bargain on behalf of the first purchaser.

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If *bona fides* means ignorance of any prior right it is quite clear that Stewart could not be *in bona fide*, because he knew the exact state of matters. Less than has been proved would, in my opinion, have been enough to put him in a position in which he could not with propriety have made the purchase.

The Lord Ordinary's view is that there never was a concluded agreement, and that all negotiations were broken off. I do not think all negotiations were broken off. The mere fact of Mr Shand giving up the agency could not break the agreement.

Stewart was also in the same town with Petrie when he was in communication with Miss Forsyth's agents, and if he did not know what was the true state of matters he was bound to know.

Although I am of opinion that the pursuer should prevail I can pronounce no eulogium on his conduct. I think this unfortunate lady's position is a most unpleasant one to contemplate.

With regard to the authorities cited I do not think it necessary to say more than that a question of *bona fides* like this is always one of circumstances.

Lord Neaves.—I concur.

The case is of considerable importance, and at first sight of considerable nicety.

I think that the Lord Ordinary's view proceeds on a consideration of the transaction in a different aspect from what the truth of the case really requires.

For a considerable time a transaction was going on between the pursuer and Miss Forsyth, who was apparently willing to sell the subjects to the pursuer at a low price, and he seems to have been ready to take them at her price, intending to waive all his claims under an obligatory letter by her which he held.

The parties were in correspondence through their agents, and the whole subject of the correspondence was the sale of the subjects and the price. The parties came very near to each other—at least there was only £2, 10s. between them, and eventually Miss Forsyth offered the subjects, in a letter to her agents, Grigor and Young, at the price of £55, and, after one or two letters had passed, Mr Shand, on behalf of the pursuer, accepted that offer. The letters founded upon seem to me to create a concluded contract. The only matter ever in dispute was as to the price to be paid, and that was definitely settled, and accordingly the title-deeds were forwarded to Mr Shand.

The second stage of the transaction now arrived, namely, how to carry out this concluded contract. On this point there was some correspondence, Miss Forsyth objecting to certain terms proposed to be introduced into the conveyance, but the contract of sale had been completed, and was enforceable from the date of the acceptance, and is so now.

Miss Forsyth, however, afterwards conveyed the subjects to Stewart, and although that is an obstacle in the way of her implementing her obligation to Petrie it can make no difference as to the obligation itself.

The point of law next arises, how far is Stewart, the second purchaser, to be made to give way in favour of the first contracting party?

For this purpose I do not think it necessary that there should be absolute fraud on the part of the seller who conveys subjects to a second purchaser. It is enough if it be done in error, and contrary to the legal rights of the first purchaser. The fact that the seller can have no good defence to an action raised upon the first contract fixes the seller's obligation.

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As to the position of the second purchaser, it is quite possible that although there was no fraud on the part of the disponer there may have been gross fraud on the part of the second purchaser. While the disponer may have been in good faith, the second purchaser may have been *in pessimâ fide*.

What was Stewart's position here? It is clear from the letters that he was cognisant of the true state of matters. Not only so, but he himself was the principal obstacle in the way of the first bargain being carried out. He complained to Mr Shand that Petrie was treating him badly, and Mr Shand being unwilling to be mixed up any longer with the affair, threw up Petrie's agency at a critical moment, and that without communicating with Petrie, trusting to Stewart to tell him. But although Stewart was afterwards in Elgin he never saw Petrie or communicated with him.

Stewart then, although aware that the first contract was still binding, took a disposition to himself of the subjects, and so disabled Miss Forsyth from implementing the first contract, which, in the opinion of this Court, was then, and still is, binding.

We must, therefore, break off this second bargain, and find Petrie entitled to specific implement as against both the defenders.

LORD ORMIDALE.—This case is undoubtedly one of importance to the parties, and also of considerable importance with regard to some principles involved in it.

The first question is, was there a concluded and binding sale of these subjects in dispute to Petrie? The second is, if there was such a sale, was it subsisting at the time the defender Stewart entered into the transaction founded on by him with Miss Forsyth in August 1873, whereby he says he obtained the subjects for himself? And, thirdly, is there any sufficient reason, in the circumstances of the present case, why the ordinary principle of law, that a second purchaser, in the knowledge of a previous sale still subsisting, is not entitled to insist on implement as against the first purchaser, should not be given effect to?

On the first question I think it unnecessary, after the full and accurate exposition of the facts given by both your Lordships, to dwell upon the evidence. It is clear to me that there was a concluded contract of sale to Petrie, and that the only matter in dispute was not as to there being such a contract, but merely as to the terms of the disposition which was to follow upon it. The parties were agreed as to the subject, the price, and every essential particular, and differed only as to the terms of the formal written instrument by which the transaction was to be carried into effect.

With regard to the second question, whether the defender Stewart entered into the second contract with Miss Forsyth in the knowledge that the subjects had been already sold to Petrie the only matter of dispute is whether Stewart has been clearly proved to have been in the knowledge of the previous sale. It is impossible, I think, to come to any other conclusion than that he was in that knowledge. Mr Shand had told him of it, and he, indeed, admits that he knew there had been, at one time, such a transaction. Mr Shand distinctly says—and I credit his evidence entirely—that he warned Stewart in July, only a very short time before he made his alleged purchase, not to try to get the subjects for himself, as any such attempt would assuredly land him in the Court of Session, for they had been already sold to Petrie. But then the de-

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fender says that before he made his own purchase from Miss Forsyth he had been informed by her that the first sale to Petrie was off. All, however, that Miss Forsyth appears in effect to have told him was that she was done with Petrie, when she heard that Mr Shand had ceased to act for him. That certainly was no sufficient ground upon which the defender was entitled to conclude that a binding contract of sale had come to an end. And it is important to keep in view that Stewart made no inquiries for himself in the proper quarter as to the true state of the matter. He made no inquiries at Petrie, although he was in the same town with him. And he did not even go to Miss Forsyth's agents, who had conducted the whole business, and who were also in the same town with him, to ascertain from them how the affair really stood. In place of doing either of these things he entered into a transaction of purchase of the subjects for himself with Miss Forsyth, an old lady of upwards of eighty years of age, and this he did only a few days after the emphatic warning which had been given to him by Mr Shand.

I have, in these circumstances, no hesitation in holding that Stewart acted *in mala fide* in entering into the second purchase, and that, in point of law, is enough to vitiate the transaction, and render it of no effect in a question with the first purchaser.

Three important cases were cited at the debate, viz., Lang v. Dixon, Marshall v. Hynd, and Morrison v. Somerville.[1] The case of Lang is a peculiar one, but the important circumstance connected with it is that the second purchaser was proved to have known that the subject then in dispute had been previously sold when he attempted to purchase them for himself. If, then, the Court be right in holding that in this case there was knowledge by Stewart of the prior sale to Petrie, Lang's case is quite in point. But it was argued that the seller here could not have been *in mala fide*, because Miss Forsyth told him the prior sale to Petrie had come to an end, and that although she may have been wrong in that she honestly thought she was right, and, at any rate, that he, Stewart, was entitled to rely on her statement. The case of Marshall v. Hynd, however, is conclusive in regard to this against the defender Stewart. There Glengarry informed Hynd of the previous sale, but that he had rescinded it, and therefore that it had come to an end. The Court, however, unanimously held that although Glengarry had made such a statement Hynd was not entitled to rely upon it, but was put upon his own and farther inquiry. Now, if ever there was a case in which an intending purchaser in the knowledge of a prior sale was put upon his inquiry so as to have the matter thoroughly cleared up, the present was one of that description. Marshall v. Hynd seems to me, therefore, to be the strongest possible authority in the pursuer's favour, and against the defender. I consider it unnecessary to enter into a consideration of the circumstances of the case of Morrison v. Somerville, as it was of a very special and complicated description, but I think it clear enough that the principles of decision in that case are equally applicable here, and strongly support the proposed judgment.

On the grounds now adverted to I am of opinion with both your Lordships that the pursuer is entitled to prevail.

Lord Gifford.—I come to the same result, although I cannot say that on some of the questions raised I have not felt more difficulty than your Lordship in the chair.

[1] *Supra*, p. 217.

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There was here a completed bargain, and one which might have been enforced by either party. It is impossible to read the offer and acceptance without coming to that conclusion. Parties were at one as to the subject and the price. The missives are probative, written by agents duly authorised. There was no error—no misrepresentation—nothing to vitiate the agreement, and all that remained was to carry it into effect.

There then arose, as often does, some difficulty and some correspondence as to the terms of the disposition to be granted.

The Lord Ordinary is of opinion that in consequence of what took place during that correspondence the bargain came to an end. But a completed bargain cannot come to an end unless both parties agree to its terminating. The agents for Miss Forsyth could not end it as long as the pursuer adhered to it, and a dispute as to the terms of the formal conveyance does not put an end to a contract of sale. If matters remained entire there could be no doubt that as between the purchaser and seller the sale must be enforced, the terms of the disposition being adjusted by a conveyancer or by the Court.

But the real difficulty arises in consequence of the second sale to the defender Stewart, and the question is whether the defender Stewart is entitled to insist on obtaining implement of his second purchase and the disposition following on it, notwithstanding the concluded bargain between Petrie and Miss Forsyth?

Various expressions are used in the authorities as to what will vitiate a second purchase such as this. Sometimes it is said fraud is necessary—we find it in issue in the case of Morrison v. Somerville[1]—sometimes *mala fides* is stated as sufficient, and sometimes it seems to be indicated that mere knowledge in the second purchaser of the first sale will be enough to invalidate the second. It seems to me to be a question of circumstances. The facts must be such as to create a personal bar against the party seeking to become a second purchaser. He must be so placed as to be in the full knowledge of the prior bargain, and bound to recognise it, or at least bound to do nothing to defeat it.

It is by no means easy to define by a general proposition the whole law as to what will bar a second purchaser from obtaining implement of his bargain. It must come up to something like this. He must have full and adequate knowledge of the prior purchase, not a mere suspicion or hearsay knowledge of it. The right of the first purchaser must have been intimated to him or something equivalent thereto, or the relation of the parties must be such as to make it the duty of the second purchaser to communicate with the first purchaser, so as to give him an opportunity of completing his title under his bargain. These elements are very strongly against Stewart in this case. Upon the whole evidence, I am of opinion that Stewart was personally barred here, and can in no light be looked on as a *bona fide* second purchaser.

On these grounds I am of opinion that the conveyance in favour of Stewart must be set aside, so that the first purchaser may get his bargain implemented.

THE COURT on 15th December pronounced this interlocutor:—"Alter the interlocutor of the Lord Ordinary complained of: Find by the missive letters, Nos. 19 and 51 of process, that the defender, Miss Forsyth, agreed to sell the property in question and the pursuer agreed to purchase the same at the price of £55, with entry at the

[1] *Supra*, p. 217.

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term of Whitsunday 1873, the price to be paid on delivery of the disposition, and that the defender, Miss Forsyth, is still bound to convey the said subjects to the pursuer in terms of the said concluded agreement: Further, find that the defender, Stewart, having been cognisant of the said agreement between the defender, Miss Forsyth, and the pursuer, and in respect of his knowledge thereof, was not entitled to conclude with the defender, Miss Forsyth, a contract for the purchase of the said subjects on his own account, and that the conveyance in his favour libelled in the summons cannot affect the right of the pursuer to obtain a disposition thereof from the defender Miss Forsyth, and to that effect and extent reduce, decern, and declare in terms of the reductive conclusions of the summons, reserving all questions of repetition or otherwise between the defenders; and further decern the defender, Miss Forsyth, to implement her part of the contract of sale of the said subjects entered into between the pursuer and her, in terms of the other conclusions of the summons: Find the pursuer entitled to expenses," &c.

ALEXANDER GORDON, S.S.C.—J. J. & A. FORMAN, W.S.—Agents.

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Dec. 17, 1874. Phillips v. M'Innes.

JAMES PHILLIPS, Pursuer and Respondent.—*R. V. Campbell.*
JOHN M'INNES, Defender and Appellant.—*Millie.*

Master and Servant—Truck Act, 1831 (1 *and* 2 *Will. IV. c.* 37), *secs.* 6 *and* 25—"*Employers*"—"*Artificers.*"—*Held* that a foreman at a slate quarry, although bound by the terms of his engagement to assist the workmen when he saw any of the operations "falling back" or "in need of being pushed forward," was not an "artificer" but an "employer" in the sense of the Truck Act, 1831.

1ST DIVISION. Sheriff of Dumbartonshire. M.

JAMES PHILLIPS was lessee of the Luss slate quarries, and he also carried on separately the business of general merchant and grocer at Luss. John M'Innes acted as foreman to Phillips at the slate quarries for about two years from 26th February 1871.

The terms of the engagement were set forth in the following letters:—"Ballachulish, December 17, /70. Dear Sir,—In pursuance of my promise I now write to you. I shall be very much obliged if you will let me know the conditions on which you wish to engage me. 1st, What duties would you require of me, what I should have to do? 2d, What wages do you intend giving?—Awaiting your reply, I am, &c. JOHN M'INNES." "Luss, December 22, 1870. Mr John M'Innes.—Dear Sir,—I duly received your letter of 17th inst. inquiring as to conditions, with the view of coming to Luss, and the duties expected of you. As to duties expected I mean to state those as plainly as I possibly can. In the first place, then, I mean you to take charge of the men employed in the quarries, and to conduct the different operations in the working of them to the best of your ability, and with the view of making the quarries profitable. You to keep a faithful account of the men's time, for which a book will be given you for the purpose, and at the end of each week you give the time over to me, or any clerk that I may appoint. You to keep also an account of all slates carted or boated from the works, and to hand a note of them to me at earliest opportunity, so that they may be properly booked. I would be very glad to see the working of the quarries extended, so that the man taking charge would be fully employed in superintending; but so long as the quarries continue to be wrought in a small moderate scale, I will expect the foreman to be foremost at everything, leading the men on, and taking a turn at any of the operations that he may see falling

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back or are in need of being pushed forward. In this way men get on much better when the foreman can shew them a good example. He may take on men or dismiss them when he sees immediate need, such as inferior workmen or their being insubordinate. But in most cases to submit all wrongs or disputes to me, and he will always find me ready to assist and advise for the best. As to the question of wages, in all cases I like to pay a man what they are worth, and to a man attending properly to his duties I will give £60 a-year, but were the workings extended and doing well the matter of wages could be revised. There may be some other small matters to mention, but from what I have stated you can form a good idea of the duties expected; but should I have omitted anything, or should you wish any farther explanation I will willingly give it.—Hoping to hear from you in return, I am," &c. "JAS. PHILLIPS."

During the period of M'Innes's employment at Luss he received furnishings of groceries and other alimentary necessaries from Phillips, against which the latter retained a considerable portion of his salary as foreman. There remained a balance of about £18 due by M'Innes for these furnishings, for which Phillips raised this action against him in the Sheriff-court of Dumbartonshire.

The defender pleaded;—(2) The pursuer has no right of action for the goods alleged to have been supplied by him to the defender while in his (pursuer's) employment. See Act 1 and 2 Will. IV. c. 37 (Truck Act), sec. 6.

The Sheriff-substitute (Steele), on 31st July 1874, pronounced an interlocutor finding "that the plea of the defender founded on the provisions of the Truck Act was inapplicable in the circumstances of the case, and could not be sustained."

The Sheriff (Blackburn), on 5th September 1874, adhered.

The defender appealed to the Court of Session.

Argued for the appellant;—The question was whether he was an artificer in the sense of the Truck Act or not.* The only cases bearing on the interpretation of that Act were English cases, and from a consideration of them it appeared that (1) where personal labour is stipulated for in the contract the person employed is an artificer; but (2) where the contract is not for labour but for the result of labour, or where the wage is not the wage of labour but the contract price of work to be done, the person employed is not an artificer. These were the only rules that could be laid down, and accordingly, as the terms of his employment contemplated that he should give his personal labour when and as required, he must be held an artificer in the sense of the Act. Though a foreman in relation to the workmen he was an artificer in relation to his employer.[1]

Argued for the respondent;—The English cases founded on by the appellant all referred to questions about piece labour. They ruled that a

* The Truck Act, 1 and 2 Will. IV. c. 37, sec. 25, enacts,—"That in the meaning and for the purposes of this Act all workmen, labourers, and other persons in any manner engaged in the performance of any work, employment, or operation of what nature soever, in or about the several trades and occupations aforesaid, shall be and be deemed 'artificers,' and that within the meaning and for the purposes aforesaid all masters, bailiffs, foremen, managers, clerks, and other persons engaged in the hiring, employment, or superintendence of any labour of any such artificers shall be and be deemed to be 'employers.'"

[1] Ryley v. Warden, Feb. 11, 1848, 18 L. J. Ex. 120; Weaver v. Floyd, Feb. 11, 1852, 21 L. J. Q. B. 151; Bowers v. Lovekin, May 30, 1856, 25 L. J. Q. B. 371; Ingram v. Barnes, Jan. 13, 1857, 26 L. J. Q. B. 82 and 319; Sleeman v. Barrett, Nov. 21, 1863, and Jan. 21, 1864, 33 L. J. Ex. 153; Whiteley v. Armitage, Nov. 26, 1864, 13 Weekly Reporter, 144.

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piece worker was not protected by the Truck Act, but they did not touch the question of the position of a foreman under its provisions. The defender might be expected to labour with his hands when required, but the terms of his employment shewed that he was truly engaged in the superintendence of labour, and therefore, under sec. 25, could not claim protection as an artificer.[1]

LORD PRESIDENT.—The only question which we need consider in this case is, whether the Sheriff-substitute and the Sheriff are right in holding the defender not to be an artificer within the meaning of the Truck Act.

It is necessary to attend to the terms of the contract under which he accepted employment. He wrote on 17th December 1870 asking the pursuer to let him know "the conditions on which you wish to engage me,—1st, What duties would you require of me; what I should have to do? 2d, What wages do you intend giving?" Even in this first letter it seems plain to me that the man so offering his services was not a workman in the ordinary sense of the term. He speaks of his duties, and wishes to know their scope and nature. That is not the position usually taken by an ordinary workman. Accordingly, the answer which the pursuer makes to him is as follows:—(Reads letter pursuer to defender, December 22, 1870, quoted *supra*, p. 224). This was accepted on the part of the defender, and the contract was completed. Now, the man so engaged, with the duties thus specified, appears to me to be a proper foreman of works employed on a yearly engagement at an annual salary. No doubt he was expected to lend a hand at manual labour when he saw any of the operations "falling back" or "in need of being pushed forward." But that does not interfere with his being a foreman in the proper sense of the term. Every man knows that a farm grieve, who undoubtedly is a foreman, takes a turn at manual labour, and works with or at the head of the men. But that does not interfere with his position as foreman, or make him any the less superintendent of their labour.

If, then, the defender was thus engaged, can he be held an artificer in the sense of the Truck Act? The clause with which we are specially dealing is clause sixth. Now, in this and all the other sections of the Act the artificer and employer are spoken of as persons belonging to two different and opposing classes between whom contracts of service may exist, the one paying and the other receiving wages for purely manual labour. But the 25th section of the Act defines more particularly what is to be understood by the term "artificer" in the meaning and for the purposes of the Act,—"All workmen, labourers, and other persons in any manner engaged in the performance of any work, employment or operation, of what nature soever, in or about the several trades and occupations aforesaid, shall be and be deemed 'artificers.'" On the other hand it provides that "all masters, bailiffs, foremen, managers, clerks, and other persons engaged in the hiring, employment, or superintendence of the labour of any such artificers shall be and be deemed to be 'employers.'" It thus includes among employers any person who is engaged in the "superintendence of the labour of any such artificers." A person who stands in that position cannot be an artificer himself. The two terms "artificer" and "employer" are put in con-

[1] Monteith and Co. v. Blackie, Feb. 2, 1827, 5 S. 280; Finlayson v. Braidbar Quarry Co. July 1, 1864, 2 Macph. 1297, 36 Scot. Jur. 647; Davies v. Berwick, Jan. 23, 1861, 30 L. J. Mag. Ca. 84; see also 4 Geo. IV. c. 34, and 30 and 31 Vict. c. 141, sec. 2.

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trust for the purposes of the Act. Now, the defender is a foreman put in superintendence of the work of those who are artificers in the sense of the Act, and therefore not an artificer himself. That is a sufficient ground of judgment in this case, and I do not therefore go into any of those nice and delicate questions which have been raised in the cases cited from the Common Law Courts in England, which, I confess, seem to me somewhat unsafe guides in this matter.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Find in fact that the defender (appellant) was when the goods sued for were supplied to him by the pursuer (respondent), the now deceased James Phillips, a foreman employed by the pursuer on an engagement for a year at a salary of £60: Find in law that the defender was not at such time, in a question with the pursuer, an artificer within the meaning of the statute 1st and 2d Will. IV. c. 37: Therefore refuse the appeal, and decern: Find the appellant liable in expenses," &c.

W. & J. BURNESS, W.S.—THOMAS CARMICHAEL, S.S.C.—Agents.

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Jacobsen v. His Creditors.

1ST DIVISION.
M.

HENRY JACOBSEN, Pursuer.—*Lancaster.*
THE UNION BANK OF SCOTLAND AND OTHERS (Jacobsen's Creditors), Defenders.—*J. P. B. Robertson.*

Process—Cessio Bonorum—6 and 7 Will. IV. c. 56, sec. 2.—Henry Jacobsen, grain and commission merchant, formerly of Glasgow, raised a summons of *cessio bonorum*. His creditors objected to the competency of the summons, inasmuch as it did not set forth, in terms of A. S. 24th December 1838, sec. 1 (to regulate proceedings in processes of *cessio bonorum*),* any ground entitling the pursuer to *cessio* under the statute.†

The only fact founded on in the summons was that Jacobsen had been charged to pay a debt on 10th November 1873, but as the summons was raised on 18th November, before the *inducice* had expired, no warrant of imprisonment had or could have issued against him.

THE COURT held that as the pursuer was not in any of the situations enumerated by the statute, the objection must be sustained, and dismissed the summons as incompetent.

JOHN WRIGHT, W.S.—J. & F. ANDERSON, W.S.—Agents.

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* "Summonses of *cessio bonorum* raised before the Court of Session from and after the 12th day of January 1839 shall set forth the particular description of diligence for civil debt against the pursuer on which he founds his right to claim the benefit of the *cessio*, and when produced in Court shall be accompanied by the necessary evidence of the said diligence so set forth."

† 6 and 7 Will. IV. c. 56, sec. 2,—"If a debtor has been or shall be charged to pay a civil debt, and a warrant to imprison him has been issued, or if he be liable to imprisonment under a decree of a Small-debt Court, or be in prison or imprisoned and afterwards liberated in respect in these several cases of a civil debt, it shall be competent to such debtor . . . to apply for interim protection and for decree of *cessio bonorum* in the manner hereinafter mentioned."

No. 55. THE SCHOOL BOARD OF THE PARISH OF KELSO, Petitioners and Appellants. —*D.-F. Clark—Darling.*

Dec. 18, 1874. Kelso School Board v. Hunter.

GEO. DUNCAN HUNTER, Respondent.—*Sol.-Gen. Watson—J. P. B. Robertson.*

School Board—Schoolmaster—Education Scotland Act, 1872, *sec.* 23—*Interdict—Sheriff.*—A petition in the Sheriff-court by a school board against the teacher of a public school praying to have him interdicted "from preventing or excluding the said school board, or members thereof, under the authority of the board, from entering the school during school hours, whenever and so often as they may deem necessary in the discharge of their duties under the Act of Parliament (the Education Act, 1872), or in any other way obstructing the school board in effectually carrying out the visitations referred to," *refused* (*dub.* Lord Ardmillan), on the ground that the right of visitation claimed was not clear on the face of the statute.

1ST DIVISION. Sheriff of Roxburgh, &c. M.

THE school board of the parish of Kelso presented this petition for interdict in the Sheriff-court of Roxburgh against G. D. Hunter, teacher of the Kelso Public School. They averred "that Kelso Public School is vested in and under the management of the petitioners, the school board of the parish of Kelso, who are bound to maintain and keep the same efficient, in terms of 'The Education (Scotland) Act, 1872.'

"That George Duncan Hunter, the respondent, is the teacher thereof.

"That the petitioners found it necessary, in the discharge of the duties devolving on them under said Act, to establish a system of visitation to the schools under their charge, including the school before mentioned, such visitations being made at irregular intervals during school hours, and by two or more members of the board, under the authority of the board, at a time.

"That the respondent objected to such visitations being made to the said school of which he is teacher; and on or about the 13th day of March last he refused to admit to the schoolrooms two members of the board, Mr Charles Robson and Mr James Brunton, although they intimated to him, agreeably to the fact, that they had been deputed by the board to make such visitation, for the purpose of inspecting the school, and ascertaining, for the information of the board, that the work therein was being properly conducted. That in consequence of such refusal the said visitation is frustrated.

"That the unwarrantable and illegal course of conduct thus pursued by the respondent not only obstructs and hinders the petitioners from efficiently or properly discharging the duties imposed on them by the Act of Parliament, but injuriously affects the educational interests of the parish, and frustrates the provisions and intentions of the said Act.

"In these circumstances the present application has become necessary."

The prayer was in these terms:—"To interdict, prohibit, and discharge the said George Duncan Hunter, or others in his employment, from refusing admission to the said school board, or members thereof under the authority of the board, into the said school during school hours, whenever and so often as they may deem necessary, in the discharge of their duties under the Act of Parliament, or in any other way obstructing the school board in effectually carrying out the visitations referred to."

The defence stated was "that there was no authority in the Education Act of 1872, or in the education code for Scotland, authorising a school board to make visits of surprise to a school under their charge, or to interfere with the schoolmaster appointed to a public school before the passing of that Act, otherwise than directed by that Act."

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The Sheriff-substitute (Russell) granted interdict.*
On appeal the Sheriff (Pattison) dismissed the petition as incompetent.†
The petitioners appealed to the Court of Session.
The appellants were allowed to amend the prayer of their petition. Instead of the words "from refusing," &c., it was altered to "from preventing or excluding the said school board, or members thereof under the authority of the board, from entering the said school," &c.
The appellants founded on the Education Act, 1872, section 23,[1] and sections 26, 27, 28, 29, 31, 36,[2] 60, 66, 74, were also founded on by the parties.
The respondent argued;—Under section 23 the school board had only succeeded to the powers of the heritors and minister. They had no power of visitation. That belonged only to the presbytery of the bounds.[3]
At advising,—

LORD PRESIDENT.—This is an application for interdict by the school board of Kelso of a rather singular description, and presented under peculiar circumstances.

* This interlocutor, after other findings, proceeded,—"Finds as matter of law that, in terms of the provisions of the said Act, the said school being under the management of the said school board, and it being their duty to maintain the same and keep it in a state of efficiency, and to satisfy themselves that the rules applicable to it are duly observed, it is lawful to the said board, by means of managers duly appointed by them in terms of the Act, or by means of any committee or deputation of their number, or otherwise in any reasonable manner, to visit the school during school hours so often as they shall deem it their duty to do so: Therefore repels the defences," &c.

† "NOTE.— . . . . An application to interdict a person from refusing to do something is quite new in the Sheriff's experience. It comes in effect to a prayer to compel the person against whom it is directed to do what he is said to have refused to do. This is a prayer or demand inappropriate to a process of interdict, the proper and legitimate object of which is to continue or protect from innovation a lawful or established and existing possession." . . . .

[1] 35 and 36 Vict. c. 62, sec. 23—"The parish and other schools which have been established and now exist in any parish under the recited Acts, or any of them, together with teachers' houses and land attached thereto, shall be vested in and be under the management of the school board of such parish, or, if situated in a burgh, then of the school board of such burgh, unless such parish school is the parish school of the landward district of a parish partly landward and partly burghal, in which case it shall be under the management of the school board of such district from and after the election of such school board; and the said school board shall thereafter, with respect to school management and the election of teachers, and generally with respect to all powers, obligations, and duties in regard to such schools now vested in or incumbent on the heritors qualified according to the existing law, and the minister of the parish, supersede and come in the place of such heritors and minister, and all jurisdiction, power, and authority possessed or exercised by presbyteries or other church courts with respect to any public schools in Scotland are hereby abolished: Provided that nothing in this section contained shall defeat or prejudice any right or title to the land whereon any such school or teacher's house shall be built, other than that of the heritors or others, being managers of such school, or shall defeat or prejudice any charge, burden or liability to which such land or houses may be subject." . . . .

[2] Sec. 36—"The school board of every parish and burgh shall maintain and keep efficient every school under their management, and shall from time to time provide such additional school accommodation as they shall judge necessary." . . . .

[3] Stat. 1693, c. 22; 43 Geo. III. c. 54, sec. 19; Presbytery of Elgin v. Magistrates of Elgin, Jan. 16, 1861, 23 D. 287, 33 Scot. Jur. 141; Dunlop's Parochial Law, 519.

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It is quite a competent mode of proceeding to ask for interdict against any one obstructing a party in the exercise of an undoubted right or the discharge of a clear duty. But I apprehend that to justify such a course the right or the duty must be very clear. We are not to try doubtful questions in a process of interdict. That must be done in a different form.

Now, in what position do the petitioners stand in that respect? It is assumed that the board are entitled to send any of their members at any time, and without notice, for the purpose of inspecting the school, and ascertaining whether the teacher is doing his work well. In short, the very duty which, by the Education Act, seems to be lodged in Her Majesty's inspectors, is said to form part of the functions of the board. Now, is this clear? I confess that to my mind it is anything but clear. I cannot find words expressly conferring such a power; and I am not disposed to imply or infer it from ambiguous provisions, because I should have thought, *à priori*, that the school board was a very bad depositary of such powers. I do not think it was intended that the school boards should superintend the management of the schools, but rather that the object of the constitution of those local boards is to look after the rights and interests of the ratepayers, and to protect their pockets on the one hand, and on the other to provide sufficient school accommodation for the requirements of the parish or district.

As to the right of the board or its members to visit the school I entertain no doubt. They have duties to discharge which make it indispensable that they should visit the school, and that at all times, including school hours. Whether they are entitled to do so without giving notice I do not think it necessary to give an opinion. The purpose of their visits is to enable them to perform the duties expressly imposed upon them, such as providing accommodation. Those duties cannot be performed without personal inspection. Therefore the idea of excluding them absolutely is out of the question; and if the master had proposed to do so I should have had no hesitation in holding that he was acting contrary to his duty and to the Act of Parliament, and that the board were entitled to every legal remedy. But, in this case, they came to the school for the purpose of doing a thing which apparently was not contemplated by the Act of Parliament. I do not express a decided opinion upon that question. It is an important one, and may afterwards require to be more solemnly decided. But, at all events, it is not made clear to me that the board have the functions which they have here assumed.

The first section founded on by the appellants is the 23d—(*reads*). Now, the visitatorial powers of the presbytery are not transferred to the school board, but abolished by this section. The duties of the heritors and minister of the parish jointly, or of the minister individually, are said to be transferred to the board; and it is maintained that the minister before the passing of the Act had a statutory right to inspect the school whenever he thought fit.

The fact that the visitatorial duty of the presbytery is abolished and not transferred is important. It leads one to conclude that the Legislature did not intend that that duty should be performed by the school board. Again, it is very doubtful whether any duty performed by the minister individually was intended to be transferred. It would rather appear that what was intended to be transferred was only the class of powers and duties which fall to be exercised and discharged by the heritors and minister jointly. And still further, if it were maintained successfully that any duty which the minister was empowered

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to perform will pass to the board, the inquiry meets us what statutory power the minister had, and I think the only answer is that he had none. We all know that in practice the minister took a great charge of the school. He was enjoined to do so by various Acts of the General Assembly. But there is no statutory authority giving the minister, as an individual, any such power of superintendance or interference. The practice of the minister inspecting the school and taking a great charge of it is easily accounted for, because he was a constituent member of the presbytery—the member living nearest to the school, and always on the spot. But there is no authority for saying that he had any statutory duty. The argument of the appellants, therefore, derives no countenance from this 23d section.

The 26th section, again, which only provides that the schools shall be "vested in and under the management of" the board, does not advance their argument.

The 27th section enables the school board to adopt various means for securing that the educational requirements of the parish shall be met.

The 36th section was also founded on. It provides that the school board "shall maintain and keep efficient every school under their management, and shall from time to time provide such additional school accommodation as they shall judge necessary;" and if they fail to do so, the Board of Education is empowered to prosecute them. There is no doubt that the board are charged with the duty of maintaining the efficiency of the school, and providing such accommodation as may be required. But it does not follow that the individual members are to superintend the teacher and inspect the school. That duty is devolved upon another officer.

The 60th section contains a provision of considerable importance in its bearing on this question. If the school board shall consider that any "teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school and the teacher from Her Majesty's inspector;" and, on receiving such report, they "may, if they see cause, remove such teacher from office." Now, it is said that if the power of removing a teacher for inefficiency is vested in the board, they must have some means of personally ascertaining whether he is inefficient or not. But this very clause supplies the means. If any representation is made to them, or they have themselves any reason to suppose that the teacher is inefficient, they can immediately call for a report by the inspector, and on that report, and not on any personal inspection, they are empowered to proceed. So that this section instead of aiding the argument of the appellants seems to have rather the opposite effect.

On the whole matter, I am of opinion that the school board have not, on the face of this statute, so clear and undoubted a right to visit this school for the purpose of inspecting it—that is to say, superintending the teaching, and examining the scholars—as to induce me to grant interdict against any one molesting them in the exercise of that right. I therefore come to the same conclusion as the Sheriff, and am for refusing the interdict.

LORD DEAS.—I agree in the result arrived at by your Lordship. A good deal has been said upon the construction of the Act of Parliament. But the only question we can decide here is the granting or refusal of this interdict.

It is essential to keep in view the very peculiar nature of a process of interdict, which differs materially from every other civil suit, and may not inaptly be termed *quasi*-criminal. If the party interdicted fails in any particular to

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observe the interdict he is liable to be brought to the bar, and subjected summarily to censure, fine, and imprisonment, or any of these punishments, as well as to be mulcted in expenses. An interdict is thus of the nature of an extraordinary remedy, not to be given except for urgent reasons, and even then not as a matter of right, but only in the exercise of a sound judicial discretion. If granted at all it must be in terms so plain that he who runs may read. The responsibility of making it so lies upon the party asking the interdict, and the Court is not called upon to relieve him of that responsibility. He may be allowed to amend his prayer, but if interdict cannot be granted in accordance with the original or amended prayer it cannot be granted at all.

In the present case the complainers have amended their prayer. As amended it runs thus,—"To interdict, prohibit, and discharge the said George Hunter, or others in his employment, from preventing or excluding the said school board or members thereof under authority of the board, from entering into the said school during school hours, whenever and so often as they may deem necessary in the discharge of their duties under the said Act of Parliament, or in any other way obstructing the school board in effectually carrying out the visitations referred to."

It must further be kept in view that there is a difference between what can be done in a suspension and interdict in this Court and what can be done under an application, such as we have now before us, to the Judge Ordinary of the bounds. In a suspension and interdict certain questions of right may be discussed and determined upon the passed note, whatever becomes of the prayer for interdict. But under an application like this to the Judge Ordinary, unless interdict be finally granted, nothing can be done at all. This is not a process for determining debateable rights or deciding new or undecided questions. Nor does the process change its nature by being brought into this Court by appeal from the Sheriff. Our duty is to do in it what the Sheriff could and ought to have done, and nothing more,—that is to say, simply to grant or refuse the interdict.

Interim interdict to prevent the object of a depending action from being defeated may be incidentally granted in any case, but that is a different sort of proceeding from this, and need not be here discussed.

An application to regulate possession, where two or more parties are interested in that possession, is also a different sort of proceeding from this, and is generally competent before the Judge Ordinary. Possibly it may be thought,—although I do not go into that question,—that there are joint rights of possession here. The school board have, on the one hand, important duties to perform which may require them to visit the school. The schoolmaster, on the other hand, has his profession to exercise in the schoolroom, his livelihood to earn, and his character to sustain. The finding of the Sheriff-substitute that the school board may visit the school during school hours "in any reasonable manner," and the observations in his note as to the presumption that the school board will shew "due regard to the position and feelings of the teacher so as neither needlessly to interfere with his teaching nor wound his susceptibilities," would be extremely to the purpose if this were an application to regulate possession, but into the terms of an interdict the qualification of "reasonable," or any other element of uncertainty, cannot be allowed to enter.

The object of the school board seems to be to vindicate their right to make visits of surprise during school hours. The inspector of schools has that right expressly conferred on him by the statute. If the school board also have it

they have it only by implication. I cannot say the implication is so perfectly clear as not to be debateable. At all events, I think that it is not a question to be solved by placing the schoolmaster *de plano* under the ban and peril of the proposed interdict.

LORD ARDMILLAN.—I regret extremely that this dispute between the school board and the schoolmaster of Kelso has arisen. I trust the misunderstanding may be only temporary, for if the dispute is not reconciled the result will be most injurious to the cause and the interests of education, in the promotion of which both parties have duties to discharge.

It appears that the respondent, a schoolmaster appointed prior to the Act of 1872, refused to admit into the school two members of the school board who had been specially appointed and directed to visit the school. In consequence of this procedure the school board have presented an application for interdict, the terms of which are certainly so general as to create difficulty in granting or enforcing interdict.

It is alleged by the board that the circumstances of the case and the conduct of the respondent have made this application for interdict necessary.

The question is, has the school board the right to visit the school, or has the schoolmaster the right to exclude members of the board proposing to visit it? Can he exclude them absolutely, or can he exclude them in respect of want of previous notice of their intended visit? This question is certainly one of great importance, but I cannot say that I have any difficulty in replying to it.

In the first place, I entertain no doubt of the right of the school board to visit the parish school, or to appoint members of the board to visit the school; and I have no doubt of the right of these members of the board to enter the school. They are in the discharge of their duty in visiting and entering the school. The excluding or obstructing the entrance of these members of the board into the school—the closing of the door of the school against them by the schoolmaster—is, in my opinion, illegal. The statute of 1872 entrusts to the school board important duties, extensive management, and the power appropriate and required for the discharge of these duties. It is not contended that in regard to the question before us any specialty is created by the fact that the teacher was appointed prior to the statute of 1872. In regard to this matter of visiting or preventing visits the principle is the same and the law is the same whether the teacher was appointed before or after the Act. We are called on to dispose of the general proposition that the schoolmaster of the parish school is entitled to close the door of the school against members of the school board appointed and authorised to visit. The school board have the right to dismiss new teachers, and to complain of any teacher. It is said that the act of dismissing or of complaining cannot be preceded by personal inquiry, but that the schoolmaster is entitled to bar them out. I have no hesitation in negativing that proposition. I think that to give judicial sanction to such a proceeding would be subversive of the objects and the principles of the statute. The suggestion made by the respondent that all the school board may come in at once and interrupt the teaching, and sit down permanently in the school, is simply extravagant. Nothing of the kind has been attempted or can be contemplated. Two deputed members proposed to visit and enter the school, and admission was refused—as I think wrongfully refused.

In the second place, I am of opinion that one of the duties committed by the

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Legislature to the school board is to "maintain and keep efficient every school under their management," and in the present case to "maintain and keep efficient" this parish school of Kelso. I do not think that the duties of the school board are limited to the protection of the pecuniary interests of the ratepayers. To my mind it is clear that the school board have duties in regard to education apart from these interests of ratepayers. I am further of opinion that, on a sound construction of the statute, the word "efficient," as applied to a school, connot be limited to mere structural or accommodational efficiency, such as stability of building, capacity to accommodate, draining, or ventilation, as was argued to us. I have no doubt at all that the word "efficient" in this statute, and in this clause of the statute, has a more extended and comprehensive meaning. The very words of the 36th section, fairly and reasonably construed, must mean more than mere sufficiency of building. The word "maintain" is sufficient to meet the exigencies created by defective building, insufficient accommodation, or ventilation, or draining, but the words "keep efficient," as applied to the school, and as distinct from the providing of accommodation, must, in my opinion, have a wider meaning. But when we look to the other sections of the statute, where the words "efficient" and "efficiency" are applied to education as well as to the school, any critical difficulty suggested by the respondent on the mere words of the 36th section entirely disappears. In the 26th, 27th, 30th, 34th, 35th, and other sections—all fairly cognate and relative to the 36th section—the limitation of the word, so as to exclude education, as now contended for by the respondent, would be out of the question. It is the duty of the school board to keep the school efficient, and they are bound to satisfy the Board of Education in regard to the efficiency of the school, surely not of the mere building, but of the school as an educational institution. I cannot accept the respondent's narrow and hypercritical interpretation of the words of this Act. He is using subtlety of construction where it is quite inapplicable. In the interpretation of the fettering clauses of an entail I have heard of a construction so severe as to be termed malignant. But I never did hear such a construction applied to the language of a remedial and reforming statute.

In the third place, I am of opinion that if the school board are entitled to visit the school, or to send members to visit the school, in order to ascertain the efficiency of the school as an educational institution, and not merely as a building, then they may so visit without giving previous notice.

I think that giving previous notice of such a visit would frustrate and defeat its object. Every one accustomed to take a part in the direction, management, or superintendence of schools is aware of this. The notice of a coming visit would give time for the preparation and getting up of a show. Such a visit would be a mere form. It would be no test of efficiency. It might be only an occasion for presenting a delusive picture. When the visitors retired from the school with complimentary remarks, the attractive and adjusted exhibition would terminate, and the current of undiscovered mismanagement might flow on as before. A really good teacher, and there are many such, and I hope the respondent is one of them, would welcome a visit at any time, and would not complain of the want of previous notice. I feel convinced that this respondent would on reflection withdraw his demand for previous notice. It is a demand unworthy of an efficient and conscientious schoolmaster.

Thus viewing the question before us as one of power,—as involving the school board's right to enter the school without previous notice on the one hand, and the

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schoolmaster's right to shut the door and exclude the members of the school board from the school on the other hand,—my opinion is in favour of the school board. I have anxiously and carefully considered the matter, and am of opinion that the board has the right of entrance; and that the schoolmaster has no right to exclude.

But I wish to add the expression of my regret that this dispute has arisen, and also my regret that this interdict in its very broad terms has been applied for.

The prayer for interdict, even as proposed to be amended, is too general and indefinite. An interdict, the breach of which involves serious liability, ought never to be granted in terms otherwise than definite and precise. Some of the observations of the Sheriff on this point are well founded. The requiring of a definite and precise prayer is according to the settled practice of this Court.

I do not perhaps feel the objections to this prayer to be as strong as some of your Lordships do, because the circumstances out of which those proceedings arose are very peculiar. But it is fairly open to criticism, and it might have been better expressed, and your Lordships, concurring with the Sheriff, think it defective.

If your Lordships, looking to the defective prayer of the petition as too wide and general, are of opinion that it ought to be refused, on the ground that interdict in these general terms, to be followed it may be by penalties for breach of interdict, is not the appropriate remedy under the circumstances of the case, I am not prepared to dissent from that conclusion, though I could not concur in it on the footing of holding the respondent right, or even of holding it doubtful whether he is right or wrong, for I think him wrong; and if we were dealing with the question in an action of declarator, my opinion, on the merits, would be in favour of the school board.

If the refusal of this interdict, giving time for calmer consideration, shall lead to the adjustment of differences, it will do much good. In carrying practically out the provisions of a statute for national education it is most important that those engaged in working the measure should act harmoniously and with discretion. I cannot help thinking that this dispute ought not to have arisen, and that it ought to be settled, and indeed, that it would be settled, if both parties, setting aside jealousy, prejudice, and irritation, would meet to adjust it with good sense and good temper. I have already explained that, speaking generally, it is my opinion that the school board does possess the powers which they here claim. But in the exercise of these large powers it is their duty and their interest to be temperate, and discreet, and considerate towards the schoolmaster. In that view, I think that the school board would act wisely in not attempting to press as matter of right their personal examination of pupils, and in abstaining, as far as possible, from direct and unacceptable interference with the schoolmaster's special duty of teaching. Exceptional cases may, from time to time, occur; and as I have already explained, I think the power is with the board. But some confidence should be placed in the teacher; friendly relations with the teacher should, if possible be preserved; undue interposition by the school board can scarcely do good, and may lead to discord in working and failure in result. I think that it was according to the intention of the Legislature and the meaning of this statute to give to the school board all the power which is here claimed; and I do not think that the appointment of an inspector, as provided by the Act, operates a restriction or diminution of those powers. But the inspector is also a statutory officer, to whom important duties are committed; and in the duty common to both, of promoting in different spheres the work of

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Legislature to the school board is to "maintain and keep efficient every school under their management," and in the present case to "maintain and keep efficient" this parish school of Kelso. I do not think that the duties of the school board are limited to the protection of the pecuniary interests of the ratepayers. To my mind it is clear that the school board have duties in regard to education apart from these interests of ratepayers. I am further of opinion that, on a sound construction of the statute, the word "efficient," as applied to a school, connot be limited to mere structural or accommodational efficiency, such as stability of building, capacity to accommodate, draining, or ventilation, as was argued to us. I have no doubt at all that the word "efficient" in this statute, and in this clause of the statute, has a more extended and comprehensive meaning. The very words of the 36th section, fairly and reasonably construed, must mean more than mere sufficiency of building. The word "maintain" is sufficient to meet the exigencies created by defective building, insufficient accommodation, or ventilation, or draining, but the words "keep efficient," as applied to the school, and as distinct from the providing of accommodation, must, in my opinion, have a wider meaning. But when we look to the other sections of the statute, where the words "efficient" and "efficiency" are applied to education as well as to the school, any critical difficulty suggested by the respondent on the mere words of the 36th section entirely disappears. In the 26th, 27th, 30th, 34th, 35th, and other sections—all fairly cognate and relative to the 36th section—the limitation of the word, so as to exclude education, as now contended for by the respondent, would be out of the question. It is the duty of the school board to keep the school efficient, and they are bound to satisfy the Board of Education in regard to the efficiency of the school, surely not of the mere building, but of the school as an educational institution. I cannot accept the respondent's narrow and hypercritical interpretation of the words of this Act. He is using subtlety of construction where it is quite inapplicable. In the interpretation of the fettering clauses of an entail I have heard of a construction so severe as to be termed malignant. But I never did hear such a construction applied to the language of a remedial and reforming statute.

In the third place, I am of opinion that if the school board are entitled to visit the school, or to send members to visit the school, in order to ascertain the efficiency of the school as an educational institution, and not merely as a building, then they may so visit without giving previous notice.

I think that giving previous notice of such a visit would frustrate and defeat its object. Every one accustomed to take a part in the direction, management, or superintendence of schools is aware of this. The notice of a coming visit would give time for the preparation and getting up of a show. Such a visit would be a mere form. It would be no test of efficiency. It might be only an occasion for presenting a delusive picture. When the visitors retired from the school with complimentary remarks, the attractive and adjusted exhibition would terminate, and the current of undiscovered mismanagement might flow on as before. A really good teacher, and there are many such, and I hope the respondent is one of them, would welcome a visit at any time, and would not complain of the want of previous notice. I feel convinced that this respondent would on reflection withdraw his demand for previous notice. It is a demand unworthy of an efficient and conscientious schoolmaster.

Thus viewing the question before us as one of power,—as involving the school board's right to enter the school without previous notice on the one hand, and the

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schoolmaster's right to shut the door and exclude the members of the school board from the school on the other hand,—my opinion is in favour of the school board. I have anxiously and carefully considered the matter, and am of opinion that the board has the right of entrance; and that the schoolmaster has no right to exclude.

But I wish to add the expression of my regret that this dispute has arisen, and also my regret that this interdict in its very broad terms has been applied for.

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If your Lordships, looking to the defective prayer of the petition as too wide and general, are of opinion that it ought to be refused, on the ground that interdict in these general terms, to be followed it may be by penalties for breach of interdict, is not the appropriate remedy under the circumstances of the case, I am not prepared to dissent from that conclusion, though I could not concur in it on the footing of holding the respondent right, or even of holding it doubtful whether he is right or wrong, for I think him wrong; and if we were dealing with the question in an action of declarator, my opinion, on the merits, would be in favour of the school board.

If the refusal of this interdict, giving time for calmer consideration, shall lead to the adjustment of differences, it will do much good. In carrying practically out the provisions of a statute for national education it is most important that those engaged in working the measure should act harmoniously and with discretion. I cannot help thinking that this dispute ought not to have arisen, and that it ought to be settled, and indeed, that it would be settled, if both parties, setting aside jealousy, prejudice, and irritation, would meet to adjust it with good sense and good temper. I have already explained that, speaking generally, it is my opinion that the school board does possess the powers which they here claim. But in the exercise of these large powers it is their duty and their interest to be temperate, and discreet, and considerate towards the schoolmaster. In that view, I think that the school board would act wisely in not attempting to press as matter of right their personal examination of pupils, and in abstaining, as far as possible, from direct and unacceptable interference with the schoolmaster's special duty of teaching. Exceptional cases may, from time to time, occur; and as I have already explained, I think the power is with the board. But some confidence should be placed in the teacher; friendly relations with the teacher should, if possible be preserved; undue interposition by the school board can scarcely do good, and may lead to discord in working and failure in result. I think that it was according to the intention of the Legislature and the meaning of this statute to give to the school board all the power which is here claimed; and I do not think that the appointment of an inspector, as provided by the Act, operates a restriction or diminution of those powers. But the inspector is also a statutory officer, to whom important duties are committed; and in the duty common to both, of promoting in different spheres the work of

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education, their labours should be conducted in a friendly spirit. The duties of the inspector in the examination of pupils, and in that respect in the ascertainment of the educational efficiency of the school, must be of great service to the school board; and the assurance that these duties of the inspector are well discharged may encourage the board to refrain, with wisdom and courtesy, from too frequent or too peremptory interposition in the department of teaching.

I make these remarks as one friendly to the cause of national education and hopeful of the results of this statute. On the question of power, my opinion is in favour of the board, and my view is in accordance with that of Lord Young, whose interpretation of this statute cannot be otherwise than important. His Lordship's views have been clearly stated in a note to a recent decision.[1] On the question of procedure by interdict I do not venture to differ from your Lordships; and I trust the result may be, that time, and better consideration, and kindlier feeling, may lead to an amicable settlement.

LORD MURE.—This is an important question as affecting the statutory powers and duties of school boards, and I agree with Lord Ardmillan in regretting that the appellants have proposed to try it in a process of interdict. For if interdict were granted, even in terms of the amended prayer, it would lead to inconvenience, and mutual annoyance, and probably to farther litigation.

If the rights and duties of school boards in the matter of visiting and inspecting schools were clearly laid down in the statute I am not prepared to say that it might not be proper that these boards should be allowed by means of an interdict, provided it were framed in very definite and distinct terms, to place themselves in a position to discharge these duties. But it appears to me, that the rights and duties of school boards in these respects, and more particularly for the purpose of seeing whether "the work in schools is being properly conducted," as claimed in this application, are by no means clearly defined. It is not at all clear to me what their precise nature is, and this ought, I think, to have been ascertained and defined in some other way than by means of an application for interdict, before that remedy was resorted to. I agree with your Lordship in the chair that the 23d section does not of itself confer any such powers as are here in question, because I am not aware that any such power was vested in the minister and heritors. That being so, and even assuming that the word "efficiently" when used in the statute, includes efficiency in education, there is machinery provided by the statute by which that efficiency can, I believe, be ascertained. By section 66 the inspectors are authorised to enter the school at all times. Now, we are here dealing with a statutory matter, and when we have a clause expressly conferring such a power on one set of officials, and a total absence of any similar enactment with regard to school boards, it is not easy to say what or whether any precise duty in the matters of inspection was intended to be conferred upon them, and I am satisfied that their right and duty in this respect is not made so clear and distinct as to warrant us in granting an interdict in terms of this prayer.

THIS interlocutor was pronounced:—"Recall the interlocutor of the Sheriff-substitute of 22d June 1874, and the interlocutor of the Sheriff of 31st October 1874; refuse the prayer of the petition, and decern: Find the appellants liable in expenses," &c.

J. S. DARLING, W.S.—D. HUNTER, S.S.C.—Agents.

[1] Hunter v. Kelso School Board, decided by Lord Young 16th December 1874, and by Inner-House 5th March 1875, reported *infra*.

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MRS MARY MITCHELL OR SPALDING, Pursuer and Appellant.—*Balfour—Young.*
WILLIAM LAURENCE YOUNG, &c. (Spalding's Trustees), Defenders and Respondents.—*Scott—Jameson.*

Dec. 18, 1874. Spalding v. Spalding's Trustees.

Parent and Child—Trust-Disposition—Aliment.—A person conveyed certain lands, and generally his whole estate, heritable and moveable, with the exception of his household furniture, to trustees for the following purposes, to pay the expenses of management and all debts due by the granter at the date of the deed, to pay the income to the granter during his life,—after his death to pay an annuity to his widow, and aliment and educate A, B, and C, his children, and eventually to convey the estate to the said children upon the youngest attaining majority. The deed was delivered to the trustees on the day of its execution, and was recorded in the Register of Sasines three months thereafter. The granter died about five months after executing the deed, and a posthumous child was born nine months after the date of the deed. *Held* (*diss.* the Lord President) that the posthumous child was entitled, as a creditor, to aliment out of the trust-estate.

1ST DIVISION. Sheriff of Perthshire. M.

ON 10th March 1873 Charles Spalding executed a trust-disposition in the following terms:—"I, Charles Spalding, considering that I have full trust and confidence in the persons afternamed for executing the trust hereby constituted, do therefore, and for other good causes and considerations, give, grant, assign, and dispone to and in favour of William Laurence Young, &c. . . . . heritably and irredeemably,—First, All and Whole the town and lands of Burnside of Kilrie; . . . . also, Second, All and Whole these three acres of land or thereby lying to the south of Loanhead, . . . as also the whole other estates and others, heritable and moveable, belonging to me, together with my whole right, title, and interest, present and future, in the subjects hereby conveyed, but always excepting from the above conveyance my household furniture; but declaring always that these presents are granted by me in trust only, and for the ends, uses, and purposes aftermentioned, viz.—(First), That my said trustees shall, out of the means and estate hereby conveyed to them, pay all expenses incurred by them in the management and administration of the trust hereby constituted, and also pay all just and lawful debts at present due by me: (Second), That my said trustees shall, during my life, pay to me the whole free income, interest, or annual produce of the means and estate hereby conveyed to them: (Third), I direct and appoint my said trustees, after my death, from the means and estate hereby conveyed to them, to pay to Mrs Mary Mitchell or Spalding, my wife, an annuity of £10 sterling, ... which annuity in favour of my said wife shall be in lieu of all terce of lands, legal share of moveables, and everything that she *jure relictæ* or otherwise could ask, claim, or demand of me, my heirs, executors, or representatives through my death, in case she shall survive me, and which annuity I consider to be an ample aliment for her, in her position and habits of life, and that a larger income would not be for her advantage, and which provision in favour of my said wife is hereby declared to be purely alimentary, and not to be assignable by her or attachable by her creditors: (Fourth), My said trustees shall, after my death, aliment, clothe, and educate my children, Mary Ann Spalding, James Mitchell Spalding, and John Spalding, in a manner suitable to their station and prospects in life, until the youngest of them attain the age of twenty-one years, and my said trustees on my death shall be the sole judges of where they shall reside and receive their education, I myself being bound, out of the income of the estate payable to me as aforesaid, to aliment, clothe, and educate my children during my life: (Fifth), I

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direct my said trustees to make over and convey to my said son, James Mitchell Spalding, on my youngest child attaining the age of twenty-one years complete, the heritable subjects above conveyed, under burden of—(1st), £100 sterling to be payable to my daughter Mary Ann Spalding, and (2d), £100 to be payable to my son John Spalding, and failing him by predeceasing me, then to such other of my children as I may direct by any writing under my hand, and failing such direction by me, then to my son John, under burden of the said £100 payable to my daughter Mary Ann Spalding, and failing him, then to my son Dr William Spalding, Gorebridge, and his heirs, under said burden of £100 payable to my daughter as aforesaid: (Sixth), Any accumulations which my said trustees may make until the youngest of my said children attain the age of twenty-one years complete I direct and appoint them to divide equally among the said Mary Ann Spalding, James Mitchell Spalding, and John Spalding, and the survivors of them; and declaring further that the said provisions to the said Mary Ann Spalding, James Mitchell Spalding, and John Spalding shall be in full satisfaction to them of any share they can demand as legitim, bairns' part of gear, portion-natural, or of their mother's *jus relictæ*, excepting only what I may leave to them of my good will; and declaring farther that my children, the said Dr William Spalding and Arthur Robert Spalding have already received their portion from me, and are not entitled to anything from my said estate; . . . . declaring that my said trustees shall have all the powers and privileges conferred on trustees by the Acts 24 and 25 Vict., cap. 84, and 30 and 31 Vict., cap. 97; . . . . as also with powers of sale, by public roup or private bargain, or borrowing on loan on said property, in so far as necessary for carrying out the purposes of this trust, and of which my said trustees shall be the sole judges, with power to my said trustees to sell the said heritable property above specially conveyed, if they should deem it expedient, of which they shall be the sole judges, excepting that during my lifetime my consent must be first had and obtained; and declaring that the money so realised from the said estate shall be held by my said trustees on the like trusts and for the like purposes as the said estate; and with power to my said trustees to invest the same on such securities or shares as they may consider safe; . . . . and I nominate and appoint my said trustees, and such other person or persons as may be assumed as trustees, and the survivors or survivor of them who shall accept, to be tutors or curators to the said Mary Ann Spalding, James Mitchell Spalding, and John Spalding, during their respective pupillarities and minorities; . . . . and I revoke and recall all settlements or testaments made by me at any time heretofore; and having delivered these presents to my said trustees, I consent to registration hereof for preservation."

The deed was registered in the Register of Sasines on behalf of the trustees on 3d June 1873.

Mr Spalding was twice married. By the first marriage he had two sons, one of whom received £1000 and the other £1500 from him in his lifetime. Of the second marriage three children were born during his lifetime. He died on 31st August 1873, and on 20th December following a posthumous son was born.

His widow raised the present action against the trustees named in the trust-disposition, concluding for £5 as inlying expenses, and £20 per annum for aliment of the posthumous child until it should attain five years of age.

The only property left by the deceased appeared to have been his heritable estate, which was sold by the trustees after his death under the powers of the trust-deed.

The pursuer pleaded;—The pursuer's late husband, the deceased

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Charles Spalding, being the father of the child, aliment for which is concluded for, and the said Charles Spalding having died possessed of considerable means and estate, at all events having died leaving means and estate in the hands of the defenders, as trustees for behoof of his children, the pursuer is entitled to receive aliment for said child out of said estate, and the sum concluded for being fair and reasonable, decree therefor ought to be pronounced, as concluded for, with expenses. The deceased Charles Spalding having conveyed his whole estate, both heritable and moveable, to the defenders, as trustees for behoof of his children, Mary Ann Spalding, James Mitchell Spalding, and John Spalding, the children alive and born of the marriage between him and the pursuer at the date he executed said trust-deed, these children, or the defenders as representing them, are bound to aliment the posthumous child, for whom aliment is claimed.

The defenders pleaded;—(2) There being no power in the trust-disposition to pay the sums claimed, the trustees cannot apply the trust-fund to purposes different from those specified in the deed. (3) The income of the trust being only sufficient to aliment the beneficiaries under the trust, and the pursuer being an able-bodied woman, she has no claim against the trustees.

The Sheriff-substitute (Barclay) pronounced this interlocutor:—"Finds that the defenders, admitting that they were and are sole trustees, appointed by and during the lifetime of the said Charles Spalding, and that since his death they have sold his heritage, and now are in possession of the price or produce thereof, they therefore represent him, and are liable to pay his debts, and are not precluded by any directions contained in said trust-deed: Therefore repels the defenders' first, second, and third pleas in law."

The Sheriff (Adam) pronounced this interlocntor:—"Finds that under and in terms of the said trust-disposition the defenders are directed to pay all just and lawful debts of the said Charles Spalding due by him at the date when the said trust-disposition was executed and delivered as aforesaid, but finds that they are not thereby directed to pay debts subsequently incurred by him: Finds that the alleged debt sued for was not due by him at the date when the said trust-disposition was executed and delivered as aforesaid: Finds that the defenders do not represent the said Charles Spalding, and are not liable for debts and obligations incurred by him subsequent to the said date: Finds, further, that by the said trust-disposition, the defenders are directed to aliment, clothe, and educate certain children of the said Charles Spalding therein specially named, but that they are not directed, and are not bound to aliment the child born on the 20th December 1873, of which he is alleged to be the father: Therefore assoilzies the defenders from the conclusions of the action: Finds them entitled to expenses," &c.

The pursuer appealed, and argued;—The trust-disposition was a *mortis causa* deed, and could not affect the rights of creditors, in which position the pursuer stood. In any view, the father was not divested of the heritable estate until the trustees put the deed on record in June. By that time the child was *in utero*, and its rights were fixed.[1]

[1] Somerville v. Somerville, May 18, 1819, F. C.; Miller v. Dickson, July 11, 1826, 4 S. 822; Barbour v. M'Minn, July 7, 1826, 4 S. 806; Fyfe v. Kedslie, March 6, 1847, 9 D. 853, 19 Scot. Jur. 380; Lowther v. M'Laine, Dec. 15, 1786, M. 435; Morrice v. Sprot, June 27, 1846, 8 D. 918, 18 Scot. Jur. 248; Duguid v. Caddall's Trustees, June 29, 1831, 9 S. 845, 3 Scot. Jur. 557; Ersk. 3, 8, 46, and 1, 6, 58; Bell's Prin. secs. 1776, 1777, and 1632; 1 M'Laren on Wills, 259; Smitton v. Tod, Dec. 12, 1839, 2 D. 225, 12 Scot. Jur. 241; Hastie and

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The defenders argued;—The trustees did not represent the father, and were, therefore, not liable for his debts contracted subsequent to the deed. They were infeft before the truster's death, and, therefore, did not take the property by succession. The object of the deed was payment of debts already contracted by the truster. The deed was neither testamentary nor revocable. The truster did not give all that he possessed. He reserved his furniture. He did not give *acquirenda*. The entry was declared to be at the date of the deed. He was solvent at the time, and was entitled to divest himself of his property, and having done so no subsequent creditor could recover from his trustees.[1]

At advising,—

LORD PRESIDENT.—This action has been raised by Mrs Spalding, and the object is to obtain aliment for a child born four months after the death of her husband. It is directed against certain trustees appointed by the late Mr Spalding under a trust-disposition dated 10th March 1873. The trustees maintain, among other pleas, that the trust conveyance to them was *inter vivos* and irrevocable, that the funds in their hands are specially appropriated, and that they have no funds which can be applied to payment of the debts of the deceased, or at least of debts contracted subsequent to the date of the trust-deed. They maintain that the claim of the posthumous child is a subsequent debt. The case involves a very important question, which turns on a construction of the deed itself, and its effects on the estate conveyed. It is maintained that, suppose the estate is irrevocably settled by the deed, and is not liable for debts, yet the posthumous child is entitled to share in the provision made by the deed for the other children. But it is most convenient to consider, first, whether the estate in the hands of the trustees is liable for debts contracted subsequent to the constitution of the trust.

I. There can be no doubt that the child has the right of being alimented out of the executry estate of his father. This was decided by the early cases of Hastie in 1671, M. 416, Muirhead in 1706, M. 5927, and other subsequent cases. But all these cases were pronounced on the assumption that the persons liable were the representatives of the deceased father. The question here is, whether the trustees are the representatives of the deceased father, and are liable for debts subsequent to the date of the trust-deed. I deal with the demand of the pursuer as of a creditor, a favoured creditor no doubt, but nothing higher than a creditor.

It appears to me that the effect of the trust-deed was to divest Spalding of the fee of his heritable estate, and to vest it in the trustees for the purposes of the trust. It is not said that there is any other estate. No doubt there are words of general conveyance, as follows:—"As also the whole other estates and others, heritable and moveable, belonging to me, together with my whole right, title, and interest, present and future, in the subjects hereby conveyed, but always excepting from the above conveyance my household furniture." Now, if there was any moveable estate, it might have been carried by these words, but it is not said that there is any. It was contended that the meaning of the clause was to convey the estate as it stood at the time of his death, but I do not so receive the words.

Keir v. Hastie, Nov. 10, 1671, M. 416; Turnbull v. Tawse, April 15, 1825, 1 W. and S. 80; Wright v. Harley, June 2, 1849, 9 D. 1151, 19 Scot. Jur. 500.

[1] 1 Bell's Com. (M'Laren), p. 35, (old ed.), p. 36; Leckie v. Leckie, Nov. 22, 1776, M. 11,581; Oliphant, Bell's Folio Cases, p. 126.

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because they are "belonging to me," not "which shall belong to me at the time of my death." But even suppose that the words could be so construed, they do not apply to the only estate which is in the hands of the trustees. It is quite possible that in one part of the deed there may be a conveyance of a part of the estate which is testamentary and revocable, while in another part of the deed there is an absolute conveyance. The only part which we have to deal with is that which conveys the heritable estate. The first purpose of the deed is,—"First, that my said trustees shall, out of the means and estate hereby conveyed to them, pay all expenses incurred by them in the management and administration of the trust hereby constituted, and also pay all just and lawful debts at present due by me." The second purpose of the deed is,—"Second, that my said trustees shall, during my life, pay to me the whole free income, interest, or annual produce of the means and estate hereby conveyed to them." The third purpose is to pay a liferent annuity to the widow of £10, with an allowance for mournings. The fourth purpose is,—"My said trustees shall, after my death, aliment, clothe, and educate my children, Mary Ann Spalding, James Mitchell Spalding, and John Spalding, in a manner suitable to their station and prospects in life, until the youngest of them attain the age of twenty-one years, and my said trustees on my death shall be the sole judges of where they shall reside and receive their education, I myself being bound, out of the income of the estate payable to me as aforesaid, to aliment, clothe, and educate my children during my life." The fifth purpose is,—"I direct my said trustees to make over and convey to my said son, James Mitchell Spalding, on my youngest child attaining the age of twenty-one years complete, the heritable subjects above conveyed, under burden of—First, one hundred pounds sterling to be payable to my daughter Mary Ann Spalding, and second, one hundred pounds to be payable to my son John Spalding, and failing him by predeceasing me, then to such other of my children as I may direct by any writing under my hand, and failing such direction by me, then to my son John, under burden of the said one hundred pounds payable to my daughter Mary Ann Spalding, and failing him, then to my son Doctor William Spalding, Gorebridge, and his heirs, under said burden of one hundred pounds payable to my daughter as aforesaid." The sixth purpose is,—"Any accumulations which my said trustees may make until the youngest of my said children attain the age of twenty-one years complete I direct and appoint them to divide equally among the said Mary Ann Spalding, James Mitchell Spalding, and John Spalding, and the survivors of them; and declaring further that the said provisions to the said Mary Ann Spalding, James Mitchell Spalding, and John Spalding, shall be in full satisfaction to them of any share they can demand as legitim, bairn's part of gear, portion-natural, or of their mother's *jus relictæ*, excepting only what I may leave to them of my good will." This contemplates the possibility of his making a further testamentary disposition. Then there is the following direction:—"And declaring farther that my children, the said Doctor William Spalding and Arthur Robert Spalding, have already received their portion from me, and are not entitled to anything from my said estate." We know that one of them had received £1500 and the other £1000. Then there is a power of sale, the exception to which is that "during my lifetime my consent must be first had and obtained." Then there is a right of entry given to the lands "with entry to the whole lands and others specially and generally above conveyed, and with right to enter into possession of the personal and moveable

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estate hereby conveyed, all at the date hereof." Then there is a declaration that the deed was delivered to the trustees. Upon this deed being executed it was, in point of fact, delivered, and in addition to that the trustees took infeftment upon it. The effect of this was entirely to denude Mr Spalding of the fee of the heritable estate. The liferent was reserved, but was not what is properly called a liferent by reservation, as the liferenter was merely to receive the income through the hands of the trustees. If the effect of the deed was to divest the truster, the estate will not be liable for his debts contracted subsequently. No power of revocation could exist if the granter was divested. It appears to me that if the conveyance had been directly to James Mitchell Spalding and the other substitutes, under burden of payment of £100 to each of the sisters, that would have completely divested the truster, and it is clear on legal principle the same result will follow if the same thing is done through the medium of a trust. A great number of cases was referred to in the argument, but I shall only refer to a few of them.

The first of these is the case of Leckie v. Leckies, decided on 22d November 1776, reported in the Folio Dictionary, and also in Morrison, p. 11,581. This report sufficiently brings out the point in the case, though there is also a longer report in the Appendix, Presumption, No. 1 :—"Leckie executed a deed, disponing an heritable subject to his youngest daughter Elizabeth and her husband, and their son, reserving his own liferent. By the same deed, he assigned to the same persons all his moveables at his death; and, of the same date, he granted them a bond for £400, which he delivered to them. This disposition contained a clause dispensing with the delivery, but it was registered by the granter. Some years afterward, Leckie, by another deed, disponed the heritable subject, and all his moveables, among his three daughters equally. After the father's death, the youngest daughter brought a reduction of the latter settlement, on the ground that the former being put upon record, was thence to be held a delivered deed, and was consequently irrevocable. The Lords found, that the first deed, in so far as regarded the moveables, could operate no transference of these till the granter's death, and therefore, to that extent, it was revoked by the posterior settlement; but with regard to the heritage, they found that the registration of the deed was equivalent to delivery, and therefore reduced the latter settlement *quoad* the heritage." That is a very instructive case in many respects. It shews that a disposition, with a reservation of the granter's liferent, is a divestiture of the granter as soon as delivered. It further shews that a deed may contain in one part a disposition of a part of the estate which is revocable and ambulatory till the granter's death, and in another part may contain an irrevocable disposition.

It has been represented that the authority of the case of Leckie has been shaken by the case of Somerville v. Somerville (May 18, 1819, F. C.); but I think, on the contrary, that the case of Somerville confirms the case of Leckie. The Judges are careful to point out the differences. In Somerville's case the deed was a conveyance in favour of the granter's daughter, her husband, and her son, and was executed in 1805. The deed proceeded upon the narrative of the granter "being resolved to execute a settlement of his affairs." It conveyed, under the reservation of his own liferent, to Janet and her husband in liferent, and to their son and a certain series of substitutes in fee, in which John and William, and the heirs of their bodies, were introduced immediately after the heirs of the bodies of the sons of Janet, and before the heirs of the bodies of her daughters

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"all and sundry lands, heritages, houses, tenements, and other heritable subjects, and all goods, gear, debts, and sums of money, or other moveable subjects whatever, which shall pertain and belong to or be due or addebted to me at the time of my decease, in any manner of way; and in particular, without prejudice to the aforesaid generality, the following lands"—Then follows the description of a particular subject. The Lord Ordinary (Pitmilly) pronounced this interlocutor:—"In respect the general disposition executed by the late Mr Somerville in November 1805 proceeds on the narrative of the granter having resolved to execute a settlement of his affairs, and after conveying in general all heritable and moveable property which should belong to him at the time of his death, dispones, in particular, without prejudice to the foresaid generality, the lands of Ampherlaw, finds that the conveyance of these lands was thus expressly qualified, and in the same manner as the general conveyance of the disponer's property, heritable and moveable, was qualified, with the condition that the lands and other property disponed was only such as should belong to the disponer at the time of his death, and that it therefore remained in his power equally as it did with regard to the rest of his property, heritable and moveable, to dispose of the lands of Ampherlaw onerously or gratuitously during his lifetime." When the case came before the Inner-House the Judges found great difficulty, and the case was heard more than once. "Upon advising a second reclaiming petition, with answers, the Court appointed a hearing in presence; after which, Lords Justice-Clerk, Glenlee, and Craigie, were still for adhering (though not without hesitation), upon the ground that the deed was, from its whole construction, a *mortis causa* settlement, comprehending the lands of Ampherlaw as part of that arrangement; in which circumstance their Lordships considered this case to differ from that of Leckie, where there was a special independent conveyance of the heritage. Lord Craigie was also still moved by an impression against the deed, from the manner and circumstances in which it had been prepared and executed. Lord Robertson was also for adhering, but without expressing special reasons. Lord Bannatyne was of opinion that the conveyance of Ampherlaw was an independent conveyance *inter vivos* (as in the case of Leckie), rendered irrevocable by delivery. The Court adhered to their former interlocutor." That was throughout a very hesitating judgment, but I am not disposed to dispute its substantial authority. The deed was construed as a conveyance to take effect only at the death of the granter. The case of Leckie was an independent and separate conveyance *inter vivos*, as in the present case.

If any doubt still existed as to the effect of such a deed as the present, when divested or feudalised, it was set at rest by the judgment of the House of Lords in the case of Turnbull v. Tawse, 15th April 1825, 1 W. and S. p. 80; and in the Court of Session, 12th December 1822, 2 S. p. 1. The Court of Session found that Mrs Turnbull was entitled to execute the second deed, as the first was revocable, and did not divest the granter. The House of Lords reversed this judgment. The nature of the first deed may be gathered from the judgment of Lord Cringletie, who 'finds that she and her husband, having got into pecuniary embarrassment, took the resolution to extricate themselves therefrom by paying off their debts, and to secure the free residue to their children; and accordingly, on the 18th of April 1804, they executed a trust-deed in favour of the defenders, the narrative of which details the difficulties in which they had been involved, and mentions that, from these considerations, and 'in order that the debts due by us may be speedily discharged at the least possible expense, and the residue of the property

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belonging to me, the said Elizabeth Anne Hay (*i.e.* Turnbull) may be effectually secured to me and my said husband under the declaration after-mentioned, and the longest liver of us in liferent, and to our daughters after named in fee, our said son having already received much more than his proportion of the property and effects belonging to us, we have resolved, after full deliberation and mature consideration, to grant the trust right and disposition underwritten': Finds that, accordingly, Mrs Turnbull conveyed her whole property to the defenders, with full power to feu, sell, or dispose thereof either by public or private sale, but under trust always, 1st, for payment of the expense of executing the trust, and of all debts and sums of money, whether heritably secured or otherwise, which shall have been contracted by me, the said Elizabeth Anne Hay, preceding the date thereof, and particularly a debt due to the defender, John Tawse, of £258, 16s.; 2dly, the trustees were to pay to Mrs Turnbull, exclusive of her husband's right, such surplus as could be afforded of the rents and feu-duties of her property for her maintenance; and 3dly, after the death of the longest liver of the said Mrs Turnbull and her husband, the trustees were taken bound 'to dispose and convey the free residue of the property hereinbefore disponed, or to pay and apply the proceeds thereof to the use and behoof of the said Alexander Turnbull, our son, and Mary and Elizabeth Jane Turnbull, our daughters, in such shares and proportions as shall be directed by me, the said Mrs Elizabeth Anne Hay, by any writing under my hand,' failing such writing, then to the two daughters equally between them: Finds that the trustees, defenders, were infeft on said disposition, conform to instrument of sasine dated 9th October, and registered 19th November 1804; and therefore, as this trust was executed for payment of debts contracted at its date, after the discharge of which the residue was to belong to the said Mrs Turnbull and her husband in liferent, and to their children *nominatim* in fee, and as their mother did not reserve to herself any power of contracting other or farther debts, the fee of the residue was vested in the trustees for behoof of the children, and could not be injured or impaired without their consent." He then finds that the attempt to get rid of the first deed was not effectual. The Second Division took a different view. They held that as there was no direct conveyance to the parties interested, but merely a trust-conveyance to be carried out after the truster's death, that the fee was vested in the trustees, not in the beneficiaries, and that the deed was testamentary and revocable. When the case came before the House of Lords they took a different view. I shall refer to two passages only in the opinion of Lord Gifford, in one of which he says, "It was also admitted, and, I apprehend, cannot be disputed, on the cases cited, that if this disposition had been a disposition to Mrs Turnbull herself, and the children *nominatim*, that would have vested the fee in the children. But it is said that this being a mere trust-deed, the effect of these trusts is not the same as if it had been a disposition to the children immediately, but that, looking at the whole structure of this trust, the Judges seem to have been of opinion that the fee was not so parted with by Mrs Turnbull, that the trustees were trustees for the benefit of the children, but that there still remained in her that fee to be disposed of by her, and therefore it was competent for her to execute this second trust-deed." He says, a little farther down,—"Now, if, as it then stood, Mrs Turnbull could have done this by an immediate disposition to the children, it appears to me that still more could she do so by means of a trust executed in this way. Of the fee she clearly divested herself, and it was vested in the trustees." Now, it appears to me that the case of Turnbull v. Tawse confirms the

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doctrine of the case of Leckie. When a man conveys to trustees it is the same as if he conveyed to the beneficiaries themselves.

There is another case still further confirming this doctrine, and shewing the view which the Court took of the judgment of reversal in the case of Tumbull v. Tawse,—that is the case of Smitton v. Tod, Dec. 12, 1839, 2 D. 225—"A proprietor infeft executed a conveyance of his heritage, and also of the whole moveable estate then belonging to him, in favour of trustees, on the narrative that there had been no written contract of marriage between his wife and him, nor any provision for her and the children of the marriage, and that, from natural facility, he was incapable of profitably conducting his affairs. The purposes of the trust were to pay his debts; to provide an alimentary annuity to his wife, exempt from the *jus mariti*, and, on her death, an alimentary annuity to himself; after the death of the longest liver the trustees were to hold the subjects equally for behoof of the children born or to be born of his present or any subsequent marriage. Two children were already born at the date of the deed; the trustees were empowered to provide for the education and maintenance of his children, even during his life; the warrandice was from fact and deed; the deed was delivered, and the trustees took infeftment. Held that, *quoad* the children, the deed was irrevocable."

The leading opinion was given by Lord Mackenzie, and was as follows:—"I do not consider the deed to be a postnuptial contract at all. It is simply unilateral, and was spontaneously granted by the pursuer. It is true that he recites the want of an antenuptial contract; but that is merely to shew the reason for his executing his deed. He might, nevertheless, after that recital, have made a provision for the interests of his wife and children, not amounting to anything more than a legacy, or a trust expressly revocable at pleasure. He might have done so; but I do not think he did so. He executed a *de præsenti* conveyance of his estate, a deed of immediate disposition *inter vivos*, and delivered the deed to his trustees, for the purpose of enabling them to take infeftment on it, which they did, and duly registered their infeftment. At the date of this transaction there were children already born, for whose behoof this delivery of the deed, and this registered infeftment took place. No power of revocation was inserted in the deed. It did not bear to be a settlement, or to be granted *mortis causa*; on the contrary, it was to have, and it actually had, instant and immediate effects. It was not a deed which conveyed *acquirenda*, or included the whole property of the disponer which might belong to him at his death; it merely carried his existing property as at its date. In point of form, therefore, the deed was plainly an irrevocable and completed conveyance, and it would require the occurrence of something very strong in the ends and purposes of the trust to make the deed be revocable. But these ends and purposes rather afford an opposite inference. The purposes could not well be executed, nor the ends of the deed be secured, if it was revocable. The purposes were to provide for payment of all the pursuer's debts; of an annuity to his wife during her life, and to himself after her death; and to provide for the education of his children, and for their provision after his death. All these objects were to be secured by the trust, on account of the pursuer's facility. How could that be done if the deed was revocable at his pleasure? In that case his property remained as much subject to the acts of his facility as ever, and the duration of it, down to the time of his death, could not be relied on so as to make the purposes executable. The ends and purposes of the deed, therefore, afford the reverse of any reason for

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conjecturing revocability. And as the deed is in form irrevocable, I think we cannot find it to be otherwise.

"In the case of Somerville, I was of counsel for one of the parties, and I do not think it a parallel case to this. What was chiefly pressed there was, 1st, that the deed revoked was declared to be in its preamble a 'settlement;' and, 2d, that it conveyed all the granter's property 'as at his death.' Nor, perhaps, was the construction of it wholly free from the impression produced by its being liable to the suspicion of undue impetration, under the colour of getting the granter to make a mere revocable settlement. A case which comes much nearer to the present than Somerville's does is the case of Turnbull. Looking to the decision of that case in the House of Lords, the principles laid down by Lord Gifford, in delivering judgment seem to me to be sufficient for the decision of this case. I think, therefore, that the interlocutor of the Lord Ordinary should not be altered."

On these authorities, I cannot resist the conclusion that the deed here is an irrevocable deed, and that posterior creditors have no claim. The pursuer is in no better position than a creditor.

II. But it is said that although the child may not be entitled to aliment as a claim of debt against the trustees, yet that the deed may be so read as to admit the pursuer's claim under the provision to the other children. It is maintained that the *conditio si sine liberis* applies. It might be that a deed was so conceived as to let in the claim of a posthumous child, which was not in the contemplation of the granter. But cases of that kind are rather to be referred to the legal category of "implied will," and are founded upon the notion of *pietas paterna*. The only case bearing on this branch of the argument was the case of Oliphant, 10th December 1794, Bell's Folio Cases, p. 126. That was a very singular case. "John Lord Oliphant succeeded to the estate of Bachilton under a strict entail, but he was thereby empowered to provide his younger children, other than the heir who shall succeed to the lands and estate, &c., with suitable and competent provisions, not exceeding three years' free rents of the estate for the time.

"Lord Oliphant had two sons and two daughters, but his second son dying without issue, his Lordship in 1776, in virtue of the powers given him by the entail, gave a provision of £1000 to his two daughters, Margaret and Eleonora, defenders in this case, and to the survivor and to her or their heirs and assignees. The deed contains a power of altering or revoking.

"Lord Oliphant afterwards entered into a second marriage, and lived till 1781. Of this marriage there was a son, John the present Lord Oliphant, born two years before his father's death, and a posthumous child, Janet, the pursuer of this action. Although John was born two years before the death of his father, and was at that time to be considered a younger child, being excluded from the titles and the estate by the son of his eldest brother, yet Lord Oliphant made no change in the bond of provision in favour of younger children. Upon the death of Lord Oliphant he was succeeded by his grandson, and his death happening soon after, John, the son of the second marriage, succeeded to the title and estate, but being at the time of his father's death a younger child he contended in an action for their provisions brought by his two sisters of the first marriage that he was entitled under the character of one of the younger children to retain a share of the £1000 sterling. This claim the Court overruled.

"But an action being brought by Janet, the posthumous child, the question came simply to be, whether she had right to one-third of the provision secured

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to the younger children by Lord Oliphant's bond of provision granted in 1776." Now, this provision was £1000 to Margaret and Eleonora *nominatim*. The judgment of the Court seems to have been delivered by Lord President Campbell, and no doubt that gives great weight to the decision. He says,—"This is not a question of interpretation, it is the case of an extension of will; and there have been cases in which you have gone further than you are required to go here. There is a case mentioned in the answers, where, by the contract, one daughter was to be provided in fourteen thousand merks, two in twenty thousand merks, and three in thirty thousand merks, and nothing is said of the case of a fourth. There was a fourth, and the question was, whether she could have any share of these sums. It was found that she was entitled to a share. You brought in the fourth daughter, though omitted." Now, it is a very remarkable circumstance that the case here referred to, Anderson v. Anderson (1729, 18th July, M. 6590) was reversed on appeal (13th March 1734, 1 Craigie, p. 136). It is still more remarkable that this was not known to Lord President Campbell, though we are all aware, as matter of fact, that in the last century the judgments of the House of Lords in Scotch cases were little known in Scotland. I confess that I am not surprised at the reversal, because the cases of Anderson and Oliphant carried the doctrine of implied will very much further than any other authorities.

Let us consider how the doctrine could be applied here. If the pursuer is right in maintaining that she is within the rule of the case of Oliphant, she must carry her demand further than what is contained in the summons. It must amount to a demand to share in the provision to the other children. These provisions are given in the form of a burden on the estate. James Mitchell Spalding is to get the estate on paying £100 to each of the younger children. How is the posthumous child to be let in to share in these provisions? Is the fund of £200 to be divided into three parts, or is the eldest son to give another £100? The trustees may burden the estate for the aliment of the three children, but they are not entitled to aliment any more than three. To force them to do so might throw the whole trust into confusion. I am as little inclined to adopt the second ground on which the pursuer's case is founded as I am to adopt the first ground.

I therefore agree with the Sheriff. Being aware that I stand in a minority of one, I give my opinion with diffidence; but I cannot resist the force of the authorities.

LORD DEAS.—The facts of this case, so far as judicially ascertained, may be very shortly stated. The late Mr Spalding had been twice married. His age is not stated, but it was not disputed that he was an old man. He left two sons by his first marriage, and three children by his second marriage. A fourth child of this marriage was born between three and four months after his death. He made provision for the sons of the first marriage by giving the one £1500 and the other £1000. He thereafter made provision for his three children of the second marriage by executing the trust-deed now under consideration. By that deed, which is dated 10th March 1873, he conveyed his whole means and estate, heritable and moveable, excepting his household furniture, to trustees, of whom the defenders are the acceptors and survivors, for the following purposes:—1st, For payment of expenses, and "all just and lawful debts at present due by me; 2d, That my trustees shall during my life pay to me the whole free income,

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interest, or annual produce of the means and estate hereby conveyed to them;" 3d, To pay to his wife, if she survived him, an annuity of £10 sterling, half-yearly, in full of all legal claims, and also to pay her £10 for mournings; 4th, That the trustees should, after his death, aliment, clothe, and educate the three children of his second marriage, Mary, James, and John, until the youngest attained the age of twenty-one, "I myself being bound, out of the income of the estate payable to me as aforesaid, to aliment, clothe, and educate my children during my life;" 5th, To make over to his said son James, on his attaining the age of twenty-one, the heritable subjects specially conveyed by the deed, under the burden of £100 to his son John, if he survived the truster (which he did); 6th, Any accumulations before his youngest son attained the age of twenty-one to be divided among his said three children equally, and the survivors of them,—the said provision to his said three children to be in full of all legal claims, declaring that the two children of the first marriage had already received their portion and were entitled to nothing more. The deed contained a power of sale of the heritable property, but not to be exercised during the truster's life-time except with his consent. It contained also authority to the trustees to take possession of the estate as at the date thereof, a clause of resignation for infefting the trustees in the heritable subjects, and a nomination of them to be tutors and curators to his said three children then in minority. The deed further bore—"And I revoke and recall all settlements or testaments made by me at any time heretofore; and having delivered these presents to my said trustees, I consent to registration hereof for preservation." The deed contained no express declaration of irrevocability.

The trustees caused the deed to be recorded in the Register of Sasines on 3d June 1873. The truster died on 1st August same year, survived by his widow, by his three children of the second marriage, as well as by his two children of the first marriage, who have made no claim on the estate. The widow gave birth to a male posthumous child on 20th December 1873, and she has instituted this action for behoof of herself and the posthumous child, concluding for £5 sterling of inlying expenses, and £20 per annum of aliment for the child till it attains five years of age, reserving to apply for an increased aliment at the lapse of that period.

The trustees deny all liability for aliment, however limited, as well as for inlying expenses. The Sheriff-substitute repelled the plea of non-liability, without prejudice to the question of amount, but the Sheriff recalled that interlocutor, and assoilzied the trustees from the conclusions of the action, with expenses, his ground of judgment being, as stated in his note, that the "trustees do not represent the truster generally, and are not liable for any debts or obligations which they are not directed to pay by the deed under which they act."

It is conceded on all hands that the posthumous child must be held to be legitimate, but the Sheriff says that the aliment sued for, assuming it to be due by the truster, was not due by him (meaning, I presume, not incurred by him) at the date of the deed. That, however, is far from clear. In the first place, the aliment was a debt due by the law of nature. The truster was bound *ab initio* to aliment all the children he might beget, so long as, by reason of infancy, they could not aliment themselves. In the next place, the posthumous child was born only nine months and ten days after the date of the deed and six months and seventeen days after the deed had been recorded. The child must

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therefore have been begotten prior to the latest of these dates, and the law, which in questions of legitimacy allows ten months between conception and birth (Erak. 1, 6, 50), holds that the child may have been begotten before the earliest of these dates. It can hardly, I think, be said that liability had not been incurred, at the date of the deed, for the aliment of a child which the law presumes to have been already begotten, and this view, therefore, would of itself obviate the Sheriff's ground of judgment, that the debt was not a prior but a subsequent debt.

Apart, however, from this matter of dates, I think the Sheriff does not sufficiently keep in view that the question at issue is really not the liability of the trustees, but the liability of the deceased's estate, of which the trustees are the mere administrators for behoof of the children of the second marriage, who are the gratuitous beneficiaries under the deed.

I doubt extremely whether the deed was to any effect an irrevocable deed. The authority mainly relied on in support of its irrevocability was the case of Leckie, 22d Nov. 1776, M. 11,581. In that case the father had disponed a particular heritable subject to his youngest daughter and her husband and their son, reserving his own liferent. By the same deed he assigned to them all his moveables at his death. He placed this deed on record, and likewise delivered to the same parties a bond for £400. Afterwards he disponed the heritable subjects and all his moveables to his three daughters equally. The youngest daughter brought a reduction of this second disposition after the granter's death, on the ground that by recording the first disposition he had made it irrevocable. The first disposition was held to be irrevocable as to the special heritable subject, but revocable as to the moveable estate. The question raised was purely a question of revocability, and that question obviously turned upon the terms in which the special heritable subject had been conveyed by the particular deed, for although the plea that registration was equivalent to delivery applied to the moveable estate equally as to the heritable subject, "the Lords found that the first deed, in so far as regarded the moveables, could operate no transfer of these till the granter's death."

That this decision must have proceeded upon the terms of the particular deed, taken in connection with the circumstances, becomes quite clear on attending to the fact that in the subsequent case of Somerville, 18th May 1819, F. C., although Leckie's case was cited, and no doubt whatever was cast upon its soundness, a different result was arrived at as to the heritable estate specially disponed by Somerville from what had been arrived at with reference to the heritable estate specially disponed in the case of Leckie. The deed in the case of Somerville conveyed to the granter's daughter Janet and her husband in liferent, and to their son and a series of substitutes in fee, the granter's whole means and estate, heritable and moveable, which should belong to him at his death, and in particular the lands and estate of Ampherlaw, with procuratory and precept for infefting his disponees. The granter reserved his own liferent, but the deed contained no power to revoke. On the back there was a docquet, holograph of and signed by the granter, bearing that the deed had been delivered to his daughter, and Lord Pitmilly's interlocutor, which was adhered to by the Court, proceeded expressly on the footing that the deed had been delivered. The case was discussed upon a first and second reclaiming petition, and the result was, after a hearing in presence, that the deed was held revocable out and out, on the ground that it was to be regarded, from its whole construction, as a *mortis*

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causa settlement, comprehending the lands of Ampherlaw as a part of the general arrangement. That case appears to me to come much nearer to the present than the case of Leckie.

I attach, of course, no weight to the decision of this Court in the case of Oliphant (Bell's Folio Cases, 126), which proceeded on the supposed authority of a previous case of Anderson, the judgment in which had been reversed in the House of Lords on grounds which recommend themselves to my mind as sound and satisfactory—(Craigie and Stewart, 136).

I have fully considered the other cases quoted at the bar, and in particular Turnbull v. Tawse, as decided in the House of Lords, 1 W. and S. 80; Smitton v. Tod, 2 D. 225; Morrice v. Sprot, 8 D. 918; and Wight v. Harley, 9 D. 1151; but I am satisfied that these cases were all of a special nature and do not sufficiently bear upon the present case to justify my detaining your Lordships by going over them.

It may be that, in the present case, the granter, while making what was in substance a *mortis causa* settlement of his affairs, had a sinister object in view, viz., to exclude the legal claims of his wife if she should happen to survive him, and at the same time to leave a door open to himself to plead revocability if he happened to be the survivor. This would account for the equivocal language of the general conveyance of the whole other estates and others, "heritable and moveable, belonging to me, together with my whole right, title and interest, present and future, in the subjects hereby conveyed," in place of saying in plain terms "presently" belonging to the granter, and distinctly excluding all idea of any "future" interest in the estate remaining vested in him.

All the purposes of the trust which follow this general conveyance are precisely of such a nature as might be expected in a *mortis causa* deed. The first purpose as to debts is no doubt limited in its language to "debts presently due by me," and if there had been a competition on a deficient estate between prior and subsequent debts, the effect of these words might have been brought into controversy. But it has not been suggested that this was a trust, by an insolvent party, for behoof of creditors,—nor by a facile party, for the purpose of interdicting himself from contracting future debts.

The second purpose, that the trustees should, during the granter's life, pay to him the whole free income of the estate, is just, in another form, a reservation of his own liferent, usual in *mortis causa* deeds. For although he created an immediate trust, it was a trust, during his own lifetime, for his own benefit exclusively.

The third purpose, viz., for payment after his death of an annuity to his widow, with a sum for mournings, in full of all claims against his representatives, is, of course, in its terms a purpose appropriate to a *mortis causa* deed.

The fourth purpose, which leaves the burden upon himself of alimenting, clothing, and educating his children during his life, and lays that burden on the trustees only after his death, is also such as might be expected in a *mortis causa* deed.

So is the postponment in the fifth purpose of the period of division among the beneficiaries till his youngest child should attain the age of twenty-one years; and likewise the provision in the sixth purpose, which provides for accumulation, till that same period, of the income, so far as not expended, for the maintenance and education of the children. Apparently there is to be no vesting till the youngest child attains the age of twenty-one, and in the meantime,

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by a subsequent clause, the trustees are to be tutors and curators to the children. A power of sale of the heritable property is likewise conferred on the trustees, and it is declared that the money thereby realised "shall be held by my said trustees on the like trusts and for the like purposes as the said estate," thus massing the whole estate, heritable and moveable, in one undistinguishable succession. Even this power of sale, however, was only to emerge after the granter's death, for the condition is that "during my lifetime my consent must be first had and obtained."

These purposes, certainly, are very unlike what might be expected in a deed the object of which was fairly and fully to divest the granter, and at once to place the favoured beneficiaries in his full room and stead. On the other hand, it was a deed calculated, in the circumstances, to serve, and which did serve, all the purposes of a *mortis causa* settlement of the granter's entire estate at his death. He obviously expected to have nothing more to leave, and he had, in point of fact, nothing more to leave at his death than he had disposed of by the deed.

I cannot think that such a deed would have excluded creditors from attaching the fee of the estate, if necessary, for payment of their debts, although subsequently contracted. Whether the beneficiaries would have had a *jus quæsitum* to object to revocation as to the surplus, beyond what was necessary to satisfy debts, past and future, might have been made a question, which has not perhaps been hitherto raised and decided in that precise form, and into which I do not propose here to enter farther than I have already done, because I do not think it necessary for the solution of this case to do so. My opinion is, in the first place, that the debt in dispute was a *debitum naturæ*, and in that sense a prior debt in a question with the gratuitous beneficiaries under this deed; and, secondly, that, at all events, it became a debt so soon as the child was begotten, which the law holds it may have been ten months before the birth.

For this last proposition we have the express authority of the case of Hastie and Ker v. Hastie, Nov. 10, 1671, M. 416, in which a father, having a son and a daughter, disponed a small portion of his means to the daughter, and the rest, which was very considerable, to the son. It is not said whether the deeds were *inter vivos* or *mortis causa*. But assuming them to have been the latter, the case is still important. The widow having brought forth a posthumous child, sued the son for her inlying expenses, and aliment for the child. It was answered, as to the inlying expenses, that there was no ground for the claim in law, especially seeing the defender's disposition was long before the granter's death. It was replied that these expenses were a debt, "for which the father was liable, whom the defender represents as lucrative successor by the disposition posterior to the conception of this child, *nam in beneficiis qui in utero est pro jam nato habetur.*" The report bears,—"The Lords sustained the libel, and modified, in respect of the reply and disposition." The report farther bears, with respect to the aliment,—"The Lords found the defender, as representing the father by disposition of his goods, liable to aliment the posthumous child during his minority, as he was without calling or means to aliment himself, but would not extend it after majority."

It is not stated in the report whether the disposition by Hastie was *mortis causa* or *inter vivos*, but that is immaterial to the purpose for which I cite the case, viz., that liability was incurred both for the inlying expenses and the aliment, not later, at all events, than the date of conception, "*nam in beneficiis*

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qui in utero est pro jam nato habetur." That maxim, thus authoritatively applied, brings both sums sued for under the category of prior debts, and so within the very words of the first purpose of the deed, if that were assumed to be necessary (which I am not prepared to say that it is), to warrant us in recalling the Sheriff's judgment, and pronouncing decree for the £5 sued for as inlying expenses, and for the child's aliment, also sued for, to such limited amount as your Lordships may, in the circumstances, think it right to modify.

LORD ARDMILLAN.—I rest my opinion on this very difficult question on a ground which I think is apart from most of the difficulties of the case,—I mean on the sacred duty and high legal as well as moral obligation which rests on a father to support his child. I think that obligation is one which God lays on him, one which humanity appreciates and law recognises and enforces (Ersk. i. 6, 56). I think, farther, that it is a just and becoming extension of the same obligation that, in a certain sense, it exists from the date of marriage. The father is bound to look forward and to provide for the aliment, the support necessary to protect from starvation, of an expected child. Before the child is actually born, nature, with the sanction of law, recognises the right of the child to support from parents whenever it comes into the world. And if the right is with the child the obligation is on the father. The duty of the father is very clear. The claim of the child is equally so. Both obligation and claim arise from the relationship, and *ex debito naturali*.

I am speaking of a lawful child, and we must hold this child to be the lawful child of Charles Spalding. It is a posthumous child, but I think the case before us is really the same as if the child had been born before the father's death and the demand for aliment been made against himself, his defence being that by this deed he had denuded himself in favour of these trustees. I think that the father could not on that plea have successfully resisted that claim.

The child is a creditor to whom nature gives the right. The father is a debtor on whom nature lays the obligation *ex debito naturali*. The right of a favoured creditor,—a highly favoured creditor,—arises when the claim is for bare aliment, for a few pounds a-year to keep the child from starving. That is the extent to which alone I would go. I go no farther. I do not proceed on the case of Oliphant, or on the principle of implied will. I do not think that this child is entitled to share as a beneficiary by appointment in the provisions of this trust. It is as a creditor for that support which is necessary to keep it alive, which is a debt of nature, that I am in favour of sustaining the claim. The principle on which the father's obligation to aliment a child rests is clear, and the extension of the principle to a posthumous child has long been settled and is not now disputed.

The trust-deed before us is a general—a universal—conveyance of heritable and moveable estate. In so far as regards the creation of the trust, the deed took immediate effect. But, except the payment to the truster of the whole proceeds during his life and the payment of his present debts, the administration of the trust and the disposal and distribution of the estate is postponed till after his death. The deed was gratuitous, unilateral, and postnuptial. It is an attempt to set his estate aside and protect it from his subsequent creditors, without parting with the benefit or enjoyment of it himself. Such an attempt to provide for children by a gratuitous deed to the exclusion of creditors, but without excluding himself, is not equitable, and is not favourably viewed by

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law. If the trust provision for the children named in the deed were ascertained to be reasonable, and could be sustained on that ground, then the reasonableness of the provision would equally apply to the aliment of the child subsequently born. If the question of the reasonableness of the provisions which only take effect after his death is excluded, and they are held as unreasonable and as exhausting the estate, then I should be disposed to share the doubt, expressed more than once by Lord Fullerton, whether subsequent onerous creditors would be excluded by such a deed,—a deed saving the interests of the granter and gratuitously disposing of his whole estate.

I quite admit that this trust-deed could not be revoked by the truster gratuitously or at his pleasure.

But the point now before us, involving only the claim of a child for necessary aliment is different. The claim which had arisen, during the father's life though after his deed, is peculiarly strong.

I appreciate the weight of the authorities, of which your Lordship has favoured us with a most instructive exposition, and these authorities, supported by your Lordship's opinion, certainly prevent my holding with any confidence that this trust-deed was generally revocable by the granter. Lord Deas thinks this a *mortis causa* deed, and therefore revocable. There is much force in his observations, but I am disposed to rest my opinion on the ground of the peculiarity of this alimentary debt.

The debts of Mr Spalding were to be paid. This child, which we must hold as lawful, must be held as truly a creditor, and Mr Spalding himself as truly a debtor, to the extent of necessary aliment.

As an illustration I may suggest the case of a claim for deathbed and funeral expenses of Mr Spalding. Of course these expenses were a debt subsequent to the deed. But the debt, the obligation imposed, as Mr Bell says, "by nature and by decency," to furnish from his estate, if he had any, the means of decent burial, existed at the date of the deed, and continued till he died.

So also, in my opinion, did the debt, the obligation to aliment the children he had and the child to be expected, and which was afterwards born. We must deal with this case just as if the child had been born before Mr Spalding's death. The child, before the truster died, had reached a maturity of gestation which indicated life. It must be held *pro nato*, and the obligation to aliment, which is the debt of the father, existed in binding force, pressing on him before the time for its enforcement emerged.

On this ground, and to no further extent than necessary aliment, I think the claim of the child should be sustained.

Lord Mure.—I have come to the same conclusion as the majority of your Lordships, although I have done so with very considerable diffidence and hesitation, as I was aware, when considering the case, that the opinion which I was disposed to form was at variance with that entertained by your Lordship in the chair. The claim as laid in the summons is simply one for the inlying expenses incurred by the birth of a posthumous child, and for the aliment of that child until it attains the age of five years complete. It is therefore a claim founded substantially upon the natural obligation which all parents are under to provide for their children, and is one of a description which has been held in a variety of cases to transmit, upon the death of a parent, to the parties *lucrati* by the succession. As regards one of the questions here raised, viz., the liability of

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the representatives or successors of a party deceased to implement such an obligation, I do not think I can better express the result to be deduced from the authorities than in the words of Lord Ivory in a note to Mr Erskine, i. 6, 58, where he says,—"It would seem that in every case the representatives of a person deceased, whether the degree of relationship be nearer or more remote, and whether the succession by which they are *lucrati* consist of heritables or moveables, are out of this succession liable in aliment to those whom the deceased himself was under a natural obligation to maintain." It is also, I think, clear from the decisions that this rule applies whether the representatives have succeeded to the property in the ordinary course of law, or have taken it by a conveyance from the father. The latter point was so settled in the case of Hastie, November 10th 1671, D. p. 416, and of Scott, 8th March 1759, D. App. Parent and Child, No. 1. And that the trustees under a father's trust-settlement are, in the ordinary case, under the same liability, is shewn by the decisions in Riddell, 6th March 1802, D. App. Aliment, No. 4, and Ormiston, 22d December 1838, Jurist, vol. xi. p. 232.

In this state of the law the main point raised for decision is whether there is anything in the terms of the present trust which must be held to exclude the operation of the rule. This question is one of difficulty. But after considering the matter in all its bearings I have come to the conclusion that there is not. For I concur with Lord Deas in thinking that this deed is essentially *mortis causa*, in so far as the interest of the children of the truster are concerned. There is no doubt a special *de præsenti* conveyance to the trustees of the heritable estate. But that is followed by a conveyance of "the whole other estates, heritable and moveable" to trustees, who are to enter into the possession and management, and, after discharging the debts then due by the truster, to pay the whole free income to him during his life. They are, however, during his life to do nothing more, for they are not to sell the heritable estate, except with his consent, and it is only after his death that the other purposes of the trust, which consist of provisions for the truster's family, are to come into operation. There is thus a conveyance of the whole estate belonging to the truster, with the exception of the household furniture, and I do not think that this clause must be read as limited to the estate then belonging to him. It is not qualified by the word "presently" belonging to him, which is not an unusual word of style when such a restriction is intended. And when the clause is read in connection with that where power is given to the trustees to complete titles, not only to the heritable estate specially conveyed, but to any estate to which they "may at any time have right as falling under or accruing from the trust hereby created," I am unable to put any other interpretation upon the very general terms of the conveyance than that it was intended to include *acquirenda*. The deed, moreover, as I read it, is, and was, I think, plainly intended to operate as a general settlement of the truster's affairs. For by it provision is made for his second wife, and the whole of the existing children of his second marriage, as in full satisfaction of their legal rights; and the testator gives as his reason for settling everything he had upon those children, that his two sons by his first marriage had already received their portions. Then the deed concludes with a revocation of "all settlements or testaments" before made by him, and this appears to me to be as distinct an indication that the object and intention of the truster was to make that deed the settlement of his affairs as the declaration to that effect in the narrative of the trust-deed in the case of Somerville.

18th May 1819, referred to in the argument. I am therefore of opinion that as the estate is here held in trust for parties who are *lucrati* by the succession, the defenders are liable to make good the pursuer's claim.

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THE COURT pronounced the following interlocutor:—"Recall the interlocutor of the Sheriff-substitute of 7th May 1874, and the interlocutor of the Sheriff of 24th June 1874: Repel the defences, and decern against the defenders for payment to the pursuer of £5 of inlying expenses; and, further, decern in terms of the libel for payment of aliment at the rate of £14 per annum: Find the petitioner entitled to expenses, both in the inferior Court and in this Court: Allow," &c

DRUMMOND & REID, W.S.—GEORGE BEGG, S.S.C.—Agents.

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Dec. 19, 1874.
Bertram & Co. v. Stewart's Trustees.

JOHN A. BERTRAM & Co., Pursuers.—*Sol.-Gen. Watson—Trayner.*
ROBERT SMART AND OTHERS (William Stewart's Trustees), Defenders.—*D.-F. Clark—Rhind.*

Triennial Prescription—Act 1579, *c.* 83—*Reference to Oath—Oath of Manager.—Held* that the Act 1579, c. 83, in limiting a person suing for payment of a prescribed account to a proof "by writ or oath of his party," excludes the oath of the manager of such party.

Oath—Reference.—Held that, when a reference is made to the oath of two parties jointly, it is not competent to sustain it as a reference to the oath of one of them.

THIS action was raised on 15th June 1874 by John A. Bertram and Co., wine-merchants, Leith, against Robert Smart, James Stewart, and William Ferguson, trustees of the deceased William Stewart, and also against George Scott, hotel-keeper, Portobello. The summons concluded (1) for payment by Stewart's trustees and Scott of an account amounting to £8, 6s. 9d. incurred, prior to November 20, 1869, for wines furnished to the deceased William Stewart and Scott, as partners carrying on the business of hotel-keepers in the Crown Hotel, Edinburgh; and (2) for payment by Stewart's trustees of an account amounting to £62, 4s. 3d. for wine furnished to the Crown Hotel prior to March 5, 1870, during a period when the business was carried on by George Scott as manager for the trustees.

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George Scott did not enter appearance, but decree in absence was not taken against him.

Mr Stewart's trustees appeared and denied the debt, and pleaded the triennial prescription.

The Lord Ordinary (Gifford) on 18th July 1874 pronounced this interlocutor:—"Finds that the accounts sued for have undergone the triennial prescription, and that the pursuers can only prove resting owing by writ or oath, and continues the cause."

Thereupon the pursuers put in a minute of reference to oath in these terms:—"Trayner, for the pursuers, referred and hereby refers the whole cause to the oath of the defenders, including the oath of the said George Scott as manager for the other defenders.

The Lord Ordinary (Curriehill), on 4th December 1874, pronounced this interlocutor:—"Having heard parties' procurators on the minute of reference to the oaths of the defenders, Sustains the same, so far as made to the trustees of the deceased William Stewart, and appoints them to appear and depone accordingly, and answer all pertinent interrogations: *Quoad ultra* refuses to sustain the reference, and grants leave to the pursuers to reclaim against this interlocutor."

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The pursuers reclaimed, and argued;—The reference should have been allowed to the oath of the manager for the trustees as well as to that of the trustees themselves. His writ would have been as binding on them as their own, and the statute made no distinction between writ and oath. The case of a wife was analogous. Her oath might be referred to in any matter falling under her *præpositura*.[1] The case of a factor was also analogous. Mr Dickson's doctrine on the point[2] was not supported by decisions.[3] Reference to the oath of a bank agent had been allowed, and Mr Scott occupied the same position toward the trustees in the present case.[4]

Argued for Mr Stewart's trustees;—(1) Mr Scott was not properly a party in the sense of the Act of 1579, c. 83, for, first, he was only called as a defender so far as a very small part of the account sued for was concerned; and second, so far as called he did not appear. (2) This being the case, he had no interest in the real substantial sum in dispute. It was on the ground of interest, and interest alone, that reference to oath was admitted where parole proof was excluded.[5] (3) Mr Scott had ceased to have any business connection with them for more than three years, and to allow a reference to his oath would really be to put them at the mercy of a single witness, and one, it might be, who was ill-disposed towards them, in a case in which parole testimony was excluded. (4) The doctrine that reference to a factor's oath was incompetent, if not very clearly decided in the cases cited for the pursuers, was supported by Lord Cringletie's opinion in Cromar v. Duke of Gordon,[6] and appeared to be indisputable from the earlier cases.[7] (5) Although reference to the oath of a wife might be competent where she was *præposita*, it could be so only because she is *eadem persona* with her husband.[8] (6) As the oath of a cedent did not bind his assignee, nor that of a principal his cautioner,[9] neither could that of a manager bind his employers. (7) But the case most in point was that of Duncan v. Forbes, in which it was held that reference could not be made to the oath of a ship's-husband, though himself a joint owner, so as to bind the other owners.[10]

At advising,—

Lord President.—The account sued for in this case consists of two parts. First, there is a sum of £8, 6s. 9d., which represents alleged furnishings by the

[1] Fraser's Per. and Dom. Relations, i. 312; Ersk. 3, 7, 18, note *; Young and Co. v. Playfair, Dec. 2, 1802, M. 12,486.

[2] Dickson on Evid. sec. 1591.

[3] Cromar v. D. of Gordon, Jan. 20, 1830, 8 S. 353, 2 Scot. Jur. 166; Mackay v. Ure, March 7, 1849, 11 D. 982, 21 Scot. Jur. 357; Hunter v. Dun, July 6, 1809, Hume, 584; Smith v. Falconer, Feb. 17, 1831, 9 S. 474, 3 Scot. Jur. 294.

[4] Dickson v. Ker, Dec. 2, 1830, 9 S. 125, 3 Scot. Jur. 69.

[5] Pattinson v. Robertson, Dec. 4, 1846, 9 D. 226, 19 Scot. Jur. 74.

[6] *Supra*, note 3.

[7] Kendal and Co. 1776, M. 12,351; Gilmour, 1797, M. 12,042; Kirkwood v. Wilson, June 26, 1823, 2 S. 425 (N. E. 378); Stein's Assignees v. E. of Mar, Nov. 13, 1827, 6 S. 1.

[8] Lord Gillies in Duncan v. Forbes, March 4, 1831, 9 S. 540, 3 Scot. Jur. 348; Lang v. Hislop, June 8, 1854, 16 D. 908, 26 Scot. Jur. 475.

[9] Ersk. 3, 5, 9; Dickson on Evid. secs. 1471, 1593-4; Mein v. Towers, July 11, 1829, 7 S. 902, 1 Scot. Jur. 369; Ferrier v. Graham, Feb. 10, 1831, 9 S. 419, 3 Scot. Jur. 257; Borthwick v. Christie, June 12, 1838, 16 S. 1136, 10 Scot. Jur. 491; Adam v. Maclachlan, Jan. 29, 1847, 9 D. 560, 19 Scot. Jur. 235; Guthrie, 1724, M. 12,485.

[10] July 2, 1829, 7 S. 821, and *supra*, note 8.

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pursuers to the firm of Scott and Stewart, hotel keepers. As regards that first part of the account Mr Scott and the trustees of the late Mr Stewart are called as defenders. Mr Scott does not appear, but I understand decree in absence has not been taken against him. Second, there is a sum of £62, 4s. 3d. As regards this larger sum the trustees of the late Mr Stewart are the only defenders. The account is alleged to have been incurred by them. But it is also averred that at the time it was incurred Mr Scott was managing the hotel for the trustees.

Both accounts have undoubtedly undergone the triennial prescription, and the Lord Ordinary, by his interlocutor of 4th December 1874, has sustained that defence. The pursuer thereupon put in a minute of reference to oath in these terms:—"Trayner, for the pursuers, referred and hereby refers the whole cause to the oath of the defenders, including the oath of the said George Scott, as manager for the other defenders." Now, the Lord Ordinary, by the interlocutor reclaimed against, sustains the reference "so far as made to the trustees of the deceased William Stewart, and appoints them to appear and depone accordingly, and answer all pertinent interrogatories: *Quoad ultra*, refuses to sustain the reference," &c. Now, I think that that interlocutor is incorrect and must be recalled, because it sustains a reference which has not been made. The reference as regards the sum second sued for proposed is not to the defenders, but to the defenders and Scott jointly. The Lord Ordinary has sustained a reference to the defenders, excluding Scott. That is quite a different reference, and till such reference be made it cannot be sustained.

But the real question is, whether the reference as made ought to be sustained or not. Now, on this matter it is necessary to keep in view the precise terms of the Act of 1579, c. 83. It ordains that all accounts for certain classes of debts shall be pursued for within three years, "otherwise the creditour sall have na action except he outher preife be writ or be aith of his partie." Now, the question is whether reference can be made not only to the oath of the party but also to that of the manager of the party. I give no opinion as to what might occur in other classes of cases. In the present case the limitation of proof is purely statutory. The statute says "his party," that is, his adversary in the action, and we cannot allow reference to the oath of any one else. Mr Scott does not hold that position.

LORD DEAS.—I agree with your Lordship that on a proper construction of the Triennial Prescription Act the reference here proposed cannot be sustained. The only reference we can allow is to the oath of the trustees themselves. If that reference is made, a question may arise as to whether we are then confined to the depositions, or whether their effect depends on extrinsic facts which may competently be inquired into. The case of Cooper v. Hamilton, decided in the House of Lords March 14, 1826, 2 W. and S. 59, is instructive on that point. But as the question does not yet arise I need not say anything further upon it.

LORD ARDMILLAN.—I have no difficulty in concurring with your Lordship. The triennial prescription is just a statutory limitation of proof to writ or oath of party, as the only kind of evidence whereby an account can be supported after the lapse of the years of prescription. By "party" I understand the person who is defender in the action,—the person on whom a claim is made,—and who will have to pay if it is sustained against him.

Some very delicate questions have arisen with regard to the ascertainment of

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the meaning of an oath taken on reference. And even in the present case, assuming the defenders to be examined, there might arise some difficulty in construing their oaths. Whether other evidence might then be let in, in consequence of the nature of the depositions and to explain the terms of their oaths, is a question which we need not now consider. I do not at present see my way to admit such evidence. But it will be time enough to consider this question when it arises. In the meantime I agree with your Lordship that the only parties to whom reference can here be made are those who are the real defenders in the case, Mr Stewart's trustees, who will have to pay if the claim is sustained against them.

LORD MURE.—A reference to oath is proposed to be made in this case to a person who is not properly a defender, but only the defenders' manager, under a statute which expressly limits the creditor's proof to the "writ or oath of his party."

I have looked into all the cases referred to in support of this proposal, but I do not find any of them which sanction such a construction of the statute as would warrant its being acceded to. The case of Dickson v. Ker, 9 S. 125, where reference to the oath of a bank agent was sustained, appears at first sight to come very near the present. But this did not occur under the Triennial Prescription Act, but in an ordinary reference made in a suspension of a charge upon a bill to the oath of the bank agent who had discounted the bill, and who alone was cognisant of the matter in dispute.

On the other hand, the case of Duncan v. Forbes, referred to by the defenders, 7 S. p. 821, and 9 S. 540, and which was a case under the Act, appears to me to be directly negative of the pursuers' contention, for in it the Court refused to allow the deposition of a ship's-husband, to whom a reference had been made as one of the owners of the ship of which he was ship's-husband, to be used against the other owners, because he was not, as ship's-husband, the party in the sense of the statute to whom a reference could be made so as to bind the other joint owners.

I therefore agree that the trustees are the only parties here to whose oath this debt can be referred.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Refuse to sustain the reference contained in the minute, No. 10 of process: Find the defenders entitled to expenses since the date of the said interlocutor reclaimed against," &c.

PATRICK S. BEVERIDGE, S.S.C.—FERGUSON & JUNNER, W.S.—Agents.

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Dec. 19, 1874. Brand's Trustees v. Brand's Trustees.

WILLIAM ROBERTSON AND OTHERS (Robert Brand senior's Trustees). Pursuers and Real Raisers.
JOHN BRAND AND OTHERS (Robert Brand junior's Trustees), Defenders and Claimants.—*Sol.-Gen. Watson—Mackintosh.*
WILLIAM BAIN AND OTHERS (Alexander Brand's Trustees), Defenders and Claimants.—*D.-F. Clark—Readman.*

Heritable and Moveable — Principal and Accessory — Lease — Heir and Executor.—Held (*rev.* judgment of Lord Shand) that when the tenant of minerals under a lease of ordinary duration erects upon the land fixed machinery for the purpose of working the minerals, and dies during the currency of the lease, the machinery is to be considered as moveable in a question as to the tenant's succession.

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Minor—Heritable and Moveable.—The rule that a minor cannot convey heritage does not apply to subjects which are merely heritable *destinatione*.

Observations on the case of Fisher v. Dixon, March 6, 1843, 5 D. 775, 15 Scot. Jur. 394; H. of L., June 26, 1845, 4 Bell's App. 286, 17 Scot. Jur. 568.

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ROBERT BRAND senior, coalmaster, Wishaw, died on 26th January 1873 leaving a trust-disposition and settlement, dated 7th January 1873. By this deed he left his whole means and estate, heritable and moveable, to trustees in trust for payment of certain legacies and annuities, and thereafter directed that the trustees should manage and preserve the whole residue of his estate, heritable and moveable, for the use and behoof of his only son, Robert Brand junior, until he attained majority, when the whole residue was to be conveyed over to him.

The truster's son, Robert Brand junior, who was a minor at the date of his father's death, only survived his father a few months, and died unmarried on 3d July 1873, without having attained majority. He had, however, on 28th June 1873 executed a trust-disposition and settlement, disposing of his whole means and estate to certain trustees.

Robert Brand junior was not served heir to his father.

The property of which Robert Brand senior died possessed consisted of upwards of £18,000 in deposit-receipts and other personal property, a nineteen years' lease of the coal and fire-clay on the estate of Coltness, of which eleven years still remained to run at his death, the plant and machinery used in connection with the coal-pits which he had opened in the course of the lease, including the rails laid down for the conveyance of the minerals, and also houses and properties of the annual value of about £400.

The nearest male relative of the deceased Robert Brand senior and Robert Brand junior, at the date of the death of the latter, was Alexander Brand, a miner in Wishaw, the immediate younger brother of Robert Brand senior. Alexander Brand completed a title by service as heir-at-law and of conquest to his brother, and heir-at-law to his nephew, and claimed the heritable property of Robert Brand senior, including the lease of the minerals on Coltness. Alexander Brand died on 5th November 1873 leaving a trust-disposition and settlement of his whole estate in favour of trustees.

The trust-settlement of Robert Brand junior having been executed by him in minority, and he having died without attaining majority, was ineffectual to convey heritage. The trustees of Robert Brand senior carried on the colliery after the deaths of Robert Brand senior and Robert Brand junior, with the concurrence of all parties interested, and realised considerable profit.

On 15th November 1873 the trustees of Robert Brand senior raised this action of multiplepoinding to have all the questions arising out of the succession of Robert Brand senior settled. The trustees of Robert Brand junior and of Alexander Brand both lodged condescendences and claims, as also did the beneficiaries under Robert Brand senior's trust-deed.

While the action was still pending, an agreement was entered into between the trustees of Robert Brand senior, of the first part, the trustees of Alexander Brand, of the second part, and the trustees of Robert Brand junior, of the third part, whereby on a narrative of the facts as above set forth, and on the basis that "Robert Brand junior had a vested interest in his father's heritable and moveable estate which he was entitled to test upon, except in so far as regards the heritage, but that certain questions have arisen between them as to whether certain portions thereof are heritable or moveable, and as to which trust has right to the rents and profits of the colliery which accrued subsequent to the death of the said Robert Brand senior, in regard to which they have been

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unable to agree," it was contracted and agreed (1) that the whole heritable property, including the mineral lease, should be made over to Alexander Brand's trustees; (2) that the residue of the moveable estate should be made over to Robert Brand junior's trustees; (3) that the profits of the colliery and the rents of the heritable property which had accrued in the interval between the death of Robert Brand senior and the death of Robert Brand junior should be consigned in bank until it should have been decided in the multiplepoinding who was entitled to them; (4) that Robert Brand senior's trustees be exonered and discharged; and (5) that the whole plant and machinery of the colliery be made over to Alexander Brand's trustees, on the condition that if it should be found in the multiplepoinding that any portion thereof was moveable, and, as such, belonged to Robert Brand junior's trustees, the value thereof should be paid to them by Alexander Brand's trustees according to a valuation by certain valuators therein appointed.

In the competition Alexander Brand's trustees claimed the whole heritable estate of the late Robert Brand senior or Robert Brand junior, including the colliery, plant, machinery, and equipment, except in so far as they might be held to be moveable, and also the whole profits from the colliery and rents of the heritable subjects from the date of Robert Brand senior's death, under deduction, if so found, of such sums as had been specially paid to or set apart for Robert Brand junior.

The trustees of Robert Brand junior claimed the profits and rents which had accrued in the interval between the deaths of Robert Brand senior and Robert Brand junior, and also the whole free residue of the moveable estate of Robert Brand senior, including in the moveable estate the colliery, plant, machinery, and equipment, except in so far as they might be found to be heritable.

The Lord Ordinary, on 28th March 1874, before answer, remitted to Mr John Geddes, mining engineer, Edinburgh, to report upon the precise nature, character, and construction of the machinery, &c., in dispute, and also to report all facts and circumstances which might appear to him to be material in connection with the machinery and the conflicting claims of the parties.

Mr Geddes's report bore:—"The lease is for nineteen years, and now about half run; but the working plan of the colliery instructs that two or three years will exhaust the coal let, when the tenant must remove. The proprietor has then a right, 'if he thinks proper, to take the whole engines, machinery, and apparatus connected with all or any of the pits or mines, according as the value may be ascertained by reference.'

"The lease permits a break in favour of the tenant every fifth year, on his giving six months' notice to the proprietor.

"The tenant's occupation of the subjects let has thus no permanency, while the machinery (all of iron) is necessarily so constructed as to be readily taken down in detail and erected elsewhere. There is nothing in the character of this colliery plant, or its application, to render it heritable, excepting the brickwork of the chimney and boiler seats; but these, at the termination of the lease, if required, must be left to the proprietor.

"In the present case, the machinery is not annexed to the ground by stone and lime, as appears was the case in the blowing-engines and heavy gear in Dixon v. Fisher.[1] Moreover, Dixon was owner of the land and iron-works and mineral field at Calder, and iron-making might then, as now, fairly be held to be a permanent industry in the country; but Brand

[1] Fisher v. Dixon, March 6, 1843, 5 D. 775, 15 Scot. Jur. 394; H. of L., June 26, 1845, 4 Bell's App. 286, 17 Scot. Jur. 568.

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is only lessee of a single seam of coal and accompanying fire-clay, the lease of which is near its termination, and the machinery erected by the late Mr Brand senior can be transferred at small expense to another locality; so that the ultimate disposing of it seems very much a case between proprietor and tenant at Greenhead.

"On the other hand, as this machinery is the means whereby the mineral lease has been profitable, and since the lease itself is heritable, so in the view of some should be the appropriate engines and apparatus erected thereon by the lessee for turning to good account the minerals embraced in the leasehold."

On 4th August 1874 the Lord Ordinary pronounced the following interlocutor in the competition between Alexander Brand's trustees and Robert Brand junior's trustees:—"First, Finds that the claimants, the trustees of the late Robert Brand junior, have right to the profits of the colliery business which belonged to the late Robert Brand senior, and which was carried on by his trustees after his death; and have also right to the rents of the heritable property which belonged to the late Robert Brand senior; all for the period during which the said Robert Brand junior survived his father, the said Robert Brand senior, viz., from 26th January to 3d July, both in the year 1873: Second, In regard to the machinery and plant, including rails, which belonged to the deceased Robert Brand senior, and were used by him at or in connection with the colliery held on lease by him from Mr Houldsworth, finds that the machinery and plant, and those parts thereof, are heritable, and belong to the trustees of the late Alexander Brand, which were attached, either directly or indirectly, by being joined to what is attached to the ground for use in connection with the working and carrying away of the minerals, though they may have been fixed only in such a manner as to be capable of being removed, either in their entire state or after being taken to pieces, without material injury, including those loose articles which, though not physically attached to the fixed machinery and plant, are yet necessary for the working thereof, provided they be constructed and fitted so as to form parts of the particular machinery, and not to be equally capable of being applied in their existing state to other machinery of the kind; and appoints the case to be enrolled for further procedure; meantime reserves all questions of expenses, and grants leave to the trustees of the said Robert Brand junior, and also to the trustees of the said Alexander Brand, to reclaim against this judgment." *

* NOTE.—(After a narrative of the facts, and assigning as his principal reason for the first finding in the above interlocutor that Alexander Brand's trustees were, according to the true spirit of the agreement above quoted, precluded from maintaining that the heritable property had not vested, his Lordship proceeded): —"2. The next question for decision relates to the plant, machinery, and equipments which belonged to Mr Brand, and had been used by him at the colliery held in lease from Mr Houldsworth. It is maintained by the trustees of Alexander Brand that this machinery, or at least an important part of it, attached to the leasehold property, or specially fitted for the use of the colliery, was heritable, and in a question between heir and executor descended, with the right to the lease, to Alexander Brand, as having been served heir of his brother, or rather as heir of his nephew, whose deed of settlement was ineffectual in regard to heritage. The trustees of Robert Brand junior, in any view, claim the loose unattached implements, tools, and plant unattached to the leasehold property not specially destined and fitted for its use, and which might be readily removed and used at other works. To this extent their claim is not disputed, and an inventory of a number of such articles has been lodged, and is No. 31 of process.

"It is not said that this inventory is exhaustive of the class of articles just

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Both parties reclaimed, but at the hearing counsel for Alexander Brand's trustees offered no argument against the first finding of the Lord Ordinary.

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referred to, but the parties state that, on the legal principle which is to determine their rights being settled by the Court, they may be able to arrange subordinate questions as to particular articles, and failing arrangement, a remit to a man of skill may yet be necessary. In the meantime, the report of Mr Geddes, No. 24 of process, may be referred to as shewing the general nature of the machinery and plant at the colliery. The more important articles are the steam-engines, gear, and appurtenances used for raising the minerals, and pumping water, boilers in connection with the engines, the weighing steelyards, pumps and pump-rods, and the railways and tram-road which were laid down by the late Mr Brand for the conveyance of the minerals from the pit-head, which alone are valued at £991.

"It is maintained by the trustees of Robert Brand junior that, as the whole plant and machinery just referred to was provided by the late Mr Robert Brand senior for the temporary use merely in his business carried on at the colliery, and was moveable in a question between him and the landlord, it is also moveable as between heir and executor, and therefore belongs to them as part of Mr Brand senior's personal estate.

"The only special provisions of the mineral lease which have a bearing on the question between the parties are, in the first place, the clause providing that although the endurance of the lease should be for nineteen years from 1865, that is, until 1884, yet the tenant should have breaks at Martinmas 1870, Martinmas 1875, and Martinmas 1880, provided six months' notice were given at any of these terms; and, secondly, that by article 26 of the general conditions of lease imported into the agreement between the parties, it is provided that the proprietor shall have right, if he thinks proper, 'to take the whole engines, machinery, and apparatus connected with all or any of the pits or mines according as the value may be ascertained' by reference, but subject to the proviso that the landlord shall not take a part merely of the machinery at any one pit.

"The claimants, the trustees of Robert Brand junior, maintain that the question raised in regard to the plant and machinery has been already decided in favour of the view contended for by them, that is, that machinery in such circumstances is moveable in a question of succession, by the leading case of Fisher v. Dixon, 6th March 1843, 5 D. 775, House of Lords, 26th June 1845, 4 Bell's App. 286.

"After giving my best consideration to the opinions of the Judges in the case of Fisher v. Dixon, and to the argument submitted for the parties, I have come to the conclusion that the question now raised has not been decided as the claimants, the trustees of Robert Brand junior, maintain, and that the weight of opinion in the case of Fisher v. Dixon, both in the Court of Session and in the House of Lords, was in favour of the view that plant and machinery of the kind here in question, attached or specially dedicated to the use of the leasehold property, is heritable, and goes with the lease in a question of succession between heir and executor; and I am further of opinion, holding the question to be still open for decision, that this is the sound view, and that the trustees of Alexander Brand have right to the machinery claimed by them.

"It is evident from a perusal of the reports of the case Fisher v. Dixon in this Court and in the House of Lords that the really important question between the parties related to the plant and machinery which, for the purposes of the trade or business of the collieries, Mr Dixon had put up and provided on heritable properties belonging to himself. It was a subordinate and comparatively unimportant question in its pecuniary results which arose in regard to the plant and machinery put up and provided at collieries of which he was the lessee only. Referring to the report of the case in the House of Lords, the fifth and sixth only of the properties there enumerated (4 Bell's App., 288 and 289), viz., Legbrannock and Balgrochan Coal Works, were held in lease by Mr Dixon, and the lease of the former contained a somewhat peculiar stipulation in regard to the machinery.

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Argued for Robert Brand junior's trustees;—This was not properly a question between heir and executor. It was a question of heritable and moveable between a minor's heir-at-law and his *mortis causa* disponee.

"The trustees of Robert Brand junior found specially on the seventh head of the judgment of the Court as expressly deciding that machinery attached to the leasehold subjects was to be held to be moveable in a question of succession. The finding is in these terms:—'And with regard to the seventh class in the said report, erections made on subjects held under leases by the late Mr Dixon, and which have been removed by the respondents at the termination of the said leases, finds that these are moveable, and subject to the claim of legitim on the part of the claimants.' This finding unquestionably appears to decide the question as maintained by the claimants just mentioned, but I have become satisfied, from an examination of the report, in the first place, that the finding is directly contrary to the judgment of the majority of the Judges who gave opinions applicable to that branch of the case; and, secondly, that the true explanation of the finding is that it proceeded on the admission made by the defender, and mentioned thus in the report of the concluding opinions of the whole consulted Judges (5 D. 839), 'and further, in so far as regards such subjects under lease, on which the late Mr Dixon, being the tenant only, made erections which he was entitled to remove at the end of the lease, which the respondent also admits may be included in the executry, we are of opinion,' &c. This admission, which must have been the ground of the judgment when the expressed opinions of the majority of the Judges are kept in view, may probably be accounted for by the fact that the machinery to which it referred was of small value in comparison with the other machinery, which was the subject of dispute in the general question raised, and that the parties had thus apparently acted on the view that the machinery was moveable before the dispute between them had arisen, and the matter had been fully considered; for it appears from the seventh finding of the judgment of the Court that the machinery referred to had actually been removed by the representatives of Mr Dixon at the termination of the leases, and apparently without question.

"An examination of the report shews that five of the consulted Judges expressly stated their opinion to be, that the machinery on the leasehold subjects was heritable, and went to the heir with the leases, viz., Lords Cunningham, Gillies, Jeffrey, Fullerton, and Ivory. Four of the Judges, viz., Lords Cockburn, Mackenzie, and Moncreiff, and the Lord Justice-Clerk, seem to have expressed a different view. The opinions of the four last-mentioned learned Judges suggest observations which I think are of considerable weight as affecting the weight to be given to their opinions in the present question.

"In the first place, the concluding paragraph of the joint opinion of Lords Cockburn and Mackenzie, which deals with the question under consideration, does not profess to give a final decision on the point. The expression used is, 'We are scarcely in a situation to determine the result of this,' *i.e.*, the erection of the machinery by Mr Dixon in the position of a tenant.

"Again, the conclusion on a certain assumption as to the terms of the agreement with the landlord is, 'So far as I can at present see, that machinery will ultimately belong to his executors.' The expression, 'will ultimately belong,' evidently conveys the meaning that the heir had right to the use at least of the machinery, and that even the right of property was not yet vested in the executors. If this be what is meant, it appears to me that an anomalous right, unlike any other legal right recognised by the law, must be held to exist in reference to the succession to fixed machinery erected by a tenant. I am unable, with much respect for those learned Judges, to recognise the existence of this peculiar right, and I think the special terms of the opinion are sufficient to shew that they had not formed a final judgment on the point, and were not prepared to affirm that the executors of Mr Dixon had an unconditional right of property in the machinery.

"In regard to the opinions of the two other learned Judges above mentioned, viz., the Lord Justice-Clerk and Lord Moncreiff, it is to be observed that they

No. 58. Between landlord and tenant of minerals the maxim "*inædificatum solo solo cedit*" is, by law, assumed not to apply. Things of this nature were tenant's fixtures,—the property of the tenant,—if so, they could not be

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proceed throughout entirely on the view that the machinery, whether erected on Mr Dixon's own property or on property leased by him, was alike moveable, because it had been put up for trade purposes only, and as that view was negatived, as a reason or ground of judgment, both by the Court of Session and by the House of Lords, the opinions of these Judges on the point now in question are deprived of the weight which otherwise they would have. It does not appear that they would necessarily have held that machinery erected on leasehold property was moveable, and did not devolve on the heir along with the lease, provided it had been previously decided that such machinery, erected by the proprietor on his own ground, was not moveable.

"The three remaining Judges who gave opinions in the case,—the Lord President Boyle, Lord Murray, and Lord Wood (who was consulted only at the later stages),—reserved their opinions on the point now under consideration, while Lord Meadowbank and Lord Medwyn merely concurred with the consulted Judges. This concurrence cannot be readily understood, seeing that there was a distinct difference of opinion amongst these Judges on the matter now in question. It can, I think, only be explained in the view that the really important question between the parties related to the machinery which Mr Dixon had put up on his own property, or otherwise, that the concurrence was with the majority of the consulted Judges, in which case these opinions were given in favour of the view that the machinery on the leasehold property was heritable.

"The result of this examination of the case, as reported, is that at least five of the Judges held the machinery on the leasehold property to be heritable; that while four took a different view, they were not agreed in holding that the executors' right was one of unqualified property, and the grounds of the opinions of two of their number, at least the main grounds of their opinions, were finally held to he unsound; that three of the Judges reserved their opinions; and that the remaining two, Lords Meadowbank and Medwyn, may be taken either to have concurred with the majority or not to have expressed any opinion on the point.

"It is difficult to gather from the report of the case in the House of Lords whether the question was directly raised in regard to the machinery on the leasehold property, and how far it was discussed. The opinions of Lord Campbell and Lord Brougham, who alone referred to this matter, seem to have been entirely in accordance with the view of the majority of the Judges in the Court of Session, as above explained, for (report, p. 366), Lord Campbell observed, 'a distinction was attempted to be made between leasehold and freehold, but when we bear in mind that by the law of Scotland the leasehold is realty, and that it goes to the heir, the distinction entirely fails;' and Lord Brougham concurred in this view.

"It thus appears that the terms of the judgment in the case of Fisher v. Dixon are to be explained by the admission made by one of the parties, and that the weight of judicial opinion is strongly in favour of the view that no sound distinction can be drawn between the case of machinery erected by a person on ground belonging to himself and machinery erected on ground merely leased by him.

"In the case of Syme v. Harvey, 14th December 1861, 24 D. 202, Lord Ivory and Lord Curriehill referred to the seventh finding of the interlocutor in the case of Fisher v. Dixon as if it had embodied the judgment of the Court on the principle which that finding involved, but I am satisfied from my examination of the reports, and on the grounds I have stated, that this view is incorrect.

"And when the question has now arisen for decision, I am of opinion that machinery of the kind now in question erected by a tenant on property held under lease, is heritable in a question of succession. The ground on which it has been decided that machinery erected by a proprietor on his own estate is

heritable in the tenant. They were not annexed to any property of the tenant. At best, they could only be heritable *destinatione*.[1] If the landlord here had claimed this machinery, both the present parties would have

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heritable and descends to his heir is that he has attached the machinery to the ground, or acquired machinery specially suitable for the perpetual and continual use of the particular property, and that the property being heritable, the machinery as an accessory partakes of the same character. The same principle applies to machinery erected on leasehold subjects. The principal subject, viz., the lease, is heritable, although it be of temporary duration, and the machinery, being an accessory to this principal subject, becomes heritable also. It seems to me to be of no consequence that the machinery is put up for a temporary purpose only. It is placed there for the full term of the endurance of the heritable right, as well as for the use and benefit of the subject of that right. The crop and stocking on a farm, held under a lease, is in a totally different position, for it is necessarily of a fluctuating character, not only moveable in its nature, but intended to be disposed of and changed from time to time. Such subjects as crop and stocking partake more of the character of those loose articles, like tools, furniture, and the like, which have no special attachment to a particular property, either by being fixed to it or by destination. Engines, pumps, railways, and other plant and machinery which are specially fixed or destined for the use of the particular leasehold property are rather to be compared with such a subject as an agricultural mill or other fixed erection put up by the tenant of a farm attached to the ground for the use of the subject, and which, though moveable in a question with the landlord, I should regard as heritable, descending to the heir, and, not like the crop and stocking of a farm, going to the executor.

"The specialties in the lease of the colliery held by Mr Brand, already noticed, do not appear to me to introduce any element which takes the case out of the general rule. Although there are breaks in the lease in favour of the tenant, the lease nevertheless remains heritable as long as it endures, and the accessories must have the same character. The fact that the landlord has a right to purchase the machinery at the end of the lease, and that if he fails to do so the tenant may sell it, appears to me to be also immaterial. If the landlord should exercise the option in the lease terminating in the tenant's lifetime, no doubt the proceeds would be an addition to the tenant's personal estate. Indeed, as between landlord and tenant, there is no doubt that the machinery is moveable, subject to the landlord's right of purchase, but as between heir and executor, the machinery being an accessory of the lease, the landlord's right to purchase cannot, I think, affect the question between heir and executor. The person from whom he must purchase after the tenant's death must be the heir.

"The case of a long lease having only, it may be, a single year to run, has been put as an illustration of the hardship that executors may suffer where machinery has been put up by the lessee at great expense, and the proceeds would soon have fallen into the personal estate of the deceased; but the same principle must be applied in all cases, and it would be extremely hard on the heir-at-law, in taking up a nineteen years' lease in its first year, that the executor should have the power of dismantling the whole colliery, provided the landlord had no right by contract to retain it, or did not insist on the right he had. The right to exercise this power appears to be the only alternative to the view that the machinery descends to the heir; for, although equitable considerations might point to a middle course by which the heir should have the use of the machinery for a recompense, while it belongs in property to the executors, as being most expedient and reasonable, and while legislation to that effect might be proper and beneficial, there is, I think, no sound principle for holding that an arrangement to this effect can be compelled in the existing state of the law. It may be observed that the hardship to those who are interested in the moveable estate of the tenant is limited to the case in which the tenant has been the sole person carrying on the colliery business; for, in the case of a company, which

[1] *Supra*, p. 260, note.

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disputed his claim, and rightly,—and when they had succeeded, on the ground that it was personal property and not heritable, then the trustees of the heir-at-law would have had to turn round and say it was heritable after all. The argument for the heir-at-law must go the length that because a tenant brings things to the subject he leases, with the view of using them in connection with his lease, they go to his heir as an accessory of the lease. The point in dispute was decided *in terminis* in Fisher v. Dixon.[1] Trade fixtures must necessarily be part of the moveable estate of the tenant, because it is on that ground alone that they do not go to the landlord. Whenever a subject was moveable between landlord and tenant it was moveable *quoad omnia*. The partly or partially expressed will of the father could not affect the character of this machinery, because whenever he died it became inoperative. There was no destination of these articles. Even supposing that these articles were capable of being made heritable *destinatione*, that did not prevent the owner from retaining them as moveable. They were moveable *sua natura*, and all the actings of the testator were indicative of his wish to exclude the heir as far as possible.

Argued for Alexander Brand's trustees;—There was no distinction in a question such as this, as to whether the articles claimed were attached to freehold or leasehold property. Machinery went to an heir because it was part of the lease which went to the heir as matter of course. A lease was of the same essential nature as a feu. It was a right in land, and so could be a principal subject, and the machinery, being accessory to it, went along with it. It was not laid down in Fisher v. Dixon (*supra*) that moveables could not become accessory to a lease so as to descend to an heir. Leases of minerals were not to be confounded with leases of agricultural subjects. A mineral lease actually amounted to a sale of a portion of the estate; it could not be enjoyed without the destruction of the subject. In such a case a mineral tenant came into a landlord's place in a very different position from an agricultural tenant. His was not a right of use, it was a right of consumption, which was a far higher right. The fittings in a colliery were part of the lease. They were provided for the same purpose as that for which the lease was taken, and intended clearly, as in this case, to be used permanently till the subject was exhausted. Where the purpose of an erection was for the enjoyment of the estate permanently, and not for trade purposes, it clearly passed to the heir.

At advising,—

Lord Gifford.—In this case two separate questions have been decided by the Lord Ordinary in the interlocutor now under review. The first question relates to the profits of the colliery business which belonged to the late Robert Brand senior, accruing for the period between the death of Robert Brand senior and the death of his son Robert Brand junior, and to the rents of heritable property applicable to the same period. On this question the Lord Ordinary

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occurs most frequently,—in fact, the lease and machinery as part of the company's stock in trade, or the value of these, would form part of the personal estate of the partners of the company.

"The law of England does not afford any assistance in the decision of the present question, for leasehold property is, in England, moveable estate in a question of succession,—a distinction between the law of the two countries noticed by Lord Campbell in the passage of his opinion in the case of Fisher v. Dixon already noticed."

[1] *Supra*, p. 260, note; and Syme v. Harvey, Dec. 14, 1861, 24 D. 202, 34 Scot. Jur. 98.

has found that these profits and rents belong to the trustees of Robert Brand junior.

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On this first question no argument has been submitted to us for the reclaimers. They virtually admitted that the judgment of the Lord Ordinary could not be impugned, and tacitly intimated their acquiescence therein. Nor do I wonder at this, for I see no answer to the reasons given by the Lord Ordinary in support of his first finding. They seem to me quite conclusive. In regard to the first finding, therefore, the Lord Ordinary's interlocutor must be affirmed.

The second question decided by the Lord Ordinary, however, was the subject of a very able and instructive argument at the bar. It raises a point of very great interest and importance, and on this we are now called upon to give judgment.

The question, which is one of very general application, may be stated thus: When the tenant of minerals under a lease of ordinary duration (in the present case nineteen years) erects upon the land fixed machinery for the purpose of working and winning the minerals, and dies during the currency of the lease, does the fixed machinery belong to the tenant's heir or to his executor? I purposely put the question in its most general form, for although, in the present case, there are one or two specialties—to one of which I will presently advert,—I think the general question is fairly and necessarily raised for decision.

The Lord Ordinary has decided the question in favour of the heir and against the executor—holding that the trade fixtures erected by the late Robert Brand senior for working and winning the coal let to him by Mr Houldsworth, although undoubtedly moveable in a question between him and the landlord, are yet heritable in a question of the tenant's succession, and descend to the tenant's heir and not to his executor. This judgment the Lord Ordinary has supported in an exceedingly able and ingenious note, in which he contends, first, that the question has not been decided by any previous case, and, in particular, that it was not decided in the leading case of Fisher v. Dixon, either in this Court or in the House of Lords; and, second, that assuming the question to be open, the weight of authority, as well as sound reason and analogy, favour the pleas of the heir and negative those of the executor.

After giving the question the fullest and best consideration in my power, I have found myself compelled, with the utmost deference to the Lord Ordinary, and not insensible to the force and cogency of the arguments he has used, to come to the opposite opinion from that at which he has arrived, and I have come to think, and latterly without much difficulty, that the tenant's trade fixtures at the colliery in question, moveable in a question with the landlord, are also moveable as to the tenant's succession,—that is, in a question between his heir and executor.

I need not detain your Lordships with stating the facts and circumstances in which the question arises. As to these there is no dispute whatever between the parties. Omitting, then, for the present, all specialties, I proceed to state very shortly the grounds upon which I am of opinion that the trade fixtures erected by the late Robert Brand senior in connection with the coal leased to him were moveable in his person, moveable in the persons of his testamentary trustees, and of Robert Brand junior, his son and the beneficiary under the trust, and as moveable were carried by the trust-deed of Robert Brand junior, and now belong to the claimants, his trustees.

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(1) First, I am of opinion that the point was really decided *in terminis* by the judgment in the case of Fisher v. Dixon, 5 D. 775, 4 Bell's App., H. L. 286—if not in the House of Lords, where perhaps it could only have been raised by a cross appeal, at all events in the Court of Session by a majority of the whole Court.

It is quite true that the principal subjects in dispute in Fisher v. Dixon were fixtures which had been placed by Mr Dixon for mineral purposes on lands belonging to himself in absolute property, and the fixtures placed by him on subjects of which he was only tenant seem to have been of much smaller value. Still the question as to whether tenant's trade fixtures—trade fixtures placed by Mr Dixon on subjects of which he was only mineral tenant—was distinctly raised as well as the more important one. These "tenant's fixtures" form the subject of what is called the 7th class in Mr Smith's report, and they are separately dealt with both in the opinions of the Judges and in the final judgment. The final interlocutor in the Court of Session, which bears to be pronounced "in conformity with the opinion of the majority of the whole Judges," is, in so far as relates to fixtures on leasehold subjects, in these terms:—"And with regard to the 7th class in the said report, erections made on subjects under leases by the late Mr Dixon, and which have been removed by the representatives at the termination of the said leases, Find that these are moveable, and subject to the claim of legitim on the part of the claimants, and decern." These are the words of the final interlocutor, and it seems impossible to dispute that they precisely and pointedly dispose of the question as to fixtures—trade fixtures—erected by a tenant for trade purposes on subjects to which he had only a leasehold right.

Accordingly, in the subsequent case of Syme v. Harvey, 24 D. 202, the judgment is so dealt with. Lord Ivory, who was one of the consulted Judges in Fisher v. Dixon, says (p. 211)—"It is evident, upon looking at the report of Fisher v. Dixon in the House of Lords, that that case was decided not upon the principles which regulate the law of landlord and tenant, but upon those which regulate the law of heir and executor. This is abundantly evident from the opinions of Lords Brougham and Cottenham. There was, however, one small branch of this case where the property was held by Mr Dixon on lease, and there effect was given to the interests of the tenant, and a distinction drawn between the principles which were to regulate it and those which were to regulate the case generally." And this view is concurred in and further explained by Lord Curriehill. If I mistake not, Fisher v. Dixon has been often used as an express authority upon the very point now in question.

But the Lord Ordinary very ingeniously argues that although the words of the judgment in Fisher v. Dixon appear to decide the question at issue, it does not really do so, for he has satisfied himself that "the finding is directly contrary to the judgment of the majority of the Judges who gave opinions applicable to that branch of the case," and he thinks that the explanation of the finding is that it proceeded on an admission of the defender. Now, with great submission to the Lord Ordinary, I think he is in error on both points. First, I think a close scrutiny of the opinions of all the Judges shew that a majority were of opinion that the tenant's trade fixtures were moveable in a question with the landlord, and were also moveable in a question relating to the tenant's succession. I count the Judges thus,—Lords Cockburn, Mackenzie, Jeffrey, Ivory, Meadowbank, Medwyn, Moncreiff, and Justice-Clerk Hope—eight Judges,—held

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that the tenant's trade fixtures were moveable in a claim of legitim against the tenant's estate. Lords Cunningham, Gillies, and Fullerton—three Judges,—held these fixtures heritable, while Lord President Boyle and Lord Murray held the point doubtful, and gave no opinion. The Lord Ordinary is in error in thinking that Lords Jeffrey and Ivory held the fixtures on the leasehold subject heritable. On the contrary, they both "concur entirely in the opinion of Lord Cockburn," except as to a special point relating to the favour due to trade. They make no exception as to the tenant's trade fixtures on his leasehold subjects. It is true that Lord Cockburn, concurred in by Lord Mackenzie, speaks of these fixtures as being "ultimately" the property of the executors, as if there was some interim right in the heir during the lease, but this question did not arise, and I concur with the Lord Ordinary that there is no ground for such an anomalous right in the heir as a right temporarily to possess a part of the executry. Then, as to Lords Meadowbank and Medwyn, it is true they only concur with the consulted Judges without expressly noticing this question, but this must mean that they concur with the majority of the consulted Judges on the point, and counting Lords Ivory and Jeffrey the majority of the consulted Judges were for the moveable character of the tenant's trade fixtures.

Then, as to the supposed admission by the defender in Fisher v. Dixon, I can find no trace of such admission, and looking to the character of the litigation it seems very unlikely that any such admission was given. But even if there had been an admission, it must have been an admission in point of law, for there was no dispute about any facts regarding the leases, and an admission in point of law can only have been made at the bar when it was found impossible to maintain the contrary proposition. But in actually deciding a point of law the Court never do so on mere admissions of counsel at the bar, and accordingly the judgment bears to proceed not on admission, but in conformity with the opinions of the whole Judges, and this seems to me to have been the fact.

This judgment was affirmed in the House of Lords, but it is perfectly true that the decision on the point in question, having been in favour of the appellant, could not be reviewed without a cross appeal. The observation of Lord Campbell, that in Scotland leasehold property is realty, seems certainly to suggest that he was putting fixtures on leasehold subjects in the same category with fixtures on freehold subjects, but most certainly this question was not before the House.

I am of opinion, therefore, that the question I am now considering has been decided as authoritatively as any question can possibly be decided in Scotland, by a majority of the whole Court.

(2) Second, But even if the question were quite open and undecided, I am of opinion that the fixtures in dispute were in law moveable in the succession of the tenant Robert Brand senior and of his son Robert Brand junior.

I take it to be perfectly fixed law, and it was not disputed on either side of the bar, that in leases of ordinary duration, where the tenant erects fixtures solely for the purposes of his trade, these trade fixtures remain his property, and cannot be claimed by the landlord as *partes soli*, as it is said they are moveable in a question between landlord and tenant. Syme v. Harvey and other cases are illustrations of the application of this principle.

Now, it humbly appears to me that if trade fixtures do not go to the landlord they must of necessity remain the moveable property of the tenant, and must remain moveable *quoad omnia*. The only thing that can make them heritable

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is their fixture,—their annexation to the soil; but that would carry them to the landlord to whom alone the soil belongs. If the fixture have not this effect, and this is conceded, it is difficult to see how it can make them heritable to any effect at all. The tenant could remove the fixtures at pleasure. He could convey them by assignation and without dispositive words, which until recently were necessary in the conveyance of heritage. The tenant could bequeath them by will or testament separate from the mineral lease. I think also that they could be sequestrated under the landlord's hypothec, or poinded by the tenant's creditors. Adjudication would not be the habile diligence to attach a tenant's trade fixtures of which he had the absolute power of disposal, and over which the landlord had no right.

Now, if the fixtures in dispute are moveable in all these respects, why should they be considered heritable in a question as to the tenant's succession? The answer relied on seems to be, that although not fixed to the soil so as to go with it to the landlord, they are fixed to the lease so as to go with it to the tenant's heir. But a lease is an incorporeal right, and it is difficult to follow what is meant by fixture to a lease. Fixture to the subject of a lease is not the same as fixture to or incorporation with the lease itself. The fixture may be for the most temporary purpose, and without the least reference to the duration of the lease or to its destination.

The idea seems to be that fixture to the subject of the lease indicates an intention that the machinery shall go with the lease, and so it is suggested that the machinery, though not heritable *sua natura*, has become heritable *destinatione* because of its dedication by the tenant.

Now, this view is plausible, and the argument has some force. If a proprietor by annexing machinery to his own heritable property sends it with that property to his heir,—so may not a tenant, by annexing machinery to his lease, or to the subject of his lease, send such machinery with the lease to his heir? But I think there are conclusive answers. In the first place, if the destination or dedication by the tenant is all that can be relied on,—and on this branch of the argument there can be nothing more,—then the tenant's destination would be equally applicable to unfixed machinery as to the fixed. There would be no room for distinction,—the waggons and rolling stock are as much dedicated to the colliery as the rails are,—and a locomotive may be as necessary for the successful working as a fixed engine. But no one presses destination this length, and yet, if it is worth anything, it must logically reach the whole plant.

Precisely the same argument would carry a whole farm stocking and implements to the heir along with the lease of an ordinary farm. But I need not say that such a claim has never been dreamt of.

The truth is that the destination of the tenant has really nothing whatever to do with the present case, and there is no room in the present case for the application of the principle that a proprietor of moveable subjects may, in a question as to his own succession, make them heritable *destinatione*.

And this leads me to notice one of the specialties of the present case,—that there is here no intestacy, no question of intestate succession, or of presumed will or implied destination by the deceased. Both Robert Brand senior and Robert Brand junior died testate. Robert Brand senior expressly conveyed everything he had, heritable and moveable, to his trustees for behoof of his son and his son, Robert Brand junior, expressly conveyed everything he had or could give to his trustees. The competing claimant, Alexander Brand, and his trustees

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can only claim as heir-at-law what was not carried by Robert Brand junior's deed. Implied destination must always yield to expressed will, and a thing heritable, not *sua natura*, but merely *destinatione*, will not go to the heir if the absolute proprietor expressly says it shall not go to his heir but to his trustees. Now, this is the case here. The destination or implied wills of Robert Brand senior or of Robert Brand junior are out of the question, for we have the express will of both of them, and both exclude the competing claimant Alexander Brand. Accordingly, if the element of destination must be laid out of view, as, I think, it must, and if the machinery in question is not heritable *sua natura*, then it must be held as moveable *quoad omnia*, and the property of the trustees of Robert Brand junior.

Still farther, and upon the same specialty which I have now pointed out, I am of opinion that, even if it should be held that the fixed machinery was heritable in a question as to the tenant's intestate succession, still it was effectively carried by the trust-deed of Robert Brand junior.

No doubt Robert Brand junior died in minority, and a minor cannot, *mortis causa*, convey his heritable estate; but this only applies to proper heritage,—that is, to subjects heritable *sua natura*. It does not extend to what is heritable merely *destinatione*. For example, to take a well-known case,—loose stones intended for a building in progress, and brought to and laid down on the ground beside it, but not yet built into it, are heritable *destinatione*, if the proprietor dies while his building lies unfinished. But this is a mere presumption, and if the proprietor had expressly bequeathed the loose stones to his executor or to a third party, his heir-at-law could not claim them: presumption must yield to fact.

Robert Brand junior, though a minor, might have separated the fixed machinery in question, and sold it, or carried it elsewhere (I mean, apart from the provision of his father's trust), and if so, I think he could bequeath it by testament. He has actually done so to the claimants, his trustees. If this last view is sound it would by itself suffice for the determination of the case. But, while I go upon both grounds I prefer to rest my judgment mainly upon general doctrine, which I think is fixed by Fisher v. Dixon, that a mere tenant's trade fixtures, in an ordinary case, are moveable *quoad* succession, and descend to his executors.

I am of opinion, therefore, that the second finding of the Lord Ordinary should be recalled, and that the whole machinery in use at the colliery, whether fixed or unfixed, should be held to be moveable, and belong to the trustees of the late Robert Brand junior.

As under the agreement between the claimants the machinery is to be taken by Alexander Brand's trustees, and only its value paid to Robert Brand junior's trustees, if the parties are agreed as to the value and as to the amount of profits and of rents the case may now be exhausted.

The LORD JUSTICE-CLERK, LORD NEAVES, and LORD ORMIDALE concurred.

THE COURT pronounced the following interlocutor:—"Recall the second finding of said interlocutor, and in lieu thereof find that all the machinery therein referred to is to be considered as moveable in a question as to the tenant's succession: *Quoad ultra* adhere to the said interlocutor, and remit the cause to the Lord Ordinary to proceed with the same: Find the claimants, Alexander Brand's

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trustees, liable in expenses since the date of the Lord Ordinary's interlocutor, and decern, and remit the expenses now found due to the Auditor to tax the same, and report."

EBENEZER MILL, S.S.C.—ALEXANDER MORISON, S.S.C.—Agents.

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Jan. 7, 1875. Henderson v. Wallace.

JAMES HENDERSON, Pursuer.—*Mackintosh—Henderson.*
ROBERT WALLACE AND OTHERS, Defenders.—*Lee—Strachan.*

Poinding the Ground—Maills and Duties—Heritable Creditor—Right in Security.—A creditor who, under a bond and disposition in security, has obtained a decree of maills and duties, is not in possession of the lands as proprietor, so as to render it incompetent for him to bring an action of poinding the ground.

1ST DIVISION. Ld. Craighill. M.

MR HENDERSON of Bilbster was in right of a bond and disposition in security over certain subjects in Lybster, the property of Robert Wallace and his wife, to which bond both Wallace and his wife were parties. In the year 1866 Mr Henderson raised an action of maills and duties under his bond, in which he obtained decree, and under this decree he drew various sums of rent from Wallace's tenant of the subjects. In April 1874 Mr Henderson raised this action of poinding of the ground against Mr and Mrs Wallace and their tenant, as regarded the latter to the extent of the amount of rent due only.

Mr and Mrs Wallace lodged defences, in which they stated that the action was unnecessary and oppressive, and also that Mr Henderson had been in possession of the subjects in right of his decree of maills and duties since 1866.

Pleaded for the defenders;—(1) The pursuer, being in possession of the subjects under a decree of maills and duties, the present action of poinding the ground is incompetent, and cannot be maintained. (2) The pursuer having the right and title under his decree of maills and duties to the rent payable by the tenant, which is the only extent to which, in the present case, a decree of poinding the ground, were it otherwise competent, could be enforced, he is not entitled to raise or insist in this action. (3) The pursuer having regularly obtained payment under his decree of maills and duties of the whole rents of the said subjects since the date thereof, and being entitled under that decree to uplift and enforce payment of the rents to become payable, the present action is unnecessary and oppressive, and ought to be dismissed, with expenses.

Lord Mure, before whom the case first came, on 17th June 1874 repelled *hoc statu* the plea of competency, and before further answer allowed both parties a proof of their averments.*

* His Lordship added this note :—"This is an action of poinding of the ground, proceeding upon a bond and disposition in security, and it is directed against the proprietor and tenants of the ground in the usual style, with a view to obtain authority to attach and poind the moveable goods and effects situated upon the ground, and belonging to the proprietor and his tenants, in payment of the pursuer's debt. It was explained at the debate that one main object which the pursuer had in resorting to the action was in order to lead an adjudication, which, seeing that one of the debtors in the bond was a married woman, could not be done except upon a poinding of the ground; and the authorities referred to by the pursuer appear to the Lord Ordinary to be distinct to that effect. In this view, therefore, the action is, in the circumstances, a necessary one at the instance of the pursuer. The tenants, moreover, have not appeared to defend it, and have probably no material interest to do so, as the conclusions against them are re-

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When the day appointed for the proof arrived both parties renounced probation, and after a debate Lord Craighill, before whom the cause then depended, pronounced this interlocutor :—"Repels the defences, and decerns and ordains in terms of the conclusions of the summons: Finds the pursuer entitled to expenses, of which allows an account to be given in," &c.*

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stricted to the amount of the rents, and as against them the pursuer is, it is thought, at present entitled to decree—Buchan, 20th January 1829, 7 Shaw, 296.

"The competency of the action is, however, objected to on the part of the proprietors, the debtors in the bond, because the pursuer has obtained decree in an action of maills and duties, under which it is alleged that he has entered into actual possession of the property, and authorities were referred to, and more particularly a passage in Erak. iv., 1, 11, as shewing that such actions were not competent to an heritable creditor in possession. But the allegation that the pursuer was in the actual possession of the property, and that there were no moveable effects belonging to the defender situated upon it, is denied on the part of the pursuer, so that the simple question raised for decision at this stage of the case is, whether an heritable creditor who has taken decree against the debtor's tenants in a petitory action of maills and duties is thereby precluded from taking proceedings, by way of a poinding of the ground, against the proprietor, the debtor in the bond, in order to attach his effects in payment of his debts. Now, the Lord Ordinary has been unable to come to the conclusion that there is any incompetency in such a proceeding; for the object of the one action is to obtain a remedy against the tenants, while that of the other is to attach the effects of the landlord, and, if necessary, those of the tenants, to the extent of the rents due by them, as explained by Lord Corehouse in his note to the case of Railton, June 20, 1834, referred to at the debate; and the Lord Ordinary has not been able to find any decision to the effect that the heritable creditor who has adopted the one remedy is thereby precluded from having recourse to the other.

"Cases may, it is thought, not unfrequently occur where an heritable creditor may find it necessary to proceed against tenants by an action of maills and duties; but where it is not at that time necessary, although it may afterwards become so, to take proceedings by poinding of the ground against the landlord, and although Mr Erskine's words are very general, the Lord Ordinary does not think that they must necessarily be held to imply that, in such circumstances, the effects of the proprietor situated upon the property could not be reached under a process of poinding of the ground at the instance of the party holding the decree of maills and duties against the tenants. No doubt as to this was raised in the case of Railton, and as the Lord Ordinary does not find that any such rule is laid down either by Lord Stair, or by Mr Erskine in his Principles, or by Mr Bell's Comrs., ii., pp. 58-59, he is not, as at present advised, prepared to give effect to it to the extent now pleaded by the defenders. But he has made the proof as to the facts on which the parties are at issue one before answer, so that it may still be open to the defenders to raise the question if it should be ascertained that the pursuer is in the actual possession of the property, and that there are no effects belonging to the defenders upon it."

* "NOTE.—This is an action of poinding the ground, and the question raised in the defences is—Whether, in the circumstances, such an action is competent?

"The pursuer is creditor in a bond and disposition in security over land and houses belonging to the defenders, Mr and Mrs Wallace, in which he has been infeft. The subjects forming the security are in the tenancy and occupation of Alexander Bruce, the defender, who has not appeared in the action; and the pursuer has taken decree in a petitory action of maills and duties, in virtue of which the rents payable by Bruce have for several years been drawn by the pursuer. The defenders, Mr and Mrs Wallace, contend that this is such possession on the part of the pursuer as renders a poinding of the ground at his instance an incompetent proceeding. That is the defence, and the only defence, to the present action.

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The defenders reclaimed, and argued;—Erskine and the other institutional writers had distinctly laid it down that no one in the possession

"After considering all that has been urged, the Lord Ordinary has come to be of opinion that the plea of incompetency should be repelled, and decree pronounced in terms of the conclusions of the summons. He adopts the views presented by Lord Mure, the former Lord Ordinary, in the note to his interlocutor of 17th June last, by which proof was allowed; and these, taken in connection with the observations about to be submitted, seem to be all that are required to explain the grounds of the prefixed interlocutor.

"The authorities which were cited by the defenders in support of their contention that the action is incompetent were Erskine's Institutes, b. iv., t. 1, sec. 11; More's Notes, p. 211; Menzies' Lectures (3d ed.) p. 877; Montgomerie Bell's Lectures, p. 1099; Ross' Lectures, p. 430; and Garthland v. Lord Jedburgh (Mor. 10,545-46). These may all be taken together, for the statement of the law by Erskine is rested on the decision in Garthland v. Lord Jedburgh, and the later writers named, and simply adopt and repeat in substance the dictum of Erskine. The controversy at the debate turned upon the meaning of the passages founded on, and not on the credit to which these authorities were entitled.

"The law laid down in Garthland v. Lord Jedburgh, and in the works of the text writers cited by the defenders, is, that it is incompetent for real creditors, who are possessors of the subjects conveyed, as security for their debts, to poind the ground, and therefore it is necessary to inquire whether a party in the situation of the pursuer is to be regarded as a real creditor in possession. That he is a real creditor is certain, for he is infeft in the lands which are the security for his debt. But is he in possession? That is to say, have the defenders, the proprietors gone out or been put out; and has the pursuer entered in their room? The Lord Ordinary thinks that such a result was not accomplished by the taking of decree in a petitory action of maills and duties and the subsequent receipt of rents from the tenant of the subjects in virtue of that warrant. The statement in Professor Montgomerie Bell's Lectures, vol. ii., at p. 1075, he takes to be correct. What is there said is, that the 'creditor thereby comes for the time in the place of the landlord as regards the tenants. But his right being only in security, the landlord's right as proprietor is only encumbered, not taken away, by the debt and security.' The creditor, in other words, does not even in form become the landlord. He neither appears nor possesses nor acts as such. The tenants continue the tenants of the debtor; and all which the creditor gets is a power to levy the rents as these become due, in payment *pro tanto* of his debt secured upon the land. Accordingly, by the decrees of maills and duties which the pursuer obtained, all that he got was a decerniture whereby the tenant, Alexander Bruce, was ordained 'to make payment to the pursuer of the rents, maills, and duties of the foresaid lands,' &c., 'and that during his possession,' &c. &c., 'at least so much of the said rents as will satisfy and pay the pursuer the principal sum,' &c., 'due under the bond' upon which the pursuer libelled. The right and the possession which the Court, in Garthland v. Lord Jedburgh (Mor. 10,545-46), found to be incompatible with the pursuit of a poinding of the ground were in marked contrast with those held by the present pursuer. In that case a person had wadset his lands, and taken a back-tack of them, binding himself to pay to the wadsetter a yearly rent equal to the interest of the sum borrowed. The wadsetter, considering himself a creditor, brought an action for payment of the back tack-duty, and added a conclusion for poinding the ground in time coming. This was refused, 'because the pursuer, being infeft in the property, could not ask his own ground to be poinded for any sum due to him out of the said lands.' This means no more than that a poinding of the ground may not be pursued by one whose connection with the subject, according to his title, is that of proprietor, subject though he be to an obligation to reconvey on fulfilment of a condition, and there is nothing in the decision which suggests that a creditor in the situation of the pursuer is affected by a similar incompetency. Erskine's statement (iv. 1, 11), as understood by the Lord Ordinary, means no more than was expressed in the decision of Garth-

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of heritage could use a poinding of the ground,[1] and the pursuer here was in possession of these subjects in virtue of his decree of maills and duties, and was precluded from using this diligence. Poinding of the ground was the appropriate diligence when the debtor, the real owner, was in possession of the lands; but when the lands were let the proper diligence was maills and duties, and that diligence had already been used by the pursuer, so he was not entitled to use the other. A creditor could have no higher possession of lands than by holding a decree of maills and duties, so this diligence was unnecessary and incompetent. A decree of maills and duties conferred the civil possession of the subjects upon the creditor, and he was entitled to exercise all the rights of the proprietor.[2] Moreover, this action was oppressive, the pursuer being only desirous of molesting his debtors, and knowing that he could gain nothing by it.

Argued for the pursuer;—The pursuer had a legitimate interest in raising the action. One effect of a decree of poinding the ground was to enable a creditor to accumulate arrears of interest;[3] another was to give a preference to the poinding creditor over the landlord's moveables.[4] It was also stated to be a necessary step before an adjudication could be led on a personal obligation by a wife, as in this case.[5]

The action was perfectly competent, notwithstanding that the pursuer held a decree of maills and duties. The possession under such a decree was not possession of the nature referred to by Erskine and the other text writers. The two diligences were quite distinct, and could be used simul-

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land v. Lord Jedburgh, which he cites as his authority. Those to whom, as he says, a poinding of the ground is incompetent, are proprietors-possessors, though not strictly proprietors as adjudgers, liferenters, or other real creditors, who possess on their different titles. But a creditor in a bond and disposition in security, though holding a decree of maills and duties, is not a member of the class here described. His possession, such as it is, is not on his titles, but on his decree of maills and duties, and farther, neither his titles nor his decree give him the character or the rights or even the name of a proprietor. He is in fact and in form too only a creditor. This construction of the words used by Erskine is borne out by the view of the law which is presented by Mr Walter Ross in his Lectures, vol. ii. p. 431. He there lays it down, 'that no title upon which a man may enter into the natural possession of land can be a foundation for the diligence of poinding the ground, and hence the holders of adjudications, liferent rights, wadsetters, and others of that class, cannot demand the ground to be poinded. They must enter like other landlords; and if the tenants will not pay them, the possessory action of maills and duties is the proper step to be taken.' The pursuer is not the holder of an adjudication of a liferent right, of a wadset, or of any right of that class. He is only the holder of a right which in form is but a burden on the proprietary right of the defenders, his debtors, and remaining, as he does, simply a creditor, he, though holding a decree of maills and duties upon which he levies the rents of the subjects constituting his security, is not precluded from suing the present action of poinding the ground. This at least is the opinion of the Lord Ordinary, and, accordingly, the present interlocutor has been pronounced."

[1] Ersk. iv. 1, 11; Ross' Lect. ii. 430; More's Notes to Stair, ii. 211; Bell's Lect. ii. 1099; Menzies' Lect. 877; Garthland v. Lord Jedburgh, March 2, 1532, M. 10,546.

[2] Bell's Com. (5th ed.), ii. 258; Bell's Lect. ii. 1075; Forsyth v. Aird, Dec. 13, 1859, 16 D. 197, 26 Scot. Jur. 97; Wylie v. Heritable Securities Co., Dec. 22, 1871, 10 Macph. 261, 44 Scot. Jur. 150; 10 and 11 Vict. cap. 50, sec. 2.

[3] Parker on Adjudications, pp. 4–5, sec. 3; Jurid. Styles, iii. (1) 393, *note*.

[4] 1 Bell's Com. (M'L.) 754; Hay v. Marshall, July 7, 1824, 3 S. 223 and F. C., H. of L., March 22, 1826, 2 W. and S. 71; 2 Bell's Com. (M'L.) 56.

[5] Parker on Adjudications, p. 15, sec. 26; Shand, vol. ii. p. 688.

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taneously, or the ground might be poinded first and then the decree of mails and duties obtained, so it was quite competent to reverse the order.[1]

LORD PRESIDENT.—This is an action of poinding of the ground brought by an heritable creditor infeft on a bond and disposition in security; and there cannot be the slightest doubt that a party in that position is justified in bringing a poinding of the ground. He cannot be stopped from bringing such an action, unless something has occurred to render it incompetent, or it can be shewn to be an oppressive or unnecessary diligence. Only one of these grounds was stated to the Lord Ordinary, namely, the incompetency, but both have been argued before us. In regard to the last objection, it is enough to say this poinding of the ground, if obtained, may be useful to the creditor in obtaining payment of his debt. Unless it be clearly shewn it is useless, we could not stop it.

With regard to the competency, I agree with the Lord Ordinary. It was contended that the creditor, having obtained possession under the action of mails and duties, could not pursue a poinding of the ground as he was in fact proprietor. It seems to me that the authorities on this subject have been misunderstood by the defender. The only one of these which I shall refer to is Mr Erskine, who says,—"Every person who has a debt secured upon land, or, as it is commonly called, a *debitum fundi*, whether the security be constituted by law or by paction, is entitled to an action for poinding all the goods on the lands burdened, in order to his payment, even although the original debtor should have been divested of the property in favour of a singular successor, after granting the creditor's security." That is the general rule. He then says,—"This action is therefore competent to an annualrenter for the arrears of interest due upon his infeftment, to a superior for his feu-duties, or for the retoured duties due to him before citation of the vassal's heir in an action of declarator, according to the distinction already stated, and, in general, to all creditors in debts which constitute a real burden or lien upon lands." Then he goes on to make an exception which is founded on by the defenders. "But it is not competent to proprietors, or even to possessors, though not strictly proprietors, as adjudgers, liferenters, or other real creditors who possess under their different titles; for there is a natural impropriety in poinding the ground of lands possessed by the poinder himself."

I think it is very clear that those possessors are meant who, though not strictly proprietors, have a title equal to proprietors, such as an adjudger, who, although his title is defeasible, may yet, under his charter and sasine, become proprietor by forty years' possession, unless something occur to defeat his right. A liferenter is entitled to full possession for the time he holds the property. A wadsetter for the time has full possession of the estate. Therefore, when he speaks of "possessors, though not strictly proprietors," Mr Erskine means those creditors who are practically, though not strictly, in the position of proprietors. This is very different from a creditor whose possession is redeemable within a certain time. Such a creditor does not possess the character of proprietor or of *quasi*-proprietor, but rather of encumbrancer. A liferenter or a wadsetter is entitled to take full possession of the ground, without any action, by virtue of his title alone. But what sort of possession is obtained under an action of mails and duties? I agree with a remark which was made by Lord Mure in the course of the argument that an action of mails and duties is nothing more than a process

[1] Shand, ii. 743; Railton v. Muirhead, June 20, 1834, 12 Sh. 787, Lord Corehouse's note.

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for recovery of the rents, and carries nothing more. The right of a proprietor who has let his land on lease is very different. He retains everything which he has not let. It was never heard of, that the holder of a bond and disposition in security having obtained decree of maills and duties should be entitled to shoot on the lands, or to exercise any of the rights reserved by the lease; yet such a right is reserved to the proprietor. But such possession can never be obtained by the holder of a bond and disposition in security. I am therefore of opinion that this creditor has not obtained such a possession under this action of maills and duties as prevents him from raising an action of poinding of the ground, and I am for adhering to the Lord Ordinary's interlocutor.

LORD DEAS.—The pursuer in this case is the holder of a decree of maills and duties in reference to the subjects mentioned in the summons, and he has brought this action of poinding of the ground. The defender objects that the action is incompetent, because the pursuer is in possession of the subjects as proprietor under his decree of maills and duties, and it is incompetent for a proprietor to bring an action of poinding of the ground. I am of opinion with the Lord Ordinary that the pursuer is not proprietor in that sense, but that his character is that of an heritable creditor who has used one diligence which does not prevent him from using another.

It is said, however, that the diligence of poinding the ground in addition to the decree of maills and duties is useless, and therefore oppressive. But poinding of the ground is a real diligence, accumulating the interest with the principal, —requires no transference against singular successors, and has other peculiar effects,—for instance, it has so in a mercantile sequestration, although now somewhat circumscribed by recent enactments. I can see no ground therefore for altering the interlocutor of the Lord Ordinary.

LORD ARDMILLAN.—The question is of some nicety, but I agree with the view which your Lordships have taken. I do not think that the action of poinding of the ground is here incompetent. The law of Scotland has always recognised that a creditor is entitled to more than one remedy if his interests require it. I think he may strengthen his position by using more than one diligence, if legitimate and applicable.

The observations of the institutional writers to which we have been referred are not applicable to the circumstances of this case. An heritable creditor is not a proprietor and is not a *quasi*-proprietor. He is not a wadsetter nor an adjudger. He is, as it has been expressed, an "encumbrance" on the property of another. He holds a bond with a personal obligation fortified by heritable security. There are two modes of proceeding which are competent to an heritable creditor for enforcing his rights. The first is an action of maills and duties, decree in which gives right to draw the rents. The other is an action of poinding of the ground, and one use of it is to attach any moveables of the debtor on the ground, whether it be let or unlet. It is a different remedy applicable to different circumstances. The use of the one remedy does not deprive the creditor of the other. The authorities do not go to that extent.

There is a peculiarity in the bond arising from the position of the wife as one of the obligants. Supposing an adjudication were led on the bond, a question might arise which it is not necessary now to dispose of. On that point I reserve my opinion.

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LORD MURE.—I agree with the opinions expressed by your Lordships. When the case came before me in the Outer-House I thought that there was no incompetency in an heritable creditor having recourse to a poinding of the ground, after having taken decree against the tenant in an action of maills and duties, and expressed my views to that effect in a note to the interlocutor by which a proof was allowed, for I was unable to see why a creditor who had used the remedy of an action of maills and duties should not also be entitled to bring a poinding of the ground, as there might be property of the landlord on the ground which could only be reached by a poinding. The only difficulty I then felt in dealing with the case arose from the very broad and general terms of the passage in Mr Erskine, iv. 1, 11, relied on by the defenders. But I am now quite satisfied, from the exposition of the law which has been given by your Lordship in the chair, that an heritable creditor, holding a decree of maills and duties, cannot be said to be in possession, in the sense in which that word is used by Mr Erskine, and cannot therefore be precluded from having recourse to a poinding of the ground, if that is necessary to enable him to operate payment of his debt.

THE COURT adhered.

HORNE, HORNE, & LYELL, W.S.—WALLS & SUTHERLAND, S.S.C.—Agents.

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Jan. 8, 1875. M'Intyre v. Clow.

ANDREW M'INTYRE AND COMPANY, Pursuers.—*D.-F. Clark—Asher.*
DAVID CLOW AND COMPANY, Defenders.—*Sol.-Gen Watson—Balfour.*

Contract—Locatio Operarum—Building—Vis Major.—A contractor undertook to build the entire brick-work of a house at certain rates. Before the work was completed a brick gable, forming a portion of it, was blown down during a violent gale of wind. *Held* that it having been proved that the work had been executed according to contract the loss fell upon the owner of the house, and that the contractor was entitled to recover from him the price of the work destroyed (*diss.* Lord Deas, on the grounds (1) that the contractor had not proved that the work had been executed conform to contract, and that the accident might not have been caused by a deviation therefrom; and (2) that even if it had been proved that there was no fault on the part of the contractor, the risk lay with him).

Opinions that the *onus* lay, in the first instance, on the contractor to shew that his work was conform to contract.

1st DIVISION. Ld. Mackenzie. B.

MESSRS DAVID CLOW AND COMPANY, joiners and builders, Glasgow, acting for the proprietors of the ground, employed Messrs Andrew M'Intyre and Company to execute the whole brick-work of four tenements in course of erection in Ann Street, Glasgow, conform to a schedule in which the rates for the different parts of the work were specified. It was stipulated, *inter alia*, "The bricks to be of the best make. The walls above 4½ inches thick to be built in three courses of stretchers to one of headers. . . . The work will be measured when finished, and valued by the rates contained in this schedule. . . ."

The brick gable of one of the houses was blown down before the house was finished during a violent gale of wind on 16th December 1873. It was agreed between Clow and Company and the contractors that the latter "should rebuild the brick gable and the other brick walls which had been injured by its fall, that all questions as to liability for such rebuilding should be reserved entire, and that should it be found that the pursuers were not liable to rebuild, the defenders should pay them, not

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only the contract price of the gable which fell, but also the cost of re-erecting the fallen gable and walls at current rates for time and material."

The gable having been rebuilt, M'Intyre and Company brought this action against Clow and Company for £63 as the cost of re-erection.

They pleaded;—The pursuers having rebuilt said gable and walls in terms of the minute of agreement, and the re-erection not having been caused or rendered necessary by any fault on the part of the pursuers, the defenders are bound to pay the pursuers the expense thereof.

The defenders averred;—The said brick-work was grossly disconform to the said contract, both in respect of materials and workmanship. The fall of the said gable was due to the improper materials and workmanship of it. At the time when the portion of said gable fell it had never been taken off the hands of the pursuers . . . . but was still at the pursuers' risk. The brick-work of the said building contracted for by the pursuers was not completed at the time, and no part of it had been measured.

They pleaded;—(1) The gable in question never having been taken off the hands of the pursuers, and having been at their risk when it fell, the pursuers were liable to rebuild the said gable, and the defenders ought to be assoilzied. (2) *Separatim*, the action cannot be maintained, in respect that the fall of the gable was due to its having been constructed of defective materials, and with defective workmanship, and having been otherwise disconform to the contract.

A proof was allowed. It appeared that the pursuers received payment by instalments in the course of the work. The evidence with regard to the sufficiency of the materials was contradictory. The import of the proof on that and other points, so far as material, is sufficiently given in the opinions of the Judges.

The Lord Ordinary, on 30th June 1874, pronounced this interlocutor:—"Decerns against the defenders in terms of the conclusions of the summons: Finds the defenders liable in expenses," &c.*

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* "NOTE.—1. The evidence in regard to the materials and workmanship of the gable is very contradictory. . . . . The Lord Ordinary is of opinion that it is proved that the pursuers implemented their contract both as regards materials and workmanship, that the only deviation in the construction of the gable by building, according to the usual practice, the bricks in four courses of stretchers to one of headers, was acquiesced in by the defenders, and that such mode of construction, which required the same amount of materials and labour, did not affect the stability of the gable or in any way lead to its fall. . . . . After full consideration of the proof the Lord Ordinary is of opinion that the gable, which was supported only by the front and back walls, and not by any brick-work partition being built into it, fell, not from any defect in the materials or workmanship, but from the great severity of the gale, which, as is proved, blew down other walls in the neighbourhood.

"2. The Lord Ordinary also thinks that the second ground on which the defenders resist payment of the pursuers' claim is not well founded. There is no usage or practice of trade proved that the brick-work is at the risk of the bricklayer until the whole work contracted for is completed and measured and paid for. The stipulation in the condition annexed to the schedule of prices that 'the work will be measured when finished, and valued by the rates contained in this schedule' is merely a provision for settlement of the balance of the contract price, after the instalments, which were payable by usage, and which were paid by the defenders, under deduction of the usual ten per cent, are taken into account. If the brick-work did not, as the Lord Ordinary thinks, accresce to the employer as it progressed, it did so upon each part of it being completed and taken possession of by the employer, through his other workmen, and the work

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The defenders reclaimed, and argued;—(1) On the evidence the gable was not constructed of good materials or according to contract. (2) At the time when the gable fell it had not been taken off the hands of the builder, and was therefore at his risk. The contract was for the entire work, and was not fulfilled until the whole was finished, although for convenience advances by instalments had been made to the builder. In an ordinary *locatio operarum* the contractor came under no obligation to complete the work, and therefore he might be entitled to repayment for what he had done. But where he did come under an obligation to complete the work he was not entitled to payment until it was finished. In those passages of the civil law in which it is said that the risk is with the owner in the event of an uncompleted work perishing by *vis major*, the meaning is that if it has become impossible by a *damnum fatale* to complete the contract, for example, owing to the destruction of the subject upon which it has to be executed, the risk will be with the owner. But here there was no impossibility in completing the work, and the builder had come under an express obligation to do so.[1]

The pursuers argued;—Taking the contract as one to erect the entire brick-work of the houses, the contractor was entitled to payment for what had been destroyed. As a builder builds work on the house or ground of another, the work as it proceeds becomes the property of the owner of the subject in which it is done. The contract was in this and all such cases only to build the particular house with which the builder has begun to proceed, not a house on that place. This doctrine was clearly enforced by Pothier.[2]

Further, inasmuch as the work was measured from time to time by the defenders' inspector, for the purpose of paying the instalments, and as the work was stopped in order to let the defenders proceed with the joiners' work, it had been taken off the pursuers' hands.

Lord Ardmillan.—This is substantially an action for cost of rebuilding a brick-wall or gable in Glasgow, which fell in a gale of wind, for the construction of which gable the pursuers are contractors, and in regard to which the defenders are in the position of employers and representing the owner of the premises. As matter of procedure, and in terms of an agreement of parties, the question of liability can be tried in this manner, the wall having been rebuilt, and it being held by agreement that the party bound to suffer the loss caused by the fall shall be found liable in the cost of rebuilding.

The pursuers plead that the fall of the wall was caused by the violence of the gale; that they, as contractors, were not in fault; and that the loss, having been occasioned by an extraordinary gale, and not caused by their fault, must fall on the defenders.

The defenders plead,—1st, that the proof instructs or discloses the fault of

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was thereafter at the employer's risk. The defenders went so far as to contend that until the whole work should be finally measured and paid for, which might not and frequently does not in such tenements take place until months after the tenement is completed and inhabited, the brick work is at the pursuer's risk. In the absence of usage and of special contract to that effect the Lord Ordinary considers that, in accordance with the ordinary rule of law applicable to such a contract as the present, the risk is with the employer."

[1] Appleby v. Myers, June 21, 1867, L. R. 2 C. P. 651; 1 Bell's Com. 456; Bell's Pr. 152; Sinclair v. Bowles, Feb. 6, 1829, 9 Barn. and Cress. 92; Addison on Contracts, 394 (6th ed.); Menetone v. Athawes, 1764, 1 Bell's Ill. 124.

[2] Pothier, Cont. de Louage, 433-4; 1 Domat, 110; Dig. 19, 2, 36, 37, 38.

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the pursuers as contractors, and that such fault caused or contributed to cause the fall of the wall; and 2d, that, in any view, the work had not been taken off the hands of the contractors; that the gable was at the contractors' risk; that the loss by the fall must be theirs; and that they are accordingly bound to rebuild.

The first of these questions, fault or no fault, is a question of fact, to be determined, so far as ascertainment is possible, on the proof, which is to some extent conflicting.

After much and careful consideration, and not without some difficulty, I have come to the conclusion that, in the outset, and to some extent, the burden of proof rests on the contractors. The general rule—a very just and well recognised rule—is, that the party alleging fault must prove the fault. But under the very special circumstances of this case, and with reference to the view of the law which I take, and shall afterwards explain, on the supposition of there being no fault, I think that the pursuers, as contractors, must bring their work and their claims within the contract which they were bound to fulfil. On the contract the claim rests. They cannot claim, omitting the contract; and they cannot enforce the contract if they have violated it. In short, the pursuers cannot succeed unless they make it appear that they have fairly and justly fulfilled the contract. To this extent the *onus* of bringing the claim within the contract is on them. Now, after repeated study of this proof, estimating as well as I can the credit as regards testimony and the weight as regards opinion of the witnesses adduced, I have arrived at the conclusion that the pursuers, the contractors, have discharged themselves of this burden; and that, by evidence to my mind reliable, they have brought themselves within the scope of the contract, and are entitled to found on it.

It would occupy much time, and not answer any good purpose, to enter here into minute analysis of the evidence. I concur in most of the remarks of the Lord Ordinary; and the opinion of his Lordship, who saw the witnesses and had better opportunity of judging of their personal credibility than we have, is of importance. I am disposed to think that the witnesses adduced by the pursuers are, on the whole, more reliable and satisfactory on this matter than those adduced by the defenders. Some of the pursuers' witnesses had peculiar facilities for observation, and some are men of such practical knowledge and experience that their opinion is of great weight.

The gable fell on the 16th of December 1873. It certainly fell during and, as I think, in consequence of, a violent gale of wind. In any view of the evidence, as to defect in materials or building, it has been proved that the gable was blown down by a gale of unusual severity. This is, I think, beyond dispute. It is true that a gale of wind is an event to be expected, and that a wall should be so built as to resist an ordinary gale. But this was certainly not an ordinary gale. It was a storm of wind—a gale of extraordinary violence, amounting to *vis major*.

Then it is proved that the wall was not built out of the sight or beyond the observation of the defenders, or those acting for them. On the contrary, it was watched during its erection. As the work proceeded it was subject to observation and inspection by M'Calman, an inspector appointed by the defenders, representing them and superintending the erection of the wall on their behalf. The evidence of M'Calman, the defenders' inspector, a man not shaken on cross-examination, and, so far as I can see, quite capable of judging, and not unworthy

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of credit, is most important, and is justly relied on by the pursuers; and I concur with the Lord Ordinary in thinking the evidence of M'Calman entitled to much weight. Not only is his own testimony and opinion in favour of the pursuers, which, as he was the defenders' inspector, is important, but he distinctly depones to expressions of approval of the work, by the defender Mr Clow, who himself had opportunity of observing, and who was a practical man, not unacquainted with such operations. In addition to M'Calman we have the evidence of Docherty and Paterson, and of several other witnesses, competent judges of the work, and well acquainted with bricks and brick walls,—a body of evidence quite sufficient, in my opinion, to discharge the primary *onus* resting on the pursuers, and so far to sustain the pursuers' claim and to throw on the defenders the burden of meeting the claim by proving against the contractors some fault causing or contributing to cause the fall of the gable. This is the just and usual burden resting on the party who, notwithstanding that their own inspector was satisfied, are here alleging fault as the cause of injury.

Proceeding next to consider the question of evidence on the footing of the pursuers having, in the first instance, brought themselves within the scope of the contract, I have come to the conclusion that the proof does not support the defenders' averment of fault. I think they have not proved that the fall of the gable, during a violent gale of wind, was due to defective materials and defective workmanship, or either of them.

On considering the whole evidence, and particularly the evidence of Mr Paterson, Mr James Finlay, Mr Eadie, Mr Bell, Mr Baird, and Mr M'Cord (held as concurring with Mr Baird), in addition to that of M'Calman and Docherty and Duncan M'Intyre, I am unable to arrive at any other conclusion on the question of fact than that which has been expressed by the Lord Ordinary. The preponderance of evidence is against the allegation of fault. The objection to the mortar was not pressed, and is not well founded; and the objection to the quality of the bricks and to the manner of building have not, in my opinion, been instructed by the proof. Then it is to be observed that the brick-work for which the pursuers contracted was, so far as rested with them, finished eight days before the wall fell in the gale. The defenders and their inspector saw the operations, the defenders paid by instalments from time to time and while the work was proceeding, and the defenders and their inspector seeing the materials used and seeing the manner of building found no fault, nay, as I think, they expressed approval. There was no more work then ready for the pursuers or left for the pursuers then to do, and when the pursuers ceased working there had been no objection whatever. The only part of the brick-work then remaining to be completed had been left without completion from no fault on the part of the pursuers. It was delayed for the convenience of the defenders, and for the purpose of operations with which the pursuers had no concern,—mason-work and joiner-work, not brick-work. But for that delay on the part of the defenders, or others with whom they contracted, the pursuers' work would have been taken off their hands days before the wall fell. But delay on the part of the defenders or their other contractors could not prolong the liability or increase the risk of the pursuers. This is the more clear when we take into account the fact that these defenders were themselves the contractors for the joiner-work, and that it was in order to facilitate their own operations as joiners, and also the operations of those whom they employed as stonemasons, that part of the brick-work under the pursuers' contract was left unfinished. But for the defenders, the pursuers'

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work would have been finished and taken off their hands before the gale, and in that case there would, on the defenders' own argument, have been little difficulty in disposing of the question.

The second question is one of law, and is certainly one of interest, importance, and difficulty. If fault causing the fall of the wall has not been instructed or disclosed in evidence, was the brick-wall, when, during the gale, it fell, at the risk of the pursuers or the defenders?

I am of opinion that, assuming the absence of fault, the wall was, when it fell by a *vis major*, at the risk of the defenders. I was much impressed by the very learned and able argument of the Dean of Faculty, and a subsequent study of the authorities has satisfied me that his reasoning was quite sound. The result at which I have arrived is, that according to the Roman law (Dig. l. 19, tit. 2, lex 59), and according to the apt and weighty authority of Pothier (Pothier, Cont. de Louage, No. 434), an authority, as I think, not opposed to any Scottish decision, or to any principle recognised by the law of Scotland, the risk at the time of the fall rested on the defenders (Stair, 2, 1, 40; Ersk. 2, 1, 15; 1 Bell's Com. 456; Addison on Contracts, pp. 394-5).

The wall was erected within the premises and on the ground of the defenders. The contract was, that the pursuers, using their own materials, should build the wall on the defenders' ground, and as part of the operation of building houses for the defenders, or Peacock whom the defenders represent, and the wall was built accordingly. We now assume that the wall fell by *vis major*, and without fault on the part of the pursuers.

There is a plain and important distinction between the case, on the one hand, of work done by a contractor for an employer within the contractor's premises, to be delivered when finished to the employer, and the case, on the other hand, of work of a permanent character done by a contractor on the ground of the employer. The work of a sculptor supplying a statue, or a painter supplying a picture, the work of constructing a cabinet, a piano, a table, or a clock, to be delivered when finished, is within the first class of cases. The work of building a mansion, or building a conservatory, or building a wall on the property of the employer, is within the second class of cases. The distinction is obvious.

The rearing a building on my ground is a work in progress for me,—the work, and the only work which for me the contractor has undertaken to execute is the work of rearing that building,—and as it rises from the ground it rises for me. It accresces to the soil, and as it rises and accresces in its rise it becomes gradually mine. Holding, as I now do, that fault on the part of the contractors has not been proved, the law of the case may be stated thus:—

A building reared on my ground is mine by accession or accretion. In so far as it is reared it is mine. Progress in building on my ground is progressive accession or accretion. When the contractor has fulfilled his work of building, the accession or accretion is complete,—the building is mine. Such accretion operates delivery,—delivery *pro parte* till complete, total delivery when complete. That which is, with my consent and by contract with me, attached by accretion to my land is delivered to me, and unless there be an ascertained fault or defect in materials or in work the risk of the building must also be mine. If it fall beneath the violence of an extraordinary gale the loss is mine,—*Res perit domino.*

In my humble opinion this is sound law on principle and on the authorities, and I see no reason to doubt that right views of equity, and even of expediency,

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coincide with this law. If fault has not been proved, and if I am right on this question of law, that is sufficient for disposal of the case.

There are some farther and special grounds of judgment, founded on the defenders' own operations, which have been urged by the pursuers, and which are alluded to as not without importance by the Lord Ordinary. I am not disposed to rely much on these special grounds. In so far, however, as they have any force, I must say that I think that their effect is rather to support the pleas of the pursuers; for the operations of the defenders, and of masons and joiners employed by the defenders, on and in regard to this wall, between the 5th and the 14th of December, do appear to me to have proceeded on the recognition and acceptance of the pursuers' work. That work had during its progress never been objected to—and it had been performed within the observation of the defenders, and to the satisfaction of their inspector. The defenders continued their operations after the pursuers ceased to work, and they seem to have built on the top of it before the gale came, and it is by no means clear that their operations on the chimney-head did not tend to increase the risk.

But I do not rest my opinion entirely or chiefly on this view of the case. I think there are broader and safer grounds. I am satisfied, 1st, that the pursuers have brought themselves within the contract; 2d, that on the evidence, fault, whether as regards materials or workmanship, has not been proved against the pursuers; and 3d, that, in the absence of fault, the risk of the wall, under a gale of unusual violence, was with the defenders.

As I understand the agreement of the parties, a decision to this effect is sufficient to dispose of the whole cause.

Lord Murr.—In my opinion the judgment of the Lord Ordinary ought to be adhered to. The case is one which may very fairly be dealt with on the doctrine of *res perit domino*, unless it can be shewn that the gable was of such defective construction as to lead to its fall, and that it would not have fallen if it had been of better construction. It seems to me to be of importance to keep in view the precise condition of the facts before the night of the 15th December. It appears that the brick-work was completed about December 9, that is to say, the brick-work of the walls and gables. It is true that there were some inside partitions still to be put up, but practically the work was finished. Upon the bricklayers leaving, the masons, to whom it remained to complete the gable by the addition of the copestones and chimney-heads, took possession, and their work was done between the 9th and 14th December, and then the gable so completed was taken possession of by the defenders for the purpose of setting the joiners to work upon it. It appears from the evidence of Mr Paterson that the chimney-heads were "pretty heavy," and it further appears from Mr Eadie's evidence that the weather had been very wet, and that in consequence, when the gable fell, there had not been sufficient time for the mortar to set and grow firm. That was the condition of the gable on December 15, and the question we have to decide is, whether it was the wind acting on a well-built or an ill-built gable that threw it down. It appears to me that on this question Mr Paterson's evidence is very important, and the view which he takes is confirmed by Mr Eadie. Now, having regard to the evidence of these two witnesses, and especially to the fact that it is quite uncontradicted by any of the others, it seems to shew that the force of the wind on the chimney-head knocked it down, and its weight fell on the joists, drove them out on the front wall, and as the wall fell

so did the gable which it supported, and so it was the fall of the chimn which brought about all the damage. I think that view is confirmed fact that the other half of the gable which was supported by the back wall firm. It has been examined; is proved to have been built properly, and of the same materials as the part which fell; and it has since been taken over as sufficient by the defenders. In these circumstances it seems to me that there is no fault on the part of the pursuers in the way the gable was built. Now, as to the evidence on the quality of the materials used, it seems to me that they were proper and sufficient. I think the testimony of Messrs Paterson, Eadie, and Bell is conclusive on that point. Then, too, we have the evidence of Messrs Baird and M'Cord, and it is worth observing that Mr Baird in his cross-examination on behalf of the defenders is never asked a single question as to the sufficiency of the materials. In dealing with this case I put aside altogether the evidence of the parties themselves. The only evidence on the part of the defenders which is at all contradictory is that of Mr Thomson, and I do not think it goes very far to establish this case. In these circumstances, I think the pursuers have shewn that the accident was due to no defect either in materials or workmanship, and that under the minute of agreement they are entitled to recover their money.

There is, however, one part of the case which certainly does present some difficulty. It is admitted by the pursuers that there was a deviation from the contract in the proportion of stretchers to headers, and this is said by the defenders to have made the building less secure. If that were so I should have had much difficulty in holding that the pursuers had made out their case, but then I think it is quite clearly proved that the defenders knew quite well of this occasional deviation, and that they made no objection to it, and there is no evidence that that deviation did any harm, but rather the contrary. The new work has been built with four courses of stretchers and one of headers within the defenders' own knowledge, and in that condition they have taken it over. On that ground I have got over any difficulty which might have been caused by the deviation from the terms of the contract. As regards the violence of the storm, and that it was calculated to bring down even well-built work, I think that is sufficiently proved by the evidence from the Observatory. I think the pursuers have shewn satisfactorily that the gable was not insufficiently built, and that the materials were good, and that the defenders were bound to take it over, and I think there is nothing in the evidence which points to an opposite conclusion.

LORD DEAS.—This question arises out of a building contract between the pursuers and defenders. The defenders were the employers, and they do not seriously dispute that, for the purposes of this case, they are to be held to be in the position of proprietors of the premises in which the gable in dispute was constructed. The pursuers were not contractors for the whole building but merely for the brick-work, comprehending the gable which fell, as well as a variety of other internal brick-work. This particular wall fell almost immediately after it was put up, in consequence, it is said, of a gale of wind. An agreement was entered into between the parties that the wall should be rebuilt in the meantime, and that the question between them should be just the same as if it had been raised before rebuilding the wall,—who was or was not responsible for the loss, of labour and materials, occasioned by the fall?

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coincide with this law. If fault has not been proved, and if I am right on this question of law, that is sufficient for disposal of the case.

There are some farther and special grounds of judgment, founded on the defenders' own operations, which have been urged by the pursuers, and which are alluded to as not without importance by the Lord Ordinary. I am not disposed to rely much on these special grounds. In so far, however, as they have any force, I must say that I think that their effect is rather to support the pleas of the pursuers; for the operations of the defenders, and of masons and joiners employed by the defenders, on and in regard to this wall, between the 5th and the 14th of December, do appear to me to have proceeded on the recognition and acceptance of the pursuers' work. That work had during its progress never been objected to—and it had been performed within the observation of the defenders, and to the satisfaction of their inspector. The defenders continued their operations after the pursuers ceased to work, and they seem to have built on the top of it before the gale came, and it is by no means clear that their operations on the chimney-head did not tend to increase the risk.

But I do not rest my opinion entirely or chiefly on this view of the case. I think there are broader and safer grounds. I am satisfied, 1st, that the pursuers have brought themselves within the contract; 2d, that on the evidence, fault, whether as regards materials or workmanship, has not been proved against the pursuers; and 3d, that, in the absence of fault, the risk of the wall, under a gale of unusual violence, was with the defenders.

As I understand the agreement of the parties, a decision to this effect is sufficient to dispose of the whole cause.

Lord Mure.—In my opinion the judgment of the Lord Ordinary ought to be adhered to. The case is one which may very fairly be dealt with on the doctrine of *res perit domino*, unless it can be shewn that the gable was of such defective construction as to lead to its fall, and that it would not have fallen if it had been of better construction. It seems to me to be of importance to keep in view the precise condition of the facts before the night of the 15th December. It appears that the brick-work was completed about December 9, that is to say, the brick-work of the walls and gables. It is true that there were some inside partitions still to be put up, but practically the work was finished. Upon the bricklayers leaving, the masons, to whom it remained to complete the gable by the addition of the copestones and chimney-heads, took possession, and their work was done between the 9th and 14th December, and then the gable so completed was taken possession of by the defenders for the purpose of setting the joiners to work upon it. It appears from the evidence of Mr Paterson that the chimney-heads were "pretty heavy," and it further appears from Mr Eadie's evidence that the weather had been very wet, and that in consequence, when the gable fell, there had not been sufficient time for the mortar to set and grow firm. That was the condition of the gable on December 15, and the question we have to decide is, whether it was the wind acting on a well-built or an ill-built gable that threw it down. It appears to me that on this question Mr Paterson's evidence is very important, and the view which he takes is confirmed by Mr Eadie. Now, having regard to the evidence of these two witnesses, and especially to the fact that it is quite uncontradicted by any of the others, it seems to shew that the force of the wind on the chimney-head knocked it down, and its weight fell on the joists, drove them out on the front wall, and as the wall fell

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The contract was one for the whole brick-work of the building. That work was to be paid for by a *cumulo* sum, to be ascertained by measurement, at certain stipulated rates, after the brick-work was finished. There was no agreement that any part of the contract price should be paid until the whole brick-work was finished and taken off the contractors' hands. Certain payments do seem to have been made while the work was proceeding, but it is clear that these were simply payments to account, for the accommodation of the contractors, to enable them to go on paying their men, and made upon the assumption that the whole work would be duly and properly finished, and that when it came to be measured there would be a larger sum due to the contractors than what had been paid in the meantime. The contract was for the entire brick-work, not for parts,—a contract for the entire work, to be paid at the end, according to certain specified rates, when the work had been measured, and precisely, in that respect, in the same position as if a slump sum had been to be paid for it when the work was finished and taken off the contractors' hands. The pursuers, therefore, cannot recover on the special contract, and there is no evidence of a new contract to pay for work done without implementing the entire contract.

Well, then, while this work was in progress the gable in question fell, in consequence, it is said, of an unusually high wind, which blew it down. In the way in which the case has been viewed by your Lordships, and particularly by Lord Ardmillan, it becomes one of general importance,—At whose risk was that wall when it fell? Now, in the first place, I am of opinion, that when that wall fell it was at the risk of the contractors, whether it fell from any fault of theirs or not. In the second place, I am of opinion that, supposing this to be otherwise, it was at all events incumbent upon the contractors, and the *onus* lay upon them, to prove that the wall had not fallen from any fault of theirs, or any deviation on their part from the contract. In the third place, I am of opinion that, in this particular case, the contractors have failed to prove that the wall fell from no fault or deviation from the contract on their part, and, on the contrary, that it appears there were faults or deviations from the contract on their part, which, to say the least of it, may have led or materially contributed to the fall of the wall, and which most probably did contribute materially to the fall of the wall; so that, even if this last were the alternative to be taken, the consequences would still rest upon the contractors.

The first important question is, supposing there was no fault on either side, did the risk lie upon the proprietor of the house or upon the contractors? Now, I am not able to reconcile the law, as laid down by Lord Ardmillan, with the view taken of the law in various cases in the sister country of England. That law may not be imperative upon us, but if there is nothing against it in our own law, and if it is reasonable in itself, then unquestionably the English decisions become very important for our consideration. I do not know anything against it in our law. The Scotch authorities referred to apply to different classes of cases from the present, and will be found not to be adverse. I think the law is right and reasonable in itself, and I hold it to be the law of Scotland.

Of the English cases, I refer more particularly to the case of Appleby v. Myers, decided in the Exchequer Chamber, upon appeal from the Court of Common Pleas, on 21st June 1867 (Law Rep., 2 Com. Pleas, p. 651). That was a case in which certain parties contracted to put up certain expensive and heavy machinery, including steam-engine, water-tanks, and other appurtenances, in a building belonging to another party, in which they were necessarily to become, and, so far

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as completed, did become fixtures. While the work was in progress, but before the whole was finished, an accidental fire took place in the building, which burned down the building, and destroyed the machinery which had been erected in the building. The contract was there held to have been a contract for the entire work, under which the price was not payable till the work should be finished. In these respects, I think, it was exactly similar to the present case. No suggestion was made of a difference between such machinery and mason-work or joiner-work. It was not said that either the one party or the other was to blame for the fire, but I think it is pretty clear that, if there was to be a presumption of fault in reference to the fire, it would rather have been a presumption of fault on the part of the proprietor of the building, or some of his servants in the building in which the fire originated, than upon the part of the contractors putting in the machinery. It was the burning down of the building that destroyed the machinery, and the contractors who were putting in the machinery were not said to have had anything to do with the fire. The question came first before the Court of Common Pleas on 12th June 1866 (Law Rep., 1 Com. Pleas, 615). The machinery was being put up as fixtures upon the other party's property,—and the argument was used, which has been used here, that whatever was put up upon his property became his, and the maxim *res perit domino* was founded upon,—but I do not discover any doubt to have been entertained, in the Court of Common Pleas, that that argument would not do, and that if there was no fault on the part of the proprietor the loss fell on the contractor, although there was no fault attributable to him. But it was held in that Court that it was an implied part of the contract that the proprietor should have a building fit to receive the machinery, and that when the building was destroyed and the machinery also was destroyed, the proprietor had failed in his contract, because the machinery could not go into the building if no building was there to receive it. If it had not been for that view I do not discover that in the Court of Common Pleas any doubt would have been entertained that the risk in reference to the work and machinery, before it was completed and taken off the contractor's hands, lay with the contractor.

The case afterwards went to the Court of Exchequer Chamber, and it seems obvious from the report that no doubt was entertained there as to the principles I have stated, that the risk lay with the contractor, and that the maxim *res perit domino* did not apply. The only point on which the Court of Exchequer Chamber differed from the view taken by the Court of Common Pleas was in holding that there was an implied contract upon the part of the proprietor to keep up the building which was to receive the machinery. There is certainly a difference when the destruction of the work arises from something which, as in the present case, affects the work alone, and when it arises from a fire which consumes the whole building,—external walls, roof, and everything else, thereby destroying the contractor's work, and which might, in some cases, presume fault on the part of the proprietor or his servants occupying the building. But, however that might be, there was no difference of opinion between the two Courts, in the case of Appleby, that, unless there was fault or breach of contract on the part of the proprietor, the risk lay upon the contractor. Now, that, I think, is sound in equity and in principle. The contractor undertakes to put up the work complete, and the proprietor undertakes to pay for it on its being completed and taken over. That is the nature of the contract; and that being so, and as the risk must be upon one of two innocent parties, it appears to me, both on prin-

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ciple and expediency, that there is much more reason for laying the risk upon the contractor than upon the proprietor. Certainly I am not aware of any decision or authority in the law of Scotland that goes against that, and a series of decisions in the Courts of England appear to me to be in favour of it. That being the case we have to deal with, I have come to the conclusion that, supposing there to be no fault on the part of the contractor, the risk lay with him.

But, in the *second* place, although I were wrong in that, I think the least burden the law would impose upon the contractor would be to prove that he had performed his contract according to its terms, and that there was no defect in the building which could reasonably be supposed to have contributed to the result that had occurred; and I am humbly of opinion that he has not discharged himself of that burden here. The contract was that the bricks were to be of the best description, not being machine-made bricks; and that the walls were to be of a certain thickness, and were to be built with three courses of stretchers to one of headers. Now, it is proved beyond all question, in the first place, that a great quantity of the bricks were not of the best description of ordinary bricks. They were not merely not machine-made bricks, which they did not require to be, but they were inferior bricks. Of course inferior bricks may be extensively used by other parties, but that is no answer to the objection that these were not bricks of the quality stipulated by the contract. Who is to tell what the effect of that was upon the fall of the gable? If the bricks were more brittle than they should have been they would give way more readily. It may be, as Lord Mure suggests, that the top of the gable and the chimney-heads were the first to fall. But it is not suggested or proved that there was anything wrong with the chimney-heads. It is not suggested that they were too heavy. It is not suggested that they were in any way different from the chimney-heads the gable was intended to bear. There was, in short, no fault in the chimney-heads at all. Well, the wall being intended to bear those chimney-heads, it does not touch the question to suppose that the swaying may have begun immediately under the chimney-heads. If the bricks were brittle where they were immediately connected with the chimney-heads, and the chimney-heads were pressed by the wind, that may account for the inferior bricks giving way; whereas, if they had been of better quality, they might not have given way. Then, as to the stretchers and headers, it is proved and admitted that in a great portion of the wall there were four courses, in place of only three courses, of stretchers to one of headers, as stipulated by the contract. It does not require any architectural skill to see that a brick-wall must be weaker in the one case than in the other. The headers are just the binders that keep the rows of stretchers together. Suppose there were no headers at all, is it not perfectly clear that that wall would not be so strong, and if of considerable height would be altogether insufficient? We all know that you may get men of skill to give different opinions upon almost anything, but no man of skill will convince me that the diminution of headers could make no difference on the strength of such a wall. Well, then, there are those two breaches of contract,—the bricks are not of the quality stipulated for, and the headers or binders are not so frequent as they were stipulated to be. The wall comes down with the wind. Who shall say to what extent those deviations from the contract did or did not contribute to that result? It may very well be that the slightest possible difference in the strength of that wall would have prevented it from coming down. Very often a thing is blown down, whether a tree or a wall, when, if there had been just

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one degree less of weakness, or one degree of additional strength, it would have stood, but with that difference of degree it comes down. Can it be said that the contractor has relieved himself of the *onus* that was upon him of proving that no defect or deviation from the contract had occurred? Will it do to shew a difference of opinion among men of skill about the effect of these deviations? We are to judge of that, and not the men of skill. We see the contract before us; we see it was deviated from; we see that those deviations might have affected the strength of the wall; and that is enough to shew that the contractor has not relieved himself of the *onus*, which must be admitted to have been incumbent on him.

Lastly, when we come to the question of *vis major*, I am not satisfied that there was any *vis major* in the case. When a builder undertakes to build a wall he undertakes to build a wall which will withstand wind; and in this country winds of considerable force are of frequent occurrence. The contractor is surely bound to contemplate that there may be a high wind, and I see no proof that this particular wind was so much higher than the winds that might have been anticipated as to entitle it to be called a *vis major*. It is said there were some other brick-walls blown down on the same night in Glasgow. That may be true, although we have not the particulars; but how does it appear that these had been built as they should have been built in order to stand against such winds as might occur at any time? We all know, from judicial experience, civil and criminal, that, in Glasgow not less frequently than elsewhere, brick and other walls are put up which unfortunately are not sufficient to stand the wind, and which come down and cause a sacrifice of both life and property. A contractor is not entitled to take for granted that there will not be a high wind. He is bound to build on the footing that there may come a high wind, even before the roof is on and the couples and joists are in to tie the roof together. A wall should be built to stand against any wind that is not quite extraordinary. I do not see any proof here of such an extraordinary wind as to relieve the contractor of the risk which otherwise lay upon him. Therefore I am not able, even in that view, to come to the conclusion that the contractor is entitled to his payment here.

Lord President.—This is a case of very considerable importance, and though the sum at stake is very small our duty is not in the least degree diminished of guarding carefully the principles of law applicable to a case of this kind.

I think the defenders here must be taken to be in the position of the owners of the ground on which the building was to be erected, and that they employed several tradesmen, who, in combination, were to build a house. One man was to do the mason-work, another the joiner-work, another the brick-work, and so on. The pursuers of this action entered into a contract for the performance of the brick-work. The precise terms of that contract I do not think very material, but I agree with Lord Deas that it was a single contract to do the entire work, and that the contract could not be said to be completed, or the work finished, until the whole of the work had been done and measured, and the price ascertained. Now, undoubtedly, it was before the completion of the contract, in that sense—before the work had been measured and the price ascertained—that the brick gable, which formed part of the work contracted for, fell down. It is said to have fallen in consequence of a gale of wind, and that the gale of wind, and nothing else, was the cause of its fall. The question comes to be, in point of

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law, upon whom, in such a case, does the risk fall? Is it upon the contractor, or upon the employer? Now, I think, as a general rule, the result of all the authorities in the civil law, and our own law, is that in such a case, where a house is being erected upon the soil belonging to the employer, the risk is with the employer, and not with the contractor. I am not aware that there is in the law of England any authority adverse to that, and I am certainly not of opinion that the case of Appleby v. Myers is inconsistent in the slightest degree with the general rule which I have just stated. That was a contract of a very peculiar kind. It was a contract to supply a certain piece of machinery, composed of various parts, but the parts of which, except in combination, were useless, and nothing but the completed machine could be of any avail to anybody. Now, the English Courts held that until that contract was completed, and the employer put in possession of an available machine, there could be no demand upon the part of the contractor. I think that is brought out very clearly in the judgment of Mr Justice Blackburn, who delivered the judgment in the Court of Exchequer. With his opinion, as in reference to such a machine as the Court was there dealing with, I can find no fault. It interferes not in the slightest degree with the general principle, which I think is applicable to the case of parties engaged in building a house upon the ground of the employer, which is the particular case we have to deal with. If the house or part of the house is destroyed during the progress of the work my opinion is that the risk is with the employer. I think all the civilians are of that opinion, without exception, in the general case.

But then it must be very clearly established that the cause of the destruction of the work is a *vis major naturæ*, and it is of some consequence to attend to the particular kind of *vis major* which is alleged in a case of this kind. A *vis major* may be of such a kind that you see at once that that occurrence which is called the *vis major*, and nothing else, must be the cause of the destruction. For example, if there be such an earthquake that an entire building is swallowed up in the earth, there cannot be a doubt there that the *vis major*, and nothing but the *vis major*, is the cause of the destruction. On the other hand, if you have a gale of wind, as in the present case, it may very well be that that is a *vis major* in one sense—that is to say, that it is a very trying thing to a building—and yet not the true cause or the only cause of the destruction which followed. It is not enough to say that this gable fell in a gale of wind, or in a very high gale of wind, and it is not enough to say that but for that gale of wind it would not have fallen. It must be shewn that the gale of wind, and nothing but the gale of wind, is the cause of the disaster, because if any fault on the part of the contractor has contributed along with the gale of wind to produce the disaster it is quite plain he can maintain no action. Therefore it appears to me that, as the result of this rule, the *onus* is, in the first place, upon the contractor to shew that the cause of the destruction of this gable was the gale of wind and nothing else. And that leads to the question of fact upon the evidence, which I am not going to deal with at all. I very much agree with what has been said as to the import of the evidence both by Lord Ardmillan and Lord Mure, and I particularly adopt that portion of Lord Mure's opinion in which he dealt with the literal breach of contract which took place by substituting four courses of stretchers to one course of headers in place of three courses of stretchers to one course of headers, in regard to which the contractor may be said to have committed a breach of contract. I say I adopt that

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part of Lord Mure's opinion in which he gets the better of that apparent breach of contract by ascribing it to the consent or acquiescence of the defenders, who were the employers. I think they have completely barred themselves from founding upon that, either as a breach of contract or as a defect in the workmanship of this gable.

The result, upon the whole matter, therefore, according to my view of the case, is, that it has been proved by the contractors in this case that the gale of wind was the cause, and the only cause, of the destruction of this gable; and that being so, I am of opinion that, upon the rule of law which I have already adverted to, the employer, and not the contractor, is responsible.

THE COURT pronounced the following interlocutor:—"Adhere to the said interlocutor, and refuse the reclaiming note: Find the defenders liable in additional expenses," &c.

J. & R. D. ROSS, W.S.—MACGREGOR & ROSS, S.S.C.—Agents.

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Chapman v. Balfour.

R. CHAPMAN, Pursuer.
J. BALFOUR (Lloyd's *Curator Bonis*), Defender.—*Mackintosh.*
A. DUNCAN AND G. V. MANN, Compearers.—*Trayner.*

Process—Mandatary—Expenses—Jury Trial—A. S. 16th February 1841, *sec.* 46.—On the day fixed for the trial of a cause by jury the pursuer's mandatary lodged a minute of withdrawal before the jury were empannelled. No appearance was made for the pursuer, and the defender took a verdict. *Held* that the mandatary was liable for the fees to counsel and agents, and payments to witnesses and jury for the trial, and for the expenses of audit.

2D DIVISION. Jury Cause. R.

IN this cause a jury trial was fixed for Monday, 20th July 1874. On that morning, before the jury were empannelled, Messrs A. Duncan and G. V. Mann, the pursuer's mandataries, who had on the Saturday before intimated by letter to the defender's agents that they had ceased to act as mandataries, lodged a minute of withdrawal in process. No appearance was made at the trial for the pursuer. The defender put the jury into the box, and took a verdict in his favour.* The verdict was applied, and the defender assoilzied, with expenses. When the Auditor's report came to be approved of the defender moved for decree against Messrs Duncan and Mann. The account included fees paid to counsel, agents, witnesses, and jury for the trial, and the expenses of audit.

Messrs Duncan and Mann appeared, and maintained that their liability ceased upon their entering the minute of withdrawal,[1] and that in any view they were not liable for the payment to the jury, as under A. S. 16th February 1841, sec. 46, the defender was not obliged to put the jury into the box, but had an alternative and less expensive course.

* A. S. 16th February 1841, regulating proceedings in jury causes, provides (sec. 46),—"In case either party shall not appear at the trial of a cause after due notice of trial has been given by the opposite party, the party appearing, if pursuer in the issue, shall be entitled to lead his evidence, and go to the jury for a verdict; and if the party appearing be the defender in the issue he shall be entitled to obtain a verdict in his favour without leading evidence; but if the party appearing shall decline to proceed in this manner, then the Judge presiding at the trial shall certify to the Division the fact of the other party not appearing, and the Division shall thereupon proceed as in cases in which parties are held as confessed, unless it shall be shewn to the satisfaction of the Court that the failure of the party to appear at the trial was occasioned by some sufficient cause."

[1] Martin v. Underwood, June 8, 1827, 5 S. 783.

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Jan. 8, 1875. Chapman v. Balfour.

LORD JUSTICE-CLERK.—A mandatary can put an end to his obligation by lodging a minute of withdrawal in process. But the other party has recourse against him for all necessary expenses to which he has been put in consequence of the mandatary not withdrawing sooner. Accordingly I have no doubt that the mandataries in this case are liable for the great bulk of the account in ques-question, viz., the fees to counsel, agents, and witnesses for the trial, and the expenses of taxation. The only question of any difficulty is in regard to the payment of the jury. The defender might have obtained decree by default without taking a verdict.[1] But I think that the defender was not bound to adopt that course, and that the mandataries are liable for the payment to the jury.

LORDS NEAVES and GIFFORD concurred.

LORD ORMIDALE absent.

A. DUNCAN & G. V. MANN, S.S.C.—MYLNE & CAMPBELL, W.S.—Agents.

No. 62.

Jan. 9, 1875. Steven v. Nicoll, &c.

WILLIAM STEVEN (Young's Trustee), Pursuer.—*Balfour.*
ALEXANDER NICOLL AND OTHERS, Defenders.—*Asher—J. P. B. Robertson.*

Process—Proof—Diligence—Business Books.—In a reduction of an assignation granted by a person who subsequently became bankrupt, on the ground that the deed had been granted in defraud of creditors, at a time when the granter knew that he was insolvent, the defenders moved for a diligence to recover the business books and other documents in the hands of certain of the bankrupt's creditors, with a view to instruct his solvency at the date of the deed. The Court refused the diligence, on the ground that the documents called for could not be available as evidence of the granter's solvency apart from the examination of the creditors as witnesses.

1st DIVISION. Ld. Curriehill. M.

THIS was an action at the instance of William Steven, accountant in Dundee, trustee on the sequestrated estate of Charles Denoon Young, against Alexander Nicoll and others, for reduction of a trust-assignation, dated in 1868, of three policies of insurance upon the life of the bankrupt.

The pursuer averred that Charles Denoon Young was sequestrated in 1856, when the creditors received a dividend of 2s. 6d. in the pound, and again in 1862, when the creditors received 3s. 6d. in the pound, and that he was again sequestrated in 1874. It was further averred that Mr Young was insolvent in 1867, and at the date of the deed.

The defenders alleged that Mr Young was solvent when the trust-assignation was granted, and generally denied the averments of the pursuers. They also alleged that the deed was granted in implement of the obligations in Mr and Mrs Young's marriage-contract.

The defenders moved the Lord Ordinary to grant diligence to recover the documents mentioned in the following specification:—"1. The business and cash-books of (1) Messrs D. and W. Robertson, iron merchants, Dundee, and five other firms, from the beginning of the year 1866 to the present time, or to 5th October 1868, that excerpts may be taken therefrom of all entries of transactions during said period between the said respective firms or any of their partners, on the one part, and C. D. Young and Co., engineers, Perth, or Mr C. D. Young, engineer, Perth, on the other part. 2. All original accounts sales, accounts current, invoices, and correspondence connected with advances or loans by the

[1] A. S. 16th February 1841, sec. 46.

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said D. and W. Robertson, &c., to the said C. D. Young and Co., or C. D. Young, during the above period, or connected with consignments and securities held by the said D. and W. Robertson, &c., for such advances or loans. 3. The letter-books of the said several firms, that copies may be taken therefrom of all letters to the holders or assignees of securities on which the advances before referred to were made. 4. The books of the Commercial Union Assurance Company, London, that excerpts may be taken therefrom of all entries relating to the two policies of insurance, Nos. 863 and 868, on the life of the said Charles Denoon Young. 5. The business and cash-books of Mr Melville Jameson, solicitor, Perth, from the beginning of the year 1866 to the present time, or to 5th October 1868, that excerpts may be taken therefrom of all entries of transactions during the said period between him and the said C. D. Young and Co., and C. D. Young. 6. The books of the Commercial Bank of Scotland for their agencies at Perth and Callander, that excerpts may be taken therefrom of accounts in name of the said C. D. Young and Co., C. D. Young, or Mrs C. D. Young, from the beginning of 1865 to the present time."

The Lord Ordinary pronounced the following interlocutor:—"Grants diligence for recovery of the documents mentioned in article 4 of said specification, and also those in articles 1, 2, 3, and 5, down to the date of the trust-assignation on 5th October 1868, and commission to the commissioners formerly named to examine the havers and receive their exhibits, the same to be reported on or before the 13th January next: *Quoad ultra* refuses said motion, and grants leave to reclaim against this interlocutor."

Both parties reclaimed.

The pursuer argued;—The diligence asked should not be granted, as the documents sought to be recovered would not be evidence. If the Court, however, thought that part of the diligence should be granted, the Lord Ordinary had exercised a wise discretion.

Argued for the defenders;—The defenders' case was that at the date of granting the trust-assignation Mr Young was solvent. To prove that, it was necessary to get access to the books of the creditors to shew the position in which at that time Young stood to his creditors down to the present date. This was necessary, as the pursuer had in his favour a presumption, arising from the fact of present bankruptcy, of insolvency *retro* to the date of granting the deed.

At advising,—

LORD PRESIDENT.—With the exception of article 4 of this specification I am of opinion that the diligence should be refused, as the documents specified are not the kind of evidence by which the solvency or insolvency of Young may be established. If part of the proof of solvency were, that certain alleged creditors were not creditors at any of the dates specified, or to the extent alleged, or that, instead of being creditors, they were debtors, the proper evidence would be that of Young himself, on the one hand, and that of the creditors on the other. Then, if in the examination of creditors as witnesses it is necessary for them to refer to their books, they can do so, or, if the defenders think it desirable that they should do so before coming to give evidence, they can give them notice to do so, and require them to bring the books with them. But the books in themselves, apart from the examination of the creditors, are not evidence at all. They may come to be evidence in the sense of being in the hands of witnesses under examination, and in that sense only.

If this diligence were to be granted I should give great weight to the argument of the defenders, that they are entitled to inquire into the whole matter *retro* from

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the present date to the date of granting the deed, for the pursuer, who challenges the deed, has, from the fact of present bankruptcy, a presumption in his favour of bankruptcy before, and the *onus* of rebutting that presumption lies on the defenders. That is an argument of great weight, but to grant this diligence would be to go against firmly established principles in the law of evidence.

LORD DEAS.—I am of the same opinion. If all the documents specified were recovered and in the hands of the defenders they would prove nothing, unless the owners of the books were called as witnesses.

LORD ARDMILLAN and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor, except in so far as it grants diligence for recovery of the documents in article 4 of the specification, No. 16 of process, and grant commission for that purpose; refuse the diligence *quoad ultra*, reserving all questions of expenses; and remit the cause to the Lord Ordinary to proceed as accords."

ALEX. MORISON, S.S.C.—THOMSON, DICKSON, & SHAW, W.S.—Agents.

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Jan. 9, 1875.
Rodger's Trustees v. Rodger.

MRS JANET SMITH OR RODGER AND OTHERS (Rodger's Trustees), First Parties.—*D.-F. Clark—Mackintosh.*
MRS JANET SMITH OR RODGER, Second Party.—*Sol.-Gen. Watson—Balfour.*

Public Burdens—Exemption—Assessment—Gas and Water-Rates.—A truster provided that his widow should have the liferent use of his house "free of rent, feu-duty, ground-annual, taxes, and all other deductions." *Held* that the trustees were not bound to pay gas and water-rates for the widow.

Revenue—Agreement not to deduct Income-Tax—Income-Tax Act—5 and 6 Vict., cap. 35, sec. 103.—A husband directed his trustees to pay to his wife, if she survived him, "a free yearly annuity" of £1200, and he further provided that if she accepted this annuity it should be in full satisfaction of all her rights, legal and conventional. The wife survived, and accepted the annuity. *Held* that it was unnecessary to decide whether the bequest of a free annuity was equivalent to the bequest of an annuity free of income-tax, as, if it were, the widow, by accepting the annuity as in full of her legal rights, had entered into an agreement of the nature struck at by the Act 5 and 6 Vict., cap. 35, sec. 103.

1ST DIVISION. B.

THIS special case was brought by the trustees of the deceased James Rodger, of the first part, and Mrs Rodger, his widow, of the second part.

Mr Rodger died in May 1873, leaving a trust-disposition and settlement of date 31st December 1872.

The third and fourth purposes of the deed were as follows:—"In the third place, I direct and appoint that the said Mrs Janet Smith or Rodger, my wife, shall, in the event of her surviving me, have the liferent use and enjoyment of the house in which I reside at the time of my death, free of rent, feu-duty, ground-annual, taxes, and all other deductions. . . . In the fourth place, I direct and appoint my trustees to pay to my said wife, in the event of her surviving me, a free yearly annuity of £1200 sterling during all the days and years of her life." The deed contained this clause:—"And I do hereby further declare that the acceptance by my said wife of the foresaid provisions in her favour shall be deemed and taken to be in lieu and in full satisfaction to her of all the provisions in her favour contained in our contract of marriage, of date the 25th March

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1840, and also in lieu and in full satisfaction to her of all terce of lands, half of moveables, claims for aliment, and generally of all claims legally competent to her upon my decease."

Mrs Rodger was duly put in possession of the house, but a question arose as to whether she or the trust-estate was liable—(1) For the various burdens, taxes, and assessments payable in respect of the occupancy of the said house, and in particular for the police assessments and poor and school rates, which are levied partly on owners and partly on occupiers, and inhabited house-duty, which is levied on occupiers alone. (2) For the property-tax on the house, payable under schedule A of the Act 5 and 6 Vict., cap. 35, and subsequent statutes. (3) For the public water-rate on the said house levied by the corporation of Glasgow on owners, and also for the domestic water-rate on the said house, levied by that corporation on occupiers in respect of water supplied from the Glasgow Corporation Water-Works. (4) For the amount paid for gas consumed in said house, the same being payable to the corporation of Glasgow, and being charged according to the quantity of gas consumed as indicated by meter. (5) For the premiums of fire insurance payable for said house and furniture therein. (6) For the proportion of the expense effeiring to said house of the annual cost of keeping in order the pleasure-ground attached to the house in Park Gardens, Glasgow, which, by the titles, is imposed on the proprietors of the houses. (7) For the cost of repairs on said house, and in particular for a sum of £13, 13s. recently paid for painting, and a sum of larger amount payable for renewing the hot and cold water pipes throughout the house.

A question also arose as to whether Mrs Rodger was entitled to receive her annuity free of income-tax. In these circumstances, the parties submitted for the opinion and judgment of the Court the following questions:—(1) Do the various charges above set forth, or any, and which of them, fall to be paid by Mrs Rodger, or do they all, or any, and which of them, fall to be paid by the trustees? (2) Is Mrs Rodger entitled to receive her annuity from the trustees free of income-tax?

Argued for the first parties—(1) The provision in the deed was that Mrs Rodger should have the house "free of rent, feu-duty, ground-annual, taxes, and all other deductions." Under that there was certainly not included such burdens as water-rate or payment for gas, neither of these being taxes in the proper sense of the word, but payment for an article actually consumed. (2) The bequest of a free yearly annuity was not a bequest of an annuity free of income-tax, and, even if it were so, the provision was illegal under section 103 of 5 and 6 Vict., c. 35.* This was such an agreement as was struck at by the Act, for the widow was only entitled to accept the annuity if she agreed to accept it in lieu of her legal provisions.

Argued for the second party;—(1) Mrs Rodger was entitled to have the house free, not only of taxes proper, but of such payments as water and gas-rates, these being covered by the words, "all other deductions." (2) There was no other interpretation which could be put upon the words "free yearly annuity" than an annuity free of income-tax; and it was

* Sec. 103 enacts that "if any person shall refuse to allow any deduction authorised to be made by this Act out of any payment of rent, . . . or out of any annuity or annual payment mentioned in schedules C or E, ... every such person shall forfeit the sum of £50, and all contracts, covenants, and agreements made or entered into, or to be made and entered into, for payment of any interest, rent, or other annual payment aforesaid in full, without allowing such deduction as aforesaid, shall be utterly void."

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quite competent for the testator to make such a provision. This provision was not struck at by the 103d section of the Act 5 and 6 Vict., c. 35, for what was contemplated there was not such a stipulation as there was in this case, but a specific bargain.

At advising,—

LORD PRESIDENT.—As to the first question, I think that there is no real difficulty. The provision in favour of the wife is the following:—"In the third place, I direct and appoint that the said Mrs Janet Smith or Rodger, my wife, shall, in the event of her surviving me, have the liferent use and enjoyment of the house in which I reside at the time of my death, free of rent, feuduty, ground-annual, taxes, and all other deductions." This is not unlike the provision in the case of Clark, 9 Macph. 435.[1] The right of the widow here is not a right of tenancy. It is a liferent use of the house so long as she shall reside in it, and no longer; and she is to have that use "free of rent, feuduty, ground-annual, and all other deductions." Now, the word "deductions" here is unfortunate, as having no meaning, but it is clear that what the granter intended was, that the widow should take the house free from all taxes and payments of the same nature. So, except in regard to two, I think she is entitled to have the house free of the burdens mentioned in article 4. These two are—1st, the water-rate; and 2d, the amount paid for gas. The first of these, although a compulsory payment, is a payment for water actually consumed in the house. The matter of the gas payment is still more clear, for it is not a rate or tax at all, but merely a payment proportionate to the amount of gas consumed.

As to the second question, I am not prepared to say that the bequest of a free annuity to the widow is equivalent to saying that it is to be paid free of income-tax. But it is not necessary to determine that question here, for it is clear that the non-deduction of income-tax is illegal in terms of section 103 of the Income-Tax Act. It is in the trust-deed stipulated as a condition of the acceptance by the widow of the provisions therein made for her that she should be thereby barred from claiming her legal rights. Now, when the widow accepted the provisions on that condition she concluded an agreement with her deceased husband or his trustees. That being the case, the agreement is void by the 103d section of the Act.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"The Lords having heard counsel on the special case—1st, Find and declare that the various charges set forth in article 4 of the case fall to be paid by the trustees, parties of the first part, with the exceptions of the domestic water-rate therein mentioned and the money paid for gas consumed in the house, also therein mentioned, which fall to be paid by the party of the second part: 2d, Find and declare that the party of the second part is not entitled to receive her annuity from the trustees, parties of the first part, free of income-tax: . . . Authorise the trustees to pay the expenses of both parties, as taxed, out of the fund in their hands, and decern."

C. & A. S. DOUGLAS, W.S.—JOHN STEWART, W.S.—Agents.

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[1] Clark, Jan. 19, 1871, 9 Macph. 435, 43 Scot. Jur. 213.

MALCOLM RITCHIE, Complainer.—*Sol.-Gen. Watson—Burnet.*
JAMES H. BALGARNIE, Respondent.—*Strachan.*

No. 64.

Jan. 14, 1875.
Ritchie v. Balgarnie.

Bankruptcy—Deliverance—Claim—19 *and* 20 *Vict. c.* 79, *secs.* 126, 127.—A trustee on a sequestrated estate pronounced a deliverance rejecting the claim of a creditor as being insufficiently vouched, and allowing him to lodge further evidence within eight days. The creditor did not lodge further evidence within eight days, and did not appeal within the statutory period of fifteen days. In a suspension at his instance, the Court (*rev.* judgment of Lord Young) interdicted the trustee from paying a dividend till the creditor's claim had been disposed of by a deliverance admitting or rejecting it, the previous deliverance being held incompetent under the 126th section of the statute.

Observed (*per* Lord President), that when a trustee contemplates rejecting a claim by an alleged creditor on the ground that the claimant is a conjunct and confident person, the claimant is entitled to have an opportunity of leading evidence *prout de jure* to prove the reality of the transaction.

1ST DIVISION. Lord Young. M.

THE estates of Ritchie and Company, tea-merchants in Edinburgh, and of John Ritchie, the sole partner thereof, were sequestrated on 3d December 1873. Mr J. H. Balgarnie, C.A., was elected trustee.

Malcolm Ritchie, the bankrupt's father, lodged a claim for £406, being the amount of two bills alleged to have been drawn by him upon and accepted by the bankrupt. He produced the bills as vouchers.

The time for lodging claims expired on 3d April 1874, and on 17th April the respondent sent a printed circular to the complainer and the other creditors who had lodged claims, intimating that a dividend would be paid on 4th June 1874 to those creditors whose claims were admitted. The dividend proposed to be paid was 9s. 8d. per pound, and, in the event of the trustee's deliverances rejecting claims being appealed, 5s. 3d. per pound. In the circular to the complainer it was intimated that the following deliverance had been given upon his claim, viz.:—"The trustee rejects this claim as not being sufficiently vouched, the claimant being the bankrupt's father, and therefore conjunct and confident with him: Allows the claimant, however, eight days from this date to lodge any farther documents or evidence vouching or corroborating the whole or any part of such claim." (Intd.) "J. H. B. *T.*"

Malcolm Ritchie did not tender further evidence within eight days, and did not appeal against this deliverance within the fifteen days allowed for appeal by the statute.[1] But after the lapse of that time he tendered further evidence, which the trustee declined to look at, on the ground that his deliverance had become final as a rejection of the claim.

Malcolm Ritchie then brought this suspension, praying that the trustee should be interdicted from paying any dividend until the complainer "had a proper opportunity to establish the claim lodged by him as a creditor on the said estate, and the said claim has been either admitted or rejected in terms of the Bankruptcy (Scotland) Act, 1856."

The Lord Ordinary on the Bills (Young) passed the note, and a record was made up.

The suspender pleaded;—(2) The respondent was not entitled to refuse to reconsider the complainer's claim on the ground that fifteen days had expired from the date of his deliverance of 17th April. (4) The respondent's deliverance of 17th April being unwarranted and unauthorised by the Bankruptcy Statute he is not entitled to plead its finality, and the complainer should now be allowed an opportunity of proving his claim.*

[1] Bankruptcy (Scotland) Act, 1856, sec. 127.

* By the Bankruptcy (Scotland) Act, 1856, section 126, it is enacted, "that within fourteen days after the expiration of four months from the date of the

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The respondent pleaded that the deliverance was competent, and that after the lapse of fifteen days the deliverance was conclusive in so far as regarded the dividend in question, and operated as a final rejection of the claim.*

The Lord Ordinary, on 13th November 1874, refused the note of suspension.†

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deliverance actually awarding sequestration the trustee shall examine the oaths and grounds of debt, and in writing reject or admit them, or require further evidence in support thereof, for which purpose he may examine the bankrupt, creditor, or any other party on oath relative thereto; and in case he shall reject any claim, he shall in his deliverance state the grounds of such rejection."

* By the 127th section it is enacted that . . . . "if any creditor be dissatisfied with the decision of the trustee he may appeal by a short written note to the Lord Ordinary or to the Sheriff; but if no such note be lodged with and marked by the Bill Chamber or Sheriff clerk (as the case may be) before the expiration of fifteen days from the date of the publication in the "Gazette" of the said notice, the decision of the trustee shall be final and conclusive so far as regards that dividend."

† "The question is whether the complainer has stated sufficient grounds for suspending the proceedings of the respondent as trustee in the sequestration of Ritchie and Company, with a view to the first statutory dividend, and interdicting payment thereof. The complaint involves no disputed facts, but rests exclusively on the terms of the trustee's deliverance upon the complainer's claim in the sequestration.

"The peculiarity in the deliverance is, that after formally and in terms rejecting the claim, the trustee 'allows the claimant, however, eight days from this date, April 17, to lodge any further documents or evidence vouching or corroborating the whole or any part of such claim.' The case turns on the effect of this peculiarity. I am unable to see clearly how the trustee, after rejecting the claim and declaring the first statutory dividend on that footing, could thereafter, with statutory regularity, of his own authority, have admitted the claimant to the benefit of that dividend had the claimant availed himself of the opportunity afforded him to the effect of establishing his claim to the satisfaction of the trustee. At least I see difficulty in the way of such a proceeding, and know of no authority for it. But it was unnecessary to consider that matter, for the claimant was not in a condition to avail himself, and in fact did not avail himself, of the opportunity which the trustee indulgently (and with questionable regularity) afforded to him. He did not lodge 'any further documents or evidence vouching or corroborating the whole or any part of such claim' within the eight days allowed to him for that purpose, or at any time thereafter. He does not allege now that he has any further documents or evidence, but only that, if allowed the opportunity of appealing, he may by argument satisfy the appellate tribunal that the documents and evidence which were before the trustee when he rejected the claim ought to have induced him to admit it. The purpose of this suspension is in truth to obtain for the complainer an opportunity of appealing against the judgment of the trustee after the lapse of the statutory period. But for this purpose I cannot, in the circumstances of the case, sustain it. I say in the circumstances of the case, because I think this Court has jurisdiction, which might be exercised by way of suspension, to afford relief to a claimant in a sequestration who had been misled to his prejudice by the form of the trustee's deliverance on his claim. But a party whose claim is rejected subject to further documents or evidence within eight days was put to the immediate consideration of the question whether or not he could lodge further documents or evidence, and if he determine that question in the negative, as the complainer did, I think he ought to consider his claim as rejected so far as the judgment of the trustee goes, and act accordingly. The eight days allowed by the trustee was not for argument or debate on the documents before him, and on which he had rejected the claim, but to 'lodge' further documents if the claimant had any. I am therefore of opinion that the note of suspension should be refused, with expenses."

The suspender reclaimed. No. 64.

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LORD PRESIDENT.—In this case the claim was duly lodged with appropriate vouchers, which, in the ordinary case, the trustee would probably have held to be sufficient. But the claim having been made by the bankrupt's father, the trustee rejected it as insufficiently vouched, because the father was a conjunct and confident person; but, at the same time, he allowed eight days for the production of further evidence. That deliverance was not appealed, and, if it is competent, it is final. But I am of opinion that it is not a competent deliverance under the statute. There are only three deliverances which a trustee is empowered to issue. He must either admit a claim, or reject it, or require further evidence. It is quite incompetent to combine any of these alternatives, which may lead to different and opposite results from each other. The combination here attempted by the trustee is utterly inconsistent, quite as much so as if he had admitted the claim and at the same time required further evidence. I think therefore that the complainer is entitled to some remedy. If a trustee contemplates rejecting a creditor's claim on the ground that he is a conjunct and confident person, I think the creditor is entitled to have an opportunity of leading evidence *prout de jure* to prove the reality of the transaction, just as the trustee is entitled to lead evidence instructing fraud under the statute of 1621.

I am satisfied that Mr Balgarnie was not desirous of withholding from the complainer the opportunity of establishing his claim by additional evidence, if he had seen his way to do so in competent statutory form. What he ought to have done was to require further evidence, and to examine such witnesses as he himself thought proper, and any suggested to him by the complainer. I think that course ought still to be followed. But, meanwhile, the complainer is entitled to interdict against the funds being distributed, until his claim has been disposed of by being either admitted or rejected.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Sustain the reasons of suspension: Interdict, prohibit, and discharge the respondent from proceeding to divide the sequestrated estate, or any portion thereof, among the creditors of the bankrupt, until he shall have disposed of the complainer's claim, by a deliverance in terms of the statute, rejecting or admitting the same, and until the said deliverance has become final, and decern: Find the reclaimer entitled to expenses, and remit," &c.

NEIL M. CAMPBELL, S.S.C.—T. F. WEIR, S.S.C.—Agents.

GAVIN HAMILTON, Pursuer.—*D.-F. Clark—M'Kechnie.*
POLICE COMMISSIONERS OF DUNOON, Defenders.—*Sol.-Gen. Watson—Hunter.*

No. 65.

Jan. 15, 1875. Hamilton v. Police Commissioners of Dunoon.

Burgh Election—Police Commissioners—Ballot Act, 1872, 35 *and* 36 *Vict.* c. 33, *sec.* 22—*Police and Improvement (Scotland) Act*, 1862, 25 *and* 26 *Vict.* c. 101, *secs.* 48 *and* 50—*Royal Burghs Magistrates Act*, 1833, 3 *and* 4 *Will. IV.* c. 76, *secs.* 8 *and* 10.—The Ballot Act, in enacting that "all municipal elections shall be conducted in the same manner in all respects in which the elections of councillors in" certain royal burghs "are directed to be conducted by the Acts in force at the date of the passing of this Act, as amended by this Act," only prescribes the mode of conducting the election in the sense of taking the votes, adding them up, and declaring the result, and does not repeal the provi-

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sions in secs. 48 and 50 of the Police and Improvement Act of 1862 as to the mode of dealing with an equality of votes and fixing the day of election of Police Commissioners.

Municipal Election—Ballot Act, 1872, 35 *and* 36 *Vict. c.* 33.—*Observations* as to irregularities by returning officers in the conduct of elections under the Ballot Act.

1st Division. Lord Gifford. B.

IN the year 1868 the inhabitants of the town of Dunoon adopted the General Police Improvement (Scotland) Act, 1862, and on 19th October 1868 police commissioners were appointed for the first time. In terms of section 50, subsequent elections of commissioners took place annually on the same day of the month.

In 1873 the 19th of October was a Sunday, and the election took place on the following Monday. The election was conducted under the Ballot Act. For five vacancies there were six candidates, four of whom had a clear majority of votes. Mr Hamilton and Mr Garraway, the candidates lowest at the poll, received an equal number of votes. Mr Smith, the returning officer, under a mistaken view of his duty, gave a casting vote in favour of Mr Garraway, but this being objected to as illegal he withdrew his vote and made a double return.

Mr Hamilton then, at the first meeting of commissioners, held on 27th October, gave in a claim and protest setting forth that irregularities had been committed by the returning officer, and that he had a larger number of valid votes than Mr Garraway, and had been elected. The commissioners remitted this claim and protest to a committee, and at the same time, "resolved, in consequence of the said equality of votes, and in terms of the said 48th section of the Act, to take a vote as to whether the said James Garraway or Gavin Hamilton should be chosen to sit as a commissioner, and the commissioners unanimously resolved that the said James Garraway should, in terms of the said 48th section of the Act, be chosen and selected to sit as a commissioner for the burgh of Dunoon."

The committee reported to a meeting of commissioners, held on 29th November, that they were satisfied that the proceedings had been regular, and that Hamilton and Garraway had an equality of votes.

Mr Hamilton then raised an action of reduction against Mr Garraway, David Gray, clerk to the commissioners, and Robert Leslie Smith, the senior magistrate, who presided at the election. The summons called for production of the ballot papers, "as also a pretended declaration of the poll, or other writing or minute, whereby the defender, Robert Leslie Smith, the senior magistrate and returning officer foresaid, on or about the said 20th day of October, declared that William Campbell, builder, William Whitesmith, feuar, John Martin, draper, and Robert Walkinshaw Young, Royal Renfrewshire Militia, Dunmore, Kirn, had been elected commissioners for said burgh by a majority of votes, and that James Garraway, Franklin Villa, Hunter's Quay, in respect of his the said returning officer's casting vote, had a majority of votes over the pursuer, and whereby the said James Garraway was illegally declared to have been elected a commissioner along with said other commissioners in preference to the pursuer; as also certain minutes of the commissioners of police of said burgh, bearing date the 27th day of October last, recording a further illegal election by the defenders, the commissioners of police of said burgh, of the said James Garraway as one of said commissioners, and also recording the acceptance of office by the said William Campbell, William Whitesmith, John Martin, Robert Walkinshaw Young, and James Garraway;" and concluded for reduction of "the said pretended declaration of the poll, or other minute or writing, and minute or minutes of meeting of commissioners, and other papers, writings, and documents, in so far as they

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relate to the said pretended elections, and whole grounds and warrants thereof, and of the said acts and proceedings, and declarations and elections, and the said acts and proceedings, and declarations and pretended elections themselves of the said defender James Garraway as one of the commissioners of Dunoon," and to have the pursuer reponed and restored thereagainst *in integrum*, and for declarator that James Garraway had not been duly elected a commissioner, and that a new election should take place; or otherwise, that the pursuer should be declared to have had a greater number of votes than the defender Garraway, and was entitled to the office of commissioner.

The grounds on which the action was laid were:—

1. That the election had taken place on the wrong day, because, by sub-section 2 of section 22 of the Ballot Act,* the election was to be conducted in the same manner as under the Act 3 and 4 Will. IV., c. 76, which declared, by section 8, that elections should take place on the first Tuesday in November.

2. That as there had been an equality of votes for Mr Hamilton and Mr Garraway, a new election ought to have taken place under section 10 of 3 and 4 Will. IV., c. 76.†

3. That the election was void on account of irregularities committed at the election.‡ The chief of these was, that the returning officer did not impress the official stamp on each voting paper used at the time of giving it to the voter, but marked the papers in his own shop before the election began.

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* "Sec. 20. The poll at every contested election shall, so far as circumstances admit, be conducted in the manner in which the poll is by this Act directed to be conducted at a contested parliamentary election, and, subject to the modifications expressed in the schedules annexed hereto such provisions of this Act and of the said schedules as relate to or are concerned with a poll at a parliamentary election shall apply to a poll at a contested municipal election: Provided as follows:— . . . . .

"A municipal election shall, except in so far as relates to the taking of the poll in the event of its being contested, be conducted in the manner in which it would have been conducted if this Act had not passed.

"Sec. 22. This part of this Act shall apply to Scotland, subject to the following provisions:—

"(1) The term 'mayor' shall mean the provost or other chief magistrate of a municipal borough as defined by this Act.

"(2) All municipal elections shall be conducted in the same manner in all respects in which elections of councillors in the royal burghs contained in schedule C to the Act of the session of the third and fourth years of the reign of King William the Fourth, chapter 76, intituled 'An Act to alter and amend the laws for the election of the Magistrates and Councillors of the Royal Burghs in Scotland,' are directed to be conducted by the Acts in force at the time of the passing of this Act as amended by this Act; and all such Acts shall apply to such elections accordingly."

† "Where there shall be a double return for any ward, or where any person elected shall decline accepting, then and in all such cases the presiding magistrate shall immediately appoint a new election of a councillor or councillors in place of him or them so chosen elsewhere and so declining, at the distance of not more than four nor less than two days, and affix notices of the day so appointed on the church doors of the burgh; and such election shall be proceeded in in all respects in the same manner in which the first election in the said wards or districts, and the taking the poll, casting up the votes, and declaring the result, is herein-before directed to proceed, until the council of such burgh shall be completed."

‡ The irregularities complained of are mentioned in the Lord Ordinary's note, p. 305.

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Defences against satisfying production were lodged for David Gray, clerk to the commissioners, which set out the proceedings in election, and the appointment of Mr Garraway by the commissioners, and then stated the following plea in law:—"The provisions of the 48th section of the General Police and Improvement (Scotland) Act, 1862, having been duly observed in the election, inquiry, and subsequent vote of the commissioners set forth in the defenders' statement of facts, the election or appointment of the defender, James Garraway, and other proceedings complained of, cannot now be challenged, nor is the pursuer entitled to further scrutiny or counting of votes, nor to have production satisfied, and the action ought to be dismissed as incompetent."

The Lord Ordinary, on Feb. 19, pronounced this interlocutor:—"Finds that section 48th of 'The General Police and Improvement (Scotland) Act, 1862,' (25 and 26 Vict., cap. 101), has not been repealed by the Ballot Act, 1872,' (35 and 36 Vict., cap. 33), but that the said election is still in force: Finds that, assuming the election of commissioners of police of Dunoon, the polling at which election took place on 20th October 1873, to be in other respects legal and valid, the pursuer in the present case is barred by the statute from challenging the proceedings of the commissioners of police of date 27th October 1873, and of the committee named at said meeting, and, to this effect, sustains the preliminary defences stated for the defenders, and decerns: *Quoad ultra* repels said preliminary defences, so far as preliminary, and decerns; and, before farther answer, appoints the production to be satisfied by the transmission of the whole proceedings called for to the clerk of the process, and grants warrant for such transmission accordingly; declaring that the whole packets of counted and rejected ballot papers, tendered votes list, list of votes marked by presiding officer, statements relating thereto, declarations of inability to read, packets of counterfoils and marked copies of register in use at the election and at the poll for the election of commissioners for the burgh of Dunoon on the 20th day of October 1873, and declaration of the poll, shall be transmitted, under seal, or as they at present exist, under seal and with the seals unopened, to abide the orders of Court, and that the said sealed packets shall not be opened, or their contents examined, except under orders of Court, if any such orders shall be hereafter pronounced: Appoints said transmission to be made and production to be satisfied within fourteen days; reserves meantime all questions of expenses, and grants leave to reclaim against this interlocutor.*

* "NOTE.—. . . . The Lord Ordinary feels the question is attended with considerable difficulty, chiefly owing to the very complicated enactments of the Ballot Act, which, instead of containing a code in itself embracing the whole procedure, merely adopts, modifies, and varies, in a variety of ways, the provisions of a considerable number of previous statutes. On the whole, however, the Lord Ordinary is of opinion that the 48th section of the General Police Act, 1862, is not repealed, but, subject to the Ballot Act as to taking and declaring the poll, still regulates the election of the police commissioners of Dunoon.

"It is necessary to read the whole statutes together, or at least to consider their purview, and a large number of their special enactments. But, avoiding all detail, the Lord Ordinary will simply indicate the grounds upon which he has come to the conclusion above mentioned.

"1. Section 48 of the General Police Act of 1862 is not expressly repealed by the Ballot Act of 1872. The Ballot Act contains very carefully digested schedules of the Acts and parts of the Acts repealed; and although, in schedule 5th it specially repeals sections 46, 47, and 50 of the General Police Act of 1862, it leaves sections 48 and 49 untouched. Even sections 46, 47, and 50 are only repealed 'so far as their provisions are inconsistent with the provisions

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A record was then made up, and the pursuer pleaded;—"(1) The proceedings which took place in connection with the pretended elections at

of this Act.' This very careful and partial repeal of the Police Act of 1862 is the more remarkable, as the previous General Police Act (13 and 14 Vict. 33), is dealt with in precisely the same way, the relative section of that Act being left unrepealed, while sections on both sides of it are expressly repealed.

"2. Not only is there no express repeal of section 48 of the General Police Act of 1862, but the careful repeal of sections on both sides of it seems almost equivalent to an enactment in the Ballot Act that section 48 of the Police Act shall still remain in force. At least, it creates the strongest presumption that it was not the intention of the Legislature to interfere with this section 48. Sections 46, 47, and 50 are cut down, but 48 and 49, which could not have been overlooked by the Legislature, are allowed to stand. This view has the greater force when the extreme care and minuteness of the schedules are adverted to. They deal with even particular words of particular sections, which words are repealed, the rest of the sections remaining in force. The object of the Legislature seems to have been carefully to weed out from a large number of statutes (upwards of sixty in number) everything which was inconsistent with vote by ballot, and nothing else. This, in the Lord Ordinary's opinion, is the purview of the statute, its scope, and intention.

"3. The pursuer's contention that section 48 is repealed by implication by section 22 of the Ballot Act enacting that all municipal elections shall be conducted according to the provisions of 3 and 4 Will. IV., 76, depends entirely upon the true meaning of the word 'election.' Now, the single word 'election' is not defined in any of the interpretation clauses, and undoubtedly, in common language, it may be used either in a narrow or in a more extended sense. Keeping in view the spirit of the Ballot Act, however, the Lord Ordinary thinks that 'election' must be confined to the choice by the constituency of its representative, either parliamentary or municipal, and must not be extended (unless a necessity arises) to proceedings which arise after the poll has been closed and declared, and which proceedings are taken, not by the constituency, but by some third party,—for example, the commissioners, the town council, or by parliament. In particular, the Lord Ordinary thinks that proceedings regarding disputed elections, or proceedings when a double return has been made, are not, in the statutory sense, part of the 'election' itself, but are separate proceedings altogether, which may or may not result in a 'new election or in a scrutiny or new declaration of the election.' In short, they are proceedings regarding an election, but are not the 'election' itself. The Ballot Act did not, in general, intend to affect such proceedings, except in so far as they were necessarily affected by secret voting. This might be illustrated by a consideration of a large number of the special provisions of the Ballot Act in reference to contested elections and otherwise.

"4. The alleged implied repeal of section 48 must yield to what almost amounts to the express maintenance of that section, taken in combination with the scope and purport of the Ballot Act, and with the changes which it intended to effect.

"5. There is really no reason whatever for the repeal of section 48 of the Police Act of 1862. . . . .

"Such being the opinion at which the Lord Ordinary has arrived, it follows that the decision of the committee of five is final, and there having been equality of votes, the decision of the commissioners, that James Garraway should be preferred to the pursuer, cannot now be challenged.

"The shape of the case, however, must be kept in view. The present record is only closed upon preliminary defences objecting to satisfy the production, and the decisions of the committee of five and of the commissioners themselves are pleaded upon as final and excluding the pursuer from any further investigation. It may be said, perhaps, that the report of the committee of five, and the vote by the commissioners, are pleaded upon as a sort of title to exclude the pursuer from claiming Mr Garraway's place. In this view, the Lord Ordinary thinks the defenders' plea well founded. He thinks the decision of the com-

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Dunoon, on the several dates mentioned in the summons, not being in compliance with, but in direct contravention of, statutory enactment, there has been no valid election of commissioners. No valid election did or could take place for the burgh of Dunoon on said 20th October 1873, and it was *ultra vires* of the returning officer or senior magistrate to have an election of commissioners on said day. (2) At least the said proceedings, so far as relating to the election of the defender Mr Garraway, by the proceedings at the poll, at the counting of the votes, by the casting vote of the returning officer, and subsequently by open vote of the commissioners, were altogether illegal and *ultra vires*, and his pretended election is void and null. (3) Certain of the ballot papers, counted as containing votes in favour of Mr Garraway not being officially marked, or being defective in the other requirements of the Ballot Act founded on in the summons, the returning officer was not entitled to count them,

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mittee of five and the vote of the commissioners are in conformity with section 48, which he holds to be still in force, and are protected by its provisions, and to this extent he sustains the preliminary defences.

"But then the pursuer does not content himself with challenging the proceedings of the committee of five, and the vote of the commissioners thereon—he challenges the whole 'election,' that is, the whole polling and proceedings at the poll taken on 20th October 1873. He says that the poll was not taken, and the result thereof not declared in terms of the Ballot Act, but that a great number of the essential provisions of the Ballot Act were violated or neglected. In consequence, the pursuer challenges not the election of Mr Garraway merely, but the election of the pursuer himself, and of all other commissioners who were elected or voted for at the poll of 20th October 1873, and he wants the whole proceedings at that poll, and all that followed on them, declared null and void. The pursuer's statements leading to this result are in articles 7, 8, and 9 of his condescendence.* It was not pleaded that these statements are irrelevant, and the Lord Ordinary does not see how the pursuer can be excluded from the general challenge. If the essential provisions of the Ballot Act were not observed, then there is no help for it; the whole election must be declared null. In this view, the Lord Ordinary thinks the pursuer's action cannot be excluded by the report of the committee of five, or by the vote of the commissioners. There could be no committee of five if there was no ballot at all. There could be no equality of votes if there were no legal votes at all.

"Accordingly, the Lord Ordinary thinks that, to a certain extent, the production must be ordered to be satisfied, and to this extent the preliminary defences repelled as preliminary. Keeping in view, however, the provisions of the Ballot Act, he thinks the ballot papers, tendered votes, spoiled papers, rejected votes, counterfoils, and other documents, should only be produced under seal, or with the seals unopened, for it is only in certain cases that the Court will allow them to be looked at. For example, rule 41st in schedule (I) provides that it is only by order of the House of Commons, or competent tribunal, that the sealed packet of counterfoils can be opened, or ballot papers inspected, and even when inspection is made care must be taken that the mode in which any particular elector has voted shall not be discovered, until (1) he has been proved to have voted, and (2) his vote has been declared by a competent Court to be invalid.

"The Lord Ordinary has endeavoured, in the preceding interlocutor, to carry out the views now explained, and he does not think there will be any practical difficulty in holding the production satisfied, so as to enable the Court to get at the merits of the pursuer's objections to the whole election in question. The Lord Ordinary has reserved all questions of expenses *hoc statu*, in conformity with the usual practice of dealing with preliminary defences. But the defenders have been successful on the only points of law hitherto argued. As the present decision may in one view terminate the litigation, the Lord Ordinary has given leave to reclaim."

* These objections are stated in the Lord Ordinary's note, *postea*, p. 305.

but was bound to have rejected them, and the non-compliance of the said returning officer having affected the result of the said election the same is void and null. (6) The election was not conducted in accordance with the principles laid down in the body of the Ballot Act, and the result was thereby affected, and in consequence the whole proceedings and elections are and should be declared to be null and void, and set aside, as concluded for.

The defenders pleaded that the proceedings had been regular.

The Lord Ordinary, on 10th July 1874, pronounced this interlocutor:—'*Finds* that, according to a sound construction of the statutes, the election of the commissioners of police for the burgh of Dunoon was validly and competently fixed to take place on 20th October 1873, and to this effect repels the first plea in law stated for the pursuer; reserving said plea in law and all other pleas of parties to all other effects: *Quoad ultra*, and before farther answer, allows to both parties a proof of their respective averments."

After the proof the Lord Ordinary pronounced this interlocutor:—'Repels the reasons of reduction: Assoilzies the defenders from the whole conclusions of the action, and decerns: Finds the defenders entitled to expenses, but subject to modification, so far as relates to the proof recently led and debate thereon, and, in the circumstances, modifies the expenses now found due by deducting from the taxed amount of such expenses one-third of the taxed amount of the defenders' expenses of and connected with the proof and debate thereon: Remits," &c.*

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* "NOTE.—The most important and the most difficult questions raised in this case were disposed of by the Lord Ordinary's interlocutor of 19th February 1874. These questions were raised under preliminary defences. A farther point of law was disposed of by interlocutor of 10th July 1874, and the Lord Ordinary thought that the remaining points were so mixed with disputed matters of fact as to make a proof before answer expedient. The interlocutors of 19th February and 10th July 1874 have not been taken to review, although leave to reclaim was specially given. The Lord Ordinary's impression was that if the points of law were fixed there should have been no dispute about matters of fact, which consisted of alleged irregularities more or less technical. The parties, however, have contested the case to the end, and the whole remaining points now fall to be disposed of by final judgment.

'The Lord Ordinary, by interlocutor of 19th February 1874, held that the 16th section of 'The General Police and Improvement (Scotland) Act, 1872,' had not been repealed, but is still in force, and that in consequence thereof the pursuer was not entitled to challenge the proceedings of the commissioners and their committee. This finding, which is final in the Outer-House, in substance put an end to the competition between the pursuer and his rival candidate, Mr Garraway, and fixed that, assuming the election to be a good election at all, Mr Garraway, and not the pursuer, Mr Hamilton, had been elected a commissioner.

'The only question now remaining is in effect whether, in consequence of alleged irregularities, or alleged non-observance of statutory requisites, the whole election of commissioners is void, so that neither Mr Garraway nor the pursuer, nor any of the other gentlemen who were elected or returned on 20th October 1873, have been validly elected.

'After fully considering the whole alleged irregularities, the Lord Ordinary is of opinion that the pursuer has not succeeded in establishing by proof any such irregularities as are sufficient under the statute to void the election. It is true that in many respects the election seems to have proceeded somewhat loosely. In various respects there was not exact and full compliance with the 'rules' which the Ballot Act prescribes for parliamentary and municipal elections. A municipal election includes the election of commissioners in a burgh like Dunoon.

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LORD PRESIDENT.—The pursuer was a candidate at the election of police commissioners of the burgh of Dunoon on 20th October 1873. He was not

Some of the irregularities were serious, and it has not been without difficulty that the Lord Ordinary has come to be of opinion that they are not fatal. If it had been shewn that any of them, or any of the more material of them, were intentional and in deliberate defiance of the statute and not mere innocent mistakes, the Lord Ordinary would have annulled the election. But it is quite clear, and indeed was not seriously disputed, that the proved irregularities were the result of innocent mistake or misapprehension on the part of those who were conducting the proceedings, and the Lord Ordinary is also satisfied that none of these mistakes or irregularities affected the principles laid down in the Ballot Act, or the result of the election.

"Now, it is very carefully provided by section 13 of the Ballot Act, that 'no election shall be declared invalid by reason of the non-compliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act, if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election.'

"There is a similar provision in the General Police Act of 1862, providing that elections shall not be set aside on technical mistakes or irregularities.

"The Lord Ordinary is of opinion that the provision of section 13, and the relative provision in the Act of 1862, are sufficient to save the election in the present case from nullity, though it must be confessed that some of the irregularities deserve very severe censure. None of them affected the great principle of the Ballot Act,—secret voting; and every elector had fair and full opportunity to give his secret vote. The irregularities were in matters of detail. Some of them may have affected particular votes, and might have been important had this been a question of scrutiny, but none of them, in fairness, and, according to the reason of the thing, are sufficient to upset the whole election. It is unnecessary to notice the whole objections insisted in by the pursuer, many of which were exceedingly trifling; but one or two of the leading objections may be instanced.

(1) "One of the leading objections on record is, that no official stamping or marking instrument was provided or used at the election, and this implied that none of the ballot papers were officially marked. If this had been substantiated the Lord Ordinary rather thinks he must have cut down the election, for the result would have been that not a single good vote had been given. But what turned out upon proof and on inspection of the ballot papers was, that every ballot paper did bear the official mark, an impressed 'R,' visible on both sides, and impressed by the presiding officer as his official mark. The irregularity is, that instead of pressing each ballot paper with the 'R' at the time of giving it to the voter, the presiding officer, Mr Smith, in the morning, and before the poll opened, impressed the whole of the ballot-papers with his official mark 'R,' retaining the whole papers and the stamping instrument in his own possession until after the election. Now, this was a serious breach of the statutory rules, and the excuse for it—to save time and confusion during the voting, or when there might be a crowd of voters—is not satisfactory. But it is a very different question whether it is to annul the whole election. The object of the provision was to prevent the introduction into the ballot box of any voting papers excepting those delivered by the presiding officer to the voters, and this object was accomplished by Mr Smith himself keeping in his own custody all his marked voting papers and his stamping instrument all through the election. There could be no stamped voting papers in the ballot box but those given out by Mr Smith. He acted from the best motives, and his act did not affect the 'principles' of the Ballot Act, or the 'result of the election.' It was just such a mistake as is saved by section 13 of the Ballot Act.

successful, and the object of the present action is to have it declared that he ought to have been successful, and that he is entitled to hold the office of commissioner.

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In the year 1868 the town of Dunoon adopted the Police Act of 1862. The

"It was no doubt very ingeniously urged for the pursuer, that the irregularity in question was not only a violation of the rules in the schedule, but a violation of the Ballot Act itself (section 2), which contains, more shortly expressed, many of the rules contained in the schedule. It was argued that section 13 may save violations of the rules, but not violations of the Act itself. The Lord Ordinary thinks this is much too strict a reading. Undoubtedly the thing done was a contravention of the 'rules,' and as such it is saved by section 13, although it also occurs in the statute. The 'rules' are expressly declared parts of the statute, and it seems out of the question to hold that the non-strict compliance with everything in section 2 must, without any discretion in the Court, absolutely void every election.

"Besides, and altogether apart from section 13, there is room for the distinction between provisions directory and provisions absolute and indispensable. Directions to the returning officer may be fulfilled by equivalents if this is innocently done; their violation does not at least necessarily annul the election. This principle seems to have been recognised as applicable to the Ballot Act in various English cases. See among others Pickering v. Starling, 13th January 1872, 28 Law Times, 111; Pickering v. James, 10th June 1873, Law Reports, 8 C. P. 489; Borough of Hackney, 15th and 16th April 1874, 31 Law Times, p. 69. In these cases all the Judges seem to recognise the broad distinction between provisions which affect the 'principle' of vote by ballot and mere details which are arbitrary, and the object of which may be accomplished in various ways. See Mr Justice Grove's opinion in the Hackney case.

"Another objection by the pursuer was, that the secrecy of the ballot had been infringed by the presiding officer announcing from time to time the numbers who had voted, for this, it was said, assuming the ballot papers to be consecutively numbered, would have enabled an expert note-taker to ascertain the relative numbers on the counterfoil, and so afterwards to identify any voting paper. It was proved in evidence, however, that the numbers who had voted were only mentioned to officials, all sworn to secrecy, and when no others were present. It would require very great expertness in a note-taker or observer to count and obtain the right numbers; and it was not shewn that any person had done this or attempted to do it. The only gentleman who was said might have done it was Mr Scoular, and the pursuer did not choose to call him as a witness. It has not been shewn that a single vote was known to anybody but the voter himself.

"It was attempted to be shewn that the presiding officer, Mr Smith, had not acted fairly and impartially. This objection utterly failed on proof. No doubt at eight o'clock, when the poll opened, a considerable number of voters came forward at once, and two voters, who had to leave by the 8.15 boat, could not get ballot papers in time, and had to leave without voting. But this was not Mr Smith's fault; he took the voters in their order, and identified and passed them as fast as he could. He rather did too much by pre-stamping the ballot papers to facilitate despatch.

"The other objections, omitting several of no moment, related to the non-sealing up of the papers, books, and lists used at the election. It was said that they were not sealed in separate packets, and were not sealed at the proper time. Then it is said that the rejected votes were not specially endorsed as rejected,—that at the counting the votes were not mixed, and the entire number of ballot papers were not counted before the votes were counted; then that the declaration of the result was not made at the right time, and also that the presiding officer himself should not have voted.

"Possibly the pursuer may be right in strict form upon some of these matters. It is not quite easy to read together and correctly the various provisions of the

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first election of commissioners took place on the 19th of October in the year 1868. The town of Dunoon had thus become a burgh for police purposes, and was governed by commissioners, in terms of the Police and Improvement Act of 1862. That statute provides (sec. 50)—"One-third of the commissioners, or, where the burgh is divided into wards, one-third of the commissioners for each ward, shall go annually out of office on the same day of the month as that on which the commissioners were elected into office, or on the next lawful day thereafter in each year, and on the same day of the month, or the next lawful day annually, the places of the commissioners going out of office shall be supplied by an equal number of new commissioners to be chosen from among the householders of the burgh in the manner aforesaid, under all the rules, regulations, and provisions applicable to such first election, and the like notice of such annual election shall be given as is hereinbefore directed to be given of such first election of commissioners." So that the election will always take place on the same day of the same month as the first election of the burgh of Dunoon, which took place on 19th October. Every fresh election of commissioners will take place on the 19th of October, or, in the case of that being a Sunday, on the following day. In 1873 the 19th October was a Sunday, and the election took place on the following Monday, and it cannot be disputed that that was the right day, unless section 50 of the Act of 1862 is repealed by the Ballot Act. I shall afterwards consider whether that is the effect of the Ballot Act.

The election was conducted under the provisions of the Ballot Act, and professed to be so. The result was that there being five vacancies four of the candidates were returned by a clear apparent majority of votes, and as regards the fifth and sixth candidates they had an equality of votes, the one being the pursuer Hamilton and the other the defender Garraway. The Act of 1862, by section 48, provides a mode of dealing with such a double return. It provides,—"The commissioners elected under this Act shall at twelve of the clock noon on the first Monday after the first and each annual election, hold their first general meeting in the town hall or other convenient place within the burgh, with power to adjourn to any other day or place which they may think fit; and every person who may consider that he ought to have been returned as a commissioner may lodge a complaint in writing, signed by him or by some other person duly authorised on his behalf, with the commissioners assembled at such meeting, who shall thereupon remit to a committee of three or five of their number to inquire into the merits of such disputed election, and to report thereon to a subsequent meeting of the commissioners, and such report shall be final; and in case there shall be an equality of votes at any election, the commissioners shall determine by vote which of the candidates shall be preferred;

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statutes modified, altered, partially repealed, and affected as they are by the provisions of the Ballot Act, and the Lord Ordinary does not think it necessary to decide or lay down a code of procedure under the statute. It is enough that none of the objections affect the validity of the election as a whole. Some of them affect only the question of preference between the pursuer and Mr Garraway, and this matter has been finally determined under section 48 of the Police Act by the commissioners and their committee.

"On the whole, the pursuer has entirely failed in his action, and expenses must follow; but there is room for some modification in reference to the proof and debate thereon. The pursuer has established some irregularities which the defenders in fairness should have admitted. The Lord Ordinary thinks justice will be done by deducting a third from this part of the defenders' expenses."

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and no election or appointment under this Act shall thereafter be liable to be challenged, and no such election or appointment shall be quashed or set aside on account of any misnomer, omission, or other informality." Now, this was a rough-and-ready way introduced by the statute of disposing of a double return. It was desirable that there should be no protracted litigation, and the form of procedure was very expedient. It is quite clear that if the section applies, and it was duly followed by the commissioners, there can be no possibility of setting aside their decision either in this Court or anywhere else, because their decision is declared to be final. The commissioners did meet on the 27th October, and upon that occasion Gavin Hamilton, the pursuer, gave in what he called a claim and protest, which was in effect a statement that he ought to have been returned. The commissioners thereupon remitted this claim to a committee of five, in terms of the statute. They then took up the matter of the double return, and resolved, "in consequence of the said equality of votes, and in terms of the said 48th section of the Act, to take a vote as to whether the said James Garraway or Gavin Hamilton should be chosen to sit as a commissioner, and the commissioners unanimously resolved that the said James Garraway should, in terms of the said 48th section of the Act, be chosen and selected to sit as a commissioner for the burgh of Dunoon." The committee to whom the claim and protest of Mr Hamilton had been remitted then examined into it, and reported,—"The committee having considered the claim and protest by Mr Gavin Hamilton, of date 27th October last, and examined into the matter carefully, beg to report to the commissioners that they are satisfied that the proceedings have been conducted regularly and in order; and that James Garraway and Gavin Hamilton had, at the recent election, an equality of votes." The result of the whole proceeding was this, the claim and protest was found not to be well founded, and, the equality of votes being established, the commissioners had right to elect Mr Garraway. The proceedings were thus properly conducted under section 48 of the Police Act of 1862.

But the question remains whether sections 48 and 50 of the Police Act of 1862 are still in operation or are repealed by the sections of the Ballot Act which have been quoted to us. The object of the Ballot Act was to introduce a new mode of voting, and I am not aware that the Act has any other purpose. It is concerned with the mode of conducting elections, in the sense of taking the votes, adding them up, and thereafter declaring the result. The sections which we were particularly referred to were the 20th and 22d, which deal with municipal elections, and this election of commissioners for the burgh of Dunoon was, in the sense of the Act, a municipal election. Section 20 provides that "the poll at every contested municipal election shall, so far as circumstances admit, be conducted in the manner in which the poll is by this Act directed to be conducted at a contested parliamentary election, and, subject to the modifications expressed in the schedules annexed hereto, such provisions of this Act and of the said schedules as relate to or are concerned with a poll at a parliamentary election shall apply to a poll at a contested municipal election: Provided as follows." There then occur provisions which are principally applicable to English elections. Section 22 provides for the application of the Act to Scotch municipal elections, and in subsection 2 provides,—"This part of this Act shall apply to Scotland, subject to the following provisions:—(1) The term 'mayor' shall mean the provost or other chief magistrate of a municipal borough, as defined by this Act: (2) All municipal elections shall be conducted in the same manner in all respects

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in which elections of councillors in the royal burghs contained in schedule C to the Act of the session of the third and fourth years of the reign of King William the Fourth, chapter seventy-six, intituled 'An Act to alter and amend the laws for the election of the Magistrates and Councillors of the Royal Burghs in Scotland,' are directed to be conducted by the Acts in force at the time of the passing of this Act as amended by this Act; and all such Acts shall apply to such elections accordingly." Now, this is a little awkwardly expressed, but the meaning is clearly that municipal elections shall be conducted in the same way as in royal burghs by the statutes now in force as amended by the Ballot Act. Now, the way in which the statutes in force were amended by the Ballot Act was by the introduction of secret voting instead of open voting as these statutes provided. We must take the statutes with that addition of the Ballot Act. It is said that an election can no longer be conducted under the Act 1862 on account of sections 20 and 22 of the Ballot Act. The manner of election is now regulated by the Municipal Elections Act, 1870, as amended by the Ballot Act. But the inference which the pursuer deduces is that sections 50 and 48 of the Act of 1862 are repealed because they are inconsistent with the Act 3 and 4 Will. IV., c. 76, and the Ballot Act. If sections 50 and 48 were sections regulating the mode of conducting elections within the meaning of subsection 2 of the 22d section of the Ballot Act, the inference would be irresistible. But I apprehend that it is not so. Let us see what is said to have been done inconsistent with 3 and 4 Will. IV. c. 76. That Act requires by section 15 that elections shall take place on the 1st Tuesday of November. Therefore, says the pursuer, if that Act is in force, an election on 19th October is bad, because that is not the day prescribed by the statute. But, reverting to the words of the 22d section of the Ballot Act, we see that it refers to the Municipal Election Acts only in reference to the provisions which regulate the manner of conducting elections. What does that mean? It means that the taking and summing up the votes and declaring the result are to be governed by the Ballot Act and the statutes in force at the passing of that Act. But does the fixing the day for the election fall within this provision? Certainly not. Fixing the day for the election is antecedent to the election altogether, and the manner of conducting the election is not affected thereby.

It is true that section 50 of the Police Act of 1862 is repealed by the Ballot Act, but it is repealed with a qualification. The fifth schedule appended to the Ballot Act repeals, *inter alia*, the 50th section of the Police Act, "so far as their provisions are inconsistent with the provisions of this Act." Now, section 50 of the Police Act is in some respects quite inconsistent with the provisions of the Ballot Act, and to that extent it is repealed. Thus it provides that one-third of the commissioners are annually to go out of office, and their places are to be supplied by an equal number chosen "in the manner foresaid, under all the rules, regulations, and provisions applicable to such first election." Now, these rules, regulations, and provisions provided for open voting, after the old fashion, and are therefore necessarily repealed. But otherwise the 50th section, not being inconsistent with the Ballot Act, is not repealed. The Ballot Act dealing with secrecy of voting, the fixing of a day for election does not fall under its provisions.

As to the 48th section the matter is still more clear. It is said that it is repealed, because under section 10 of 3 and 4 Will. IV. a new election is the only remedy for a double return. But what is to take place in case of a double return is not a question as to the manner of conducting the election, and so does

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not fall under section 22 of the Ballot Act. The manner of conducting the election ends when the return is made. Here the return has been made, and the question as to the double return must be dealt with under the 48th section of the Police Act. The police commissioners, when they met after the election, were desired to choose one of the two candidates, who were returned as having an equal number of votes. They did so, but that was not an election; it was rather, what it is called by the Act, an appointment. The election was over, and resulted in a double return, and what was done afterwards was only a remedy for that difficulty. In like manner, the provisions of the 10th section of 3 and 4 Will. IV. have nothing to do with this. In case of a double return there is no doubt in that section a provision that there shall be a new election, which is to be begun again from the beginning, but the providing that an election is to take place is neither part of the old nor of the new election. It is very remarkable that while several sections of the Police Act of 1862 are repealed, section 48 is not mentioned at all, and, by way of contrast, that gives a very strong argument that it is still in force. I am therefore of opinion that, as regards the objection founded on the 22d section of the Ballot Act, the pursuer's case is not well founded.

The only other objections urged by the pursuer against the validity of the election in 1873 are founded on alleged irregularities in the manner of conducting the election under the Ballot Act. Now, each and all of these objections go to this, that if any one of them is well founded the entire election must be annulled. The result would not be merely the substitution of Hamilton for Garraway. I think that the pursuer is not entitled to insist on that result under this summons. He is not in a position to insist in objections which, if sustained, would annul the whole election. In the first place, he has not called the proper parties. In order to entitle him to challenge the whole election, he must call as defenders the five candidates who were declared to be elected. But he has only called Garraway, Mr Gray, clerk to the commissioners of police for the burgh of Dunoon, for himself and as representing them, and Mr Smith, the returning officer. Now, it is clear that no reduction which would have the effect of ousting the other four commissioners can be sustained unless they are all called. But it does not appear to have been the intention of the pursuer to annul the whole election. There is no conclusion to that effect, but only for annulling the proceedings as regards Garraway. So the objections to the proceedings as under the Ballot Act cannot be entertained under this summons. I therefore give no opinion upon these objections. I, however, may say that I concur with the Lord Ordinary that the way in which Mr Smith dealt with stamping the ballot papers was a very serious irregularity. Whether or not it would be sufficient to void the election I do not say.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT adhered to the three interlocutors.

ROBERT A. VEITCH, S.S.C.—SKENE, WEBSTER, & PEACOCK, W.S.—Agents.

No. 66. Jan. 15, 1875. Mackie's Trustees v. Mackie, &c.

THOMAS GLADSTONE AND OTHERS (Ivie Mackie's Trustees), First Parties.—*D.-F. Clark—Gloag.*

JOHN GLADSTONE MACKIE AND STUART MACKIE, Second Parties.—*Sol.-Gen. Watson—Blair.*

DAVID FULTON, Third Party.—*Sol.-Gen. Watson—Blair.*

MRS A. GLADSTONE OR MACKIE, Fourth Party.—*Sol.-Gen. Watson—Blair.*

Revenue—Income-Tax—Statute 5 and 6 Vict. c. 35, sec. 103.—A testator left to his widow an annuity "free from all burdens, taxes, and deductions whatsoever," and declared it to be in full of all her legal rights. *Held* that she was entitled to the annuity without deduction of income-tax, and that the bequest was not struck at by the 103d section of the Property and Income-Tax Act, 1842.

Trust, administration of—Remuneration to Trustee.—Held that the trustees of a deceased partner, who had become entitled, under the contract of copartnery, to his share in the business, could not transact with the surviving partner, who was also one of the trustees, to the effect of giving him a larger share of profit than he formerly had, with a view of securing the continuance of his services as managing partner, on the ground that he was himself one of their number, and could not, as trustee, be *auctor in rem suam.*

2D DIVISION. R.

THIS special case was brought by Thomas Gladstone, David Fulton, and others trustees, under the trust-disposition and settlement, of the late Mr Ivie Mackie of Auchencairn, a partner of the firm of Findlater and Mackie, wine, spirit, and beer merchants, Manchester, as parties of the first part; John Gladstone Mackie and Stuart Mackie, Mr Mackie's two younger sons, and residuary legatees, of the second part; David Fulton, above mentioned, as the survivor of the original partners in the firm of Findlater and Mackie, of the third part; and Mrs Agnes Gladstone or Mackie, Mr Mackie's widow, of the fourth part.

The special case related, *inter alia*, to the two following points:—

I. By his settlement Mr Mackie (besides making provision for his children) directed his trustees to pay to his widow "an annuity, free from all burdens, taxes, and deductions whatsoever, of £2500 during all the days of her life," and added, "which provisions to my wife and children above written are hereby declared to be in full of all terce, right of dower, *jus relictæ*, . . . or any other claim or demand competent to them respectively by law in and through my decease."

It was maintained by Mrs Mackie, but denied by the trustees, that she was entitled to receive this annuity free of income-tax. Accordingly the question was submitted for the opinion and judgment of the Court. "Whether the parties of the first part are entitled and bound to pay to Mrs Mackie, the party of the fourth part, her annuity of £2500 free of income-tax?"

Argued for the trustees, the first parties;—(1) Deduction of income-tax was not intended; (2) if intended, it was not legal. This was not a simple legacy of an annuity. It was a legacy of an annuity for a consideration, namely, the discharge of all legal claims. It was therefore a contract for payment of an annuity in full, without allowing deduction of income-tax, in the sense of sec. 103 of the Property and Income-Tax Act, 1842,[1] and was void and illegal.[2]

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[1] 5 and 6 Vict. c. 35, sec. 103, enacted as follows:—"All contracts, covenants, and agreements, made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid in full, without allowing such deductions as aforesaid, shall be utterly void."

[2] Blair v. Allen, Nov. 17, 1858, 21 D. 15, 31 Scot. Jur. 1; Robson v. Macnish, Feb. 2, 1861, 23 D. 429, 33 Scot. Jur. 217; Rodger's Trustees v. Rodger, Jan. 9, 1875, *supra*, p. 294.

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Argued for Mrs Mackie, the fourth party;—(1) Deduction of income-tax was intended, for there was no other tax to which the words used by the truster could have reference; (2) It was not illegal, as the condition on which the annuity was given did not import a contract in the sense of the 103d section of the Property and Income-Tax Act, 1842.[1]

II. The business of Findlater and Mackie was carried on under a contract of copartnery, entered into on 3d October 1866, between Alexander Findlater, who died in August 1873, the truster, Ivie Mackie, who died in February 1873, David Fulton, one of Mr Mackie's trustees, who survived, and was one of the first parties, as well as the third party, to this case, and Edmund Aked Gladstone, who died in October 1873. Under this contract Messrs Findlater, Fulton, and Gladstone agreed to carry on business with Mr Mackie, "his executors, administrators, and testamentary nominee" for the term of their natural lives, subject to the termination of the partnership sooner under certain circumstances, and with power to any of the partners to withdraw on giving the others twelve months' notice.

The partners were to be interested in the profits of the concern in certain sixty-fourth shares, "such shares to be in lieu of all salaries or allowances to any partner or partners;" on the decease of any of the other partners their shares were to fall in to Mr Mackie, his executors, administrators, or testamentary nominee,—the result of which provision was, that at the date of this case Mr Mackie's trustees were in right of $\frac{11}{16}$th, and Mr Fulton of the remaining $\frac{5}{16}$th, shares in the concern.

By the 12th head of the contract of copartnery Mr Fulton was bound to give his undivided attention to the business of the partnership concern, and was prohibited from engaging in any other business.

The 33d head provided, "That at any time hereafter it shall be lawful for the parties hereto by an entry in the books of the partnership, signed by all the parties, to vary, alter, or add to any of the provisions in these presents; and such alterations or additions shall be binding on and conclusive against all the parties, as if same were originally part of, and incorporated with, these presents."

And the 34th, "That it shall be also lawful for the said Ivie Mackie to bequeath by will his share in the partnership to any person he shall think fit; and the person to whom such share shall be bequeathed shall stand in the place and stead of the said Ivie Mackie during the remaining continuance of the partnership; and all and every deed and deeds (if any), which shall be necessary for making such legatee (who is the person hereinbefore referred to as his 'testamentary nominee') a partner under the provisions of these presents, shall be executed by the said Alexander Findlater, David Fulton, and Edmund Aked Gladstone, and all other proper parties; and in case the said Ivie Mackie shall not exercise and make use of this power, then his share of and in the said partnership shall descend to his executors or administrators, who shall stand in the same position as the said Ivie Mackie now holds in said partnership."

Mr Mackie, by his general trust-disposition and settlement, directed his trustees to convey to his two sons, John Gladstone Mackie and Stuart Mackie, on the younger of them attaining twenty-five years of age, his share and interest in the concern of Findlater and Mackie.

John Gladstone Mackie and Stuart Mackie were, at the date of this case (24th October 1874), aged twenty and eighteen years respectively.

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[1] Turner v. Mullineux, Jan. 16, 1861, 1 John. and Hem. 334; Festing v. Taylor and Duchess of Somerset, Jan. 14, 1862, 3 Best and Smith, 217 and 235.

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In virtue of the contract of copartnery, and of Mr Mackie's trust-disposition and settlement, and until his sons attained the age of twenty-five years, his trustees and Mr Fulton became the only parties interested in the firm of Findlater and Mackie, the profits of which amounted to between £8000 and £9000 a-year. It was impossible that the trustees should take individually any active part in the management of the business. Mr Fulton had long been manager or joint manager of the concern, and its success came now to depend entirely on his attention. Under the altered circumstances of the firm, it became apparent that his share of the profits, which were confined to $\frac{7}{64}$ths of the whole, were insufficient to retain him in the business. As he was debarred by the contract of copartnery from receiving any salary as manager, and also from engaging in business on his own account, a proposal was made by the trustees to increase his share of the profits from $\frac{7}{64}$ths to $\frac{14}{64}$ths until the younger of the residuary legatees should attain the age of twenty-five years, on condition of his remaining in the business and applying himself exclusively to its interest as formerly. To this Mr Fulton agreed.

Doubts were, however, entertained by the trustees as to their powers in the matter, in consequence of Mr Fulton being himself one of their number; and, accordingly, the question was submitted for the opinion and judgment of the Court, "Whether, having respect to the terms of the contract of copartnership of 3d October 1866, and of the late Ivie Mackie's trust-disposition and settlement, his trustees, the parties hereto of the first part, have power to pay out of the profits of the firm of Findlater and Mackie, until the said Stuart Mackie, the youngest residuary legatee, attains the age of twenty-five, or for any and what period, such an allowance to the said David Fulton as, along with his $\frac{7}{64}$th shares of the net profits, shall not exceed $\frac{14}{64}$ths of the whole of the net profits; the said David Fulton, in consideration thereof, devoting himself exclusively to the business of the said firm of Findlater and Mackie during the said period?"

The Court appointed Mr Donald Beith, W.S., *curator ad litem* to the minors, parties of the second part. Mr Beith stated that, in his opinion, it was for the interest of the minors that the business of Findlater and Mackie should be carried on; that it could be carried on to most advantage under Mr Fulton; and that the proposal of the trustees as to his remuneration was reasonable.

Argued for the trustees, the first parties;—Though they were satisfied of the desirability of the arrangement proposed in the interest of all concerned the fact that Mr Fulton was one of their number rendered any such transaction between him and them illegal, on the principle that a trustee could not be *auctor in rem suam.*

Argued for the parties of the second and third parts;—The trustees having become partners for the time being in the concern, they were entitled, under the 33d head of the contract of copartnery, to vary the terms of the partnership, and to agree to give Mr Fulton a larger share of the profit than he was otherwise entitled to, notwithstanding that he happened to be a trustee as well as a partner.

Lord Justice-Clerk.—We have considered this case with great care, and have found some of the questions attended with considerable difficulty.

The first question is, whether the trustees are entitled and bound to pay to Mrs Mackie her annuity free of income-tax. I am of opinion that, under the terms of the will, they are so entitled and bound. The substance of the provision in favour of the widow is, that the income-tax, as well as the principal sum,

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is a legacy, and that she is entitled to receive the full amount at the expense of the estate.

The case of Rodger's trustees, recently decided in the other division, has been strongly pressed upon our attention. I have looked into the papers in that case, and am satisfied that it does not touch the present question, or affect our judgment.

The only other important question is as to the legality of the trustees agreeing to increase Mr Fulton's share in the concern of Findlater and Mackie, until the residuary legatees attain the age of twenty-five years, in consideration of his devoting himself exclusively to the business of the concern. This question arises in peculiar circumstances, and the view of the trustees is rested on peculiar grounds. What they ask substantially is this, are we entitled to give Mr Fulton a considerably larger share in the business than he is entitled to under the contract of copartnery, on condition of his remaining in it and continuing the management? The circumstances, shortly stated, are these. Mr Mackie's settlement and the contract of copartnery both contemplated that on his death his share in the concern should go to his executors. Under the contract he reserved right to his representatives to take up his share, and in his settlement he left his share to his two younger sons, as his residuary legatees, equally between them on the younger of them attaining twenty-five years of age. In the meantime the executors hold themselves entitled to act as partners. The two sons are neither of them of the age of twenty-five; in fact neither has attained majority, although they are both very near it. The question is, therefore, whether the executors, as partners of the company, are entitled to make a present to Mr Fulton of part of the trust-estate. The ground upon which it is contended that they are is, that Mr Fulton is really the manager of the business, that his exertions have much contributed to its success, and that the continuance of his exclusive attention is essential to the preservation of the business for the beneficiaries, while the share of profit to which he is entitled under the contract of copartnery is not sufficient to tempt him to remain in the concern and devote himself exclusively to its interests.

Had the question been simply, whether the executors, as partners, have power to rearrange the terms of the contract of copartnery, so as to retain a copartner whose services are so invaluable in the business, there would have been a great deal of force in the view presented to us on their behalf.

On that aspect of the question I do not think it necessary to give a decided opinion, though my leaning certainly is to the view that, as partners, the executors would be entitled to make any arrangement which, in the exercise of their discretion, they deemed essential to the preservation and success of the business.

But the peculiarity of the case is, that Mr Fulton is not only the managing partner and substantially the person holding the command of the concern, but he is also one of the trustees. The question asked of us therefore comes to be, whether the trustees can give over to one of their number a considerable share in profits which belong to the trust-estate? That, I think, they cannot do. It is quite a different question from what they could have done had they and Mr Fulton been entirely separate, representing separate interests. The question here comes really to be, can the trustees, consisting, *inter alios*, of Mr Fulton, make that gentleman the gift, without consideration, of the difference between 7/64ths and 24/64ths of the profits of the concern, until the beneficiaries attain

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the age of twenty-five years? To hold that they can would be to go contrary to one of the fundamental rules governing the conduct of trustees, viz., that a trustee cannot be *auctor in rem suam*. That is quite conclusive to my mind in the present state of the circumstances. I am therefore for answering the question in the negative.

LORD NEAVES.—I quite concur with your Lordship, and will only add a remark upon one point.

I do not know how far the case has been framed upon the idea that the beneficiaries' power of interference is suspended till they attain the age of twenty-five years. The age at which they are to receive their shares is indeed twenty-five. But their right of challenging anything done in the meantime is not thereby limited. It does not follow that upon barely attaining majority they may not give a consent to prospective arrangement, which would preclude them from challenging what was done when they reach the age of twenty-five; that may depend upon what steps they take after attaining majority. They can hardly be allowed to stand aloof from majority till they are twenty-five, and then to come forward and object to what has been going on within their knowledge and without objection. An objection founded on the rule that a trustee cannot be *auctor in rem suam* does not import an absolute nullity, but is merely a ground for challenge, which must be adopted *tempestivé*.

Now, looking at this matter from another point of view, I would submit it for the consideration of the parties, whether, seeing that the beneficiaries are so nearly of age, it would not be advisable to wait until they attain majority, and then see whether some arrangement cannot be come to with them, which would put the proposed agreement, which is admittedly so essential to their interests, entirely beyond challenge.

I only throw this out as a suggestion. In the present circumstances I entirely agree in the answer which your Lordship proposes to give to the question.

LORD ORMIDALE concurred.

LORD GIFFORD.—I come to the same conclusion, and nearly on the same grounds.

On the first question I agree that the widow is entitled to her annuity free of income-tax, and I come to that result on a construction of the settlement. I can see no other deduction but income-tax which the testator could have had in view. The 103d clause of the Income-Tax Act is the only thing which raises any difficulty. But I do not think that it really applies to the present case. The prohibition of the statute strikes at contracts, whereby one party stipulates that his income-tax shall be paid by another,—for example, when a landlord attempts to bind his tenants to pay the income or property-tax which the law lays on the landlord himself. But a bequest like the present is not a contract, and it does not become so merely by the condition that it is to be in full of certain rights in the legatee.

On the other important question raised I also agree that the trustees have not power to do what they propose, especially seeing that Mr Fulton is one of their number. A trustee is not entitled to use his position as such for the advancement of his own individual interests.

But, further, it must be observed that the object of this case is to obtain, not

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only the opinion, but the judgment of the Court. I am of opinion that no judgment we could pronounce could ever preclude the minors from challenging the arrangement when they attain majority. I think it wholly incompetent, by making minors parties to a case even with the protection of a *curator ad litem* to preclude them from subsequent challenge.

I may add, that I fully concur in the remarks of Lord Neaves as to the possibility of a binding agreement being come to with the minors on this matter when they attain majority, and that although actual payment of their provisions is postponed till a later period.

THIS interlocutor was pronounced :—"The Lords, having heard counsel on the special case, are of opinion, and find (1) that the parties of the first part are entitled and bound to pay to Mrs Mackie, the party of the fourth part, her annuity of £2500 free of income-tax : . . . . . (3) That the parties of the first part are not entitled, in the circumstances set forth in the case, to make the proposed arrangement with Mr Fulton."

RONALD, RITCHIE, & ELLIS, W.S.—HUNTER, BLAIR, & COWAN, W.S.—Agents.

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Lord Advocate v. Earl of Glasgow.

THE LORD ADVOCATE, Pursuer.—*Rutherfurd.*
THE EARL OF GLASGOW, Defender.—*D.-F. Clark—Hamilton.*

Revenue—Succession-Duty Act, 1853 (16 *and* 17 *Vict. cap.* 51), *secs.* 15, 34, 38.—An heir of entail in possession, with consent of the next three heirs, obtained authority to charge, and charged, the estate with debt, the next heir receiving, in consideration of his consent, from the heir in possession, a sum of money and a personal bond of annuity payable during their joint lives. In a question between the next heir and the Crown as to succession-duties, *held* (1) that the incumbrance was not an incumbrance created or incurred by the next heir in the sense of sec. 34 of the Succession-Duty Act; and (2) that the transaction was not an alienation of the succession, or an acceleration of the next heir's title in the sense of sec. 15,—and, therefore, that, in estimating the succession, the next heir was entitled to allowance for the incumbrance; but (3) that he was not entitled, under sec. 38, to allowance for the lapse of the annuity.

2D DIVISION. Lord Gifford. I.

THIS was an information by the Lord Advocate against George Frederick, Earl of Glasgow, which raised two questions regarding the succession-duty payable by the Earl on his succession to certain entailed estates upon the death of his brother, the late Earl James, in 1869.

In 1855 a deed of agreement was executed by the late Earl, the defender, who was next heir of entail, and the two heirs of entail next after him, to the effect that the late Earl was to make an application to the Court under the statutes 11 and 12 Vict. cap. 36, and 16 and 17 Vict. cap. 94, for authority to charge the lands of Hawkhead and Crawford Lindsay with £20,000, the other parties giving their consents. The Earl was to receive £19,000 and pay the interest on the £20,000, and to grant to the defender a personal bond of annuity for £1250 during their joint lives, and £1000 of the £20,000 out of which he was to pay the expenses of the proceedings. This transaction was carried out, and the late Earl granted bonds and dispositions in security over the lands to the extent of £20,000. The defender received an annuity of £1275, instead of £1250, as originally agreed upon.

In 1866, in terms of a similar agreement, £9440 additional was borrowed upon the lands by the late Earl, the defender receiving from him a personal bond of annuity for £500 during their joint lives, the sum of

No. 67. £2500 and £300 for expenses, and his daughter, a minor, the next heir after him, receiving £1425, being the sum calculated as the fair price of her consent.

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In a draft account of Earl James's succession, exhibited to the officers of Inland Revenue, the defender claimed, as a deduction, the interest payable on £29,440, the amount of the above sums charged on the lands.

The pursuer maintained that the defender was not entitled to any allowance for the sums charged,—(1) Because they were in the sense of the Succession-Duty Act, 1853, incumbrances created or incurred by himself;[1] (2) because they were alienations of the succession, and, to the extent to which the defender benefited, accelerations of his title to the succession;[2] (3) that the defender was in no view entitled to an allowance, in so far as he had benefited by the incumbrances.

The defender pleaded;—(2) That the incumbrances were not "created or incurred" by him; (3) that he was at least entitled to an allowance, in so far as he was not benefited; (4) or otherwise, under the 38th section of the Succession-Duty Act, 1853, the defender is entitled to an allowance in respect of the annuities of £1275 and £500, which came to an end on the death of the late Earl, as being property of which he was deprived on taking up the succession.[3]

The Lord Ordinary, on 23d June 1874, pronounced this interlocutor:—"Finds that, in estimating the value of the succession of the late Earl of Glasgow, upon which succession succession-duty is chargeable against the present defender or respondent, the Right Honourable George Frederick Boyle, Earl of Glasgow, allowance must be made in respect of the following incumbrances affecting the said succession, that is to say, first," &c.; "and with this finding appoints the cause to be enrolled for further procedure: Finds the respondent entitled to the expenses hitherto incurred by him, and remits the account thereof, when lodged, to the Auditor of Court to tax the same, and to report; meantime grants leave to reclaim against this interlocutor." *

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[1] 16 and 17 Vict. cap. 51, sec. 34.—"In estimating the value of a succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor not made in execution of a prior special power of appointment, but an allowance shall be made in respect of all other incumbrances, and also in respect of any monies which the successor may, previously to his possession, have laid out in the substantial repairs or permanent improvement of real property comprised in his succession; provided that, upon any successor becoming entitled to real property subject to any prior principal charge, an allowance shall be made to him in respect only of the yearly sums payable by way of interest, or otherwise, on such charge as reducing the annual value *pro tanto* of such real property."

[2] Sec. 15.—". . . where . . . any succession shall, before the successor shall have become entitled thereto, or to the income thereof in possession, have become vested by alienation, or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

[3] Sec. 38.—"Where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the Commissioners shall, upon the computation of the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property."

* "NOTE.—The question in this case arises principally under the 34th section of 'the Succession-Duty Act, 1853' (16 and 17 Vict. cap. 51). By this

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The pursuer reclaimed, and argued;—The present Earl had a succession in the sense of the Act, which the late Earl had no power to defeat.

statute heritable successions were made chargeable with succession-duty according to certain rules fixed and prescribed by the statute. Provision is made for estimating the value of the succession in a certain way, and for the amount and manner of payment of the succession-duty thereon.

"Section 34 of the statute enacts, *inter alia*, 'In estimating the value of a succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor not made in execution of a prior special power of appointment, but an allowance shall be made in respect of all other incumbrances.' It is under this provision that the present question arises. The respondent, the present Earl of Glasgow, claims that allowance shall be made for the four bonds and dispositions in security mentioned in the preceding interlocutor as incumbrances diminishing or affecting the succession, the Lord Advocate and the Inland Revenue authorities maintaining that the respondent is not entitled to any allowance for these incumbrances, on the ground that, whatever be their form, they were, in the sense of the statute, 'created or incurred' by the respondent himself.

"There is no dispute that the late Earl of Glasgow is, in the sense of the statute, the 'predecessor,' and that the respondent, the present Earl of Glasgow, is, in the sense of the statute, the 'successor,' and parties are agreed as to the rate at which succession-duty is to be charged. The respondent is the brother and heir of entail of the late Earl, and succeeded as such under the various deeds of entail.

"It appears that in 1855, and again in 1866, the late Earl of Glasgow wished to borrow money on the security of the entailed estates. To accomplish this, under the provisions of the Entail Amendment Act, he required the consent of the defender as the next heir of entail (the heir presumptive), and of the next two heirs of entail then in existence after the defender. To obtain these consents the late Earl entered into the agreement set forth on record with the defender and with the other two succeeding heirs of entail. By these agreements the defender and the succeeding heirs consented to the late Earl borrowing upon the estates, and in consideration of such consents the late Earl agreed, *inter alia*, to grant certain bonds of annuity in favour of the respondent.

"The late Earl then applied to the Court, under the Entail Act, for power to charge the entailed estates. The defender and the other heirs consented. The Court then granted authority, and the late Earl of Glasgow executed the powers by granting bonds for £29,440, which sums were validly and effectually charged as incumbrances upon the entailed estates. The late Earl of Glasgow is the sole granter of the said bonds and dispositions in security, and he alone received the sums borrowed. Neither the defender nor the succeeding heirs of entail were *ex facie* parties to the deeds. About the same time, however, the late Earl implemented the obligations in the agreements, and, *inter alia*, granted personal bonds of annuity to the respondent, the annuities under which have been duly paid.

"The question is, are the bonds and dispositions in security of 1855 and 1866 incumbrances which, in the sense of the statute, have been created or incurred by the respondent himself? The Lord Ordinary is of opinion that they are not, and he has therefore found the respondent entitled to an allowance therefor.

"It is not immaterial, to begin with, that the respondent is no party to the bonds creating the incumbrances. It was not the respondent, but his late brother, who acknowledged receipt of the money, and who bound himself, the heirs of entail, and his own 'heirs, executors, and representatives whomsoever,' to repay the same. On the face of the deeds, the debts were incurred by the late Earl alone. It was not seriously disputed, however, that the Lord Advocate was entitled to get behind the deeds, and to shew what was the real nature of the transaction, in order to see who it was in reality that created the incumbrance.

"Accordingly, the whole agreements have been recovered, and the exact nature of the arrangements disclosed; but the Lord Ordinary is of opinion that neither

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in form nor in substance were the incumbrances created or incurred by the respondent.

"No doubt the respondent's consent was absolutely necessary under the Entail Acts, and there may be cases where he who consents to a deed may be held as the doer of it, but this principle seems to have no application to the present case. If the consent had been given gratuitously, it would have been very difficult to hold that all the bonds are, in a question of succession, to be dealt with as the respondent's own debts, although an ingenious argument going this full length was submitted for the Lord Advocate.

"In like manner, although the subsequent heiresses of entail apparently gratuitously consented to the late Earl's petition, they could hardly be held as the creators or granters of the incumbrance. None of them might ever succeed to the estates. Even the respondent himself was only heir presumptive; and if the late Earl had left a son, the rights of all the consenting parties would have been excluded. In such cases the incumbrances, beyond all doubt, would have been held as created by the late Earl alone, although he had to buy and pay for the necessary statutory consents.

"In truth, the transaction between the late Earl and the present respondent was of the nature of an *inter vivos* purchase. The late Earl wanted to raise money for his own purposes, and he had to buy the respondent's consent. He did so, whether for a large sum or for a small sum is quite immaterial, and having obtained such consent, the late Earl, and no one else, borrowed the money and burdened the estates.

"If, instead of burdening the lands under the Entail Act, the late Earl had disentailed and sold a part of the lands, it would have been difficult to hold that the present Earl would have been liable in succession-duty on the lands disentailed and sold.

"The true meaning of the 34th section of the statute is, that a successor is not to be allowed deduction for his own debts, *e.g.*, *post obit* bonds which he has granted, anticipating the succession. But the reason of the clause does not reach the present case.

"The Lord Advocate strongly relied, however, on certain important judgments which have been pronounced in England, some of them in the House of Lords, under the statute now in question. The principal cases relied on were the following:—*In re* Peyton, July 6, 1861, 7 Hurlst. and Norman, p. 265; Attorney-General v. Floyer, July 6, 1861, 7 Hurlst. and Norman, 238, July 15, 1862,—in H. L., 9 Clark's Appeal Cases, 477; Attorney-General v. Sibthorp, June 9, 1858, 3 H. and N. 424; Attorney-General v. Braybrooke, May 8, 1860, 5 H. and N. 488; and Braybrooke v. Attorney-General, March 19, 1861, 9 Clark's H. L. Cases, 150; Attorney-General v. Lord Lorton, Feb. 9, 1861, 11 Irish Common Law Repts. 429; Commissioners of Inland Revenue v. Harrison, as decided in the House of Lords, March 26, 1874, L. R. 7 E. and I. App. 1.

"Many of these cases bear upon the respondent's alternative plea, added during the debate, but they were mainly relied upon as shewing that when, under the English law of entail, a tenant for life combines with the tenant in tail or remainder man to re-settle the estate and create burdens thereon, the burdens or incumbrances are held under sec. 34 of the Succession-Duty Statute as being 'created or incurred,' not by the tenant for life, but by the tenant in tail or remainder man. The attempt was made, with great ingenuity, to assimilate the position or legal character of a tenant for life with that of an heir of entail in possession, and the remainder man was said to hold the same position as the next heir of entail. On carefully considering the cases quoted, the Lord Ordinary is of opinion that the analogy urged by the Lord Advocate does not hold, and that the English cases, when their true nature is examined into and seen, are, instead of being authorities for the Lord Advocate, really authorities for the respondent. For the question always was, who is the party who has really incurred the debt or incumbrance, according to the substance of the transaction?

succession by his own act.[1] If that is not clear, at all events the transaction amounted to an alienation of the succession and an acceleration of the defender's title, and therefore the duty was payable as if no such alienation or acceleration had taken place.[2]

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The defender argued;—The incumbrance was the act of the heir of entail himself, and he alone was empowered to create it by the 4th section of the Rutherfurd Act. A consenter is not the maker of the deed, whether the consent is gratuitous or for valuable consideration. The pursuer's contention was disallowed in the cases of Peyton and Braybrooke, cited by him. The 15th section had no application except where there was a vested interest in the successor, not a mere *spes successionis*.

Besides the defender was entitled to an allowance, in respect that the annuities had come to an end.

At advising,—

LORD ORMIDALE.—The question for the determination of the Court in this case is, whether the defender, the present Earl of Glasgow, is entitled, in accounting for the duties owing by him on his taking up the succession of his brother, the late Earl, to an allowance in respect of certain incumbrances on the estates of which the succession consists.

The circumstances, so far as material, in which this question presents itself, are shortly the following:—By agreements in 1855 and 1866 between the late Earl of Glasgow, as heir of entail in possession of the estates of Hawkhead and others, and his brother, the present Earl, as the heir of entail next in the order of succession, along with the two heirs of entail following in the order of succession, the necessary steps were to be taken to enable the late Earl to charge the entailed estates with the sums of £20,000 and £9440, to be borrowed by him on the security of the entailed estates in virtue of the statutes referred to in the record. By the agreements it was provided that, while the late Earl was to retain as his own funds and property £19,000 of the £20,000, and £5215 of the £9440 so to be borrowed, he was to pay over to the present Earl £1000 of the former sum, and £2500 of the latter, besides £1425 to another heir, and £300 for expenses, and was also to execute and deliver to the present Earl personal bonds of annuity for £1250 and £500, to be paid during their joint lives, and to terminate at the death of the first deceaser of them. The sums of £20,000 and £9440 were accordingly borrowed by the late Earl, and

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In the English cases referred to it was held to be the tenant in tail or in remainder, and not the mere liferenter. On the very same principle, and applying as far as he can the tests and reasonings which governed the English decisions, the Lord Ordinary holds that in the present case the incumbrances were really created and incurred, not by the contingent presumptive or remote heirs of entail, to whom the succession had not opened, and to whom it might never open at all, but by the heir of entail in possession, who was, in the eye of law, and in the substance of the transaction in question, the fiar of the whole entailed estates.

"The alternative plea added by the respondent during the debate raises considerations of considerable nicety and interest; and if the respondent's first contention had failed, equity strongly supports the respondent's view. The cases above cited embrace those relating to this plea also. As the Lord Ordinary, however, has sustained the first pleas of the respondent, no decision is required on the alternative plea."

[1] The pursuer cited the authorities mentioned in the Lord Ordinary's note.

[2] 16 and 17 Vict. c. 51, sec. 15, *supra*, p. 318, note 2.

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charged by him as incumbrances on the entailed estates. He alone executed the bonds and dispositions in security which were granted to the lenders of the money, the present Earl not being a party to them at all. And the transaction was completed by the late Earl delivering to the present Earl bonds of annuity, and paying to him and the other consenting heirs the sums stipulated for in the agreements as the price or consideration in respect of which their consents were given.

In this state of matters, the present action has been raised for the purpose of having it determined whether any and what allowance ought to be made by the Crown to the defender, the present Earl of Glasgow, on settling with him for the duties in which he is liable in respect of the succession which has come to him on the death of the late Earl.

This question turns mainly on the 34th section of the Succession-Duties Act (16 and 17 Vict. cap. 51), whereby it is provided that,—"In estimating the value of a succession no allowance shall be made in respect of any incumbrance therein created or incurred by the successor not made in execution of a prior special power of appointment, but an allowance shall be made in respect of all other incumbrances." It is not matter of dispute, but, on the contrary, both parties are agreed, that in applying this enactment the late Earl of Glasgow is to be held as the predecessor, and the present Earl as the successor; and also that the incumbrances in question were not "made in execution of a prior special power of appointment." The dispute, therefore, is narrowed to the question, whether the incumbrances were created or incurred by the defender as successor. If they were, he is not entitled to any allowance, while, on the contrary, if they are held as not having been made by him, he is entitled to such allowance.

According to the form and terms of the incumbrances themselves, they certainly were not made by the defender, the present Earl of Glasgow, but by his predecessor, the late Earl. The bonds and dispositions in security, which constitute the incumbrances, were granted solely by the late Earl, and the present Earl was not *ex facie* a party to them at all. It cannot therefore be said, if the language or terms of the instruments constituting the incumbrances are alone looked at, that they have been "created or incurred" by the successor, the present Earl. Nor is it obvious why, in a matter of this kind, the form and language of the incumbrances ought not to be given effect to. The statute, being a fiscal one, ought, in conformity with an ordinary well known principle of construction, to be strictly interpreted. Not only so, but it has been ruled by the highest authority,—in the cases of Lord Saltoun v. the Advocate-General (3 Macqueen's Appeal Cases, p. 659), and Lord Braybrooke v. the Attorney-General (2 Clark's House of Lords Reports, p. 150),—that the Act is not to be construed according to the technicalities of the law of England or Scotland, but according to the popular use of the language employed in it.

I am not, however, to be understood as holding that the substance and reality of the transaction, independently of its form and terms, cannot be examined in order that it may be seen by or for whom the incumbrances were incurred or created. Accordingly, it may be right to keep in view that the defender, the present Earl of Glasgow, along with the next two heirs of entail following him in the order of succession, gave their consents to the incumbrances being incurred or created, and that they could not be effectually incurred or created without such consents. Nor is it to be overlooked that the present Earl did, in point of

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fact, derive a considerable benefit from the incumbrances, in the shape of the annuities which were constituted in his favour, and the sums paid to him out of the money raised. But are either or both of these circumstances sufficient to entitle the Court to hold that the present and not the late Earl of Glasgow incurred or created the incumbrances? The mere consent of the present Earl to their creation cannot well be said to be sufficient to do this, for, if so, it might as well be said that the incumbrances were created or incurred by the two heirs of entail following him in the order of succession in respect of their consents. In one sense, not only the present Earl, but also both of these parties, incurred or created the incumbrances, inasmuch as they were all parties to one of the steps necessary to be taken before they could be effectually created or incurred. But, according to the statute, it does not seem to be contemplated, and there is certainly no express warrant for holding, that the present Earl is not to be entitled to an allowance for incumbrances merely because he had agreed to some step preliminary to their being created or incurred.

It might, no doubt, be different if it could be fairly held that, notwithstanding the form of the transaction and the terms of the incumbrances, they were in truth and reality created by and for the present Earl. But is this so? The present Earl, no doubt, obtained a benefit, which was granted to him as a consideration for his consent, without which the incumbrances could not have been created. It may, indeed, be assumed that one of the objects of the late Earl in creating the incumbrances was to benefit his brother and successor in his title and estates. That was a perfectly natural and legitimate object, and it might have been carried out in various ways. The result of its being carried out in the way in which it was in the present instance is to diminish the succession coming to the present Earl by the amount of the incumbrances.

In these circumstances, the view I am induced to adopt,—and it does not appear to me to be an unreasonable one,—is to hold that the late Earl of Glasgow, being desirous of obtaining the use of funds which he required, and at the same assisting his brother and next heir till the succession should open to him, resorted to the method for raising money which he did, and therefore that, in substance and reality, the incumbrances were incurred and created by him, and not by the present Earl. He was the heir of entail in possession and fiar of the estates, subject, of course, to the fetters of the entail; and he alone had any real or substantial power of dealing with them (Ersk. 3, 8, 29). The other heirs following him in the order of succession, including even the present Earl, neither had, nor, till the succession opened to them, could have had, any right to or beneficial interest in the estates. As remarked by the Lord Ordinary in the note to his interlocutor, "none of them might ever succeed to the estates. Even the present Earl was only heir-presumptive, and if the late Earl had left a son, the rights of all the consenting parties would have been excluded;" and not only so, but the defender's annuity would also, of course, have fallen on the death of the late Earl.

Having regard to these considerations, I am unable, so far as the 34th section of the statute is concerned, to hold that the incumbrances in question were created or incurred by the successor, the present Earl of Glasgow. The point does not, however, appear to have hitherto been matter of judicial determination in this Court; and not being conversant with the law or technicalities of real property in England, I am reluctant, for fear of misapprehension, to rest my opinion on the English cases referred to in the note to the Lord Ordinary's interlocutor, and

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commented on by both parties in the argument addressed to the Court. I may remark, however, with the Lord Ordinary, that, according to my reading of these cases, they are authorities in support of, rather than against, the views I have expressed. Thus, *in re* Peyton (7 Hurlst. and Norman's Exchequer Reports, p. 265), Baron Martin, in delivering the judgment of the Court, in reference to a question, whether a party to whom a succession had come, was entitled to an allowance in respect of a certain annuity and of certain mortgages, remarked,—"They are incumbrances created, it is true, by both Sir Henry Peyton and his father, but so far as they affect the succession they are in reality and substance created solely by Sir Henry Peyton. His father could not by any act of his affect the succession. We therefore think the annuity to Mr Algernon Peyton and the mortgage were incumbrances created by the successor, and his father's consent was necessary to the effectual creation of them." Now, when it is in view that in that case the party who was held to have created the incumbrances, occupied, as I understand the case, a position, as regarded his right in and power over the estate, similar to that which the late Earl of Glasgow occupied in the present instance, while the consenter occupied, as regarded his rights in and power over the estate, the position of the present Earl of Glasgow, the analogy between the two cases, and the effect of the decision in the one upon the other, become apparent. So, in the case of Lord Braybrooke v. the Attorney-General (9 Clark's House of Lords Reports, p. 150), it was held that the protector of a settlement—the position analogous to that of the present Earl of Glasgow when the incumbrances in question were created—giving his consent to a disposition of property, cannot be treated as the creator of such disposition.

In regard to the second and third pleas of the Crown, to the effect that to the extent at least to which the defender derived benefit from the transaction in question, the succession must be held to have been accelerated by him, and that, therefore, in terms of the latter part of section 15 of the statute, the duty payable on the succession must "be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place," and to the effect that in no view of the case is the defender entitled, in estimating the value of the succession, to an allowance in respect of the sums charged upon the estates, in so far as he has benefited by these sums, little or no argument was addressed to the Court in support of them. For myself, I think it sufficient to say that neither of these pleas are tenable in the circumstances which here occur; for there has been no acceleration of the succession, no re-settlement of the estates, no change made in the order or time of the succession, and no surrender or extinction by the defender of any prior right held or vested in him; and just as little can it be said that the defender has, in any correct sense, been so benefited by the incumbrances as that he must be deprived of the allowances to which he might otherwise be entitled in respect of them, for, although a consideration was given to him for his consent to the incumbrances being charged on the estates, his succession has, to the extent of these incumbrances, been diminished.

On the other hand, it was contended by the defender that, in terms of the 38th section of the Act, he was entitled to an allowance in respect of his annuities having come to an end on the death of his predecessor, the late Earl of Glasgow; and in support of this contention the cases of Lord Braybrooke v. the Attorney-General (9 Clark's House of Lords Reports, p. 150), the Attorney-General v. Floyer and Others (*ib.* p. 477), and the Commissioners of Inland

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Revenue v. Harrison (Law Reports, Appellate Series, vol. vii., p. 1), were cited and relied upon. But these cases are distinguishable from the present, inasmuch as while in them the annuity in dispute was charged on the estates constituting the succession, and was made to depend, not merely on the death of the predecessor, but also on the annuitant coming into possession of the estates as successor, here the annuities have not been charged on the estates at all, and were made to depend upon the death of the first deceaser of the late and the present Earl of Glasgow, and although it happened that its termination occurred at the same time as the death of the late and the present Earl coming into possession, it might have terminated on the death of the late Earl, and, if he had left a son, without the present Earl ever coming into possession at all. This, I apprehend, is a clear and material distinction, sufficient to displace the cases referred to as precedents to govern the present.

For the reasons I have now stated, I am of opinion that the interlocutor of the Lord Ordinary under review is well founded, and ought to be adhered to.

LORD NEAVES.—I am of the same opinion. The interpretation of the statute has been quite fixed in the former decisions, particularly in the case of Saltoun, and it must be interpreted according to reasonable language and popular use, in the general sense, and not upon technicalities. We must look to the position of the parties in possession of this entailed estate. The clause of the Act is,—"In estimating the value of a succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor, but an allowance shall be made in respect of all other incumbrances." How this matter may stand under the English entail system I do not profess to know.

Our own system is intelligible to ourselves, and, I think, admits of no reasonable doubt in this case. This is a succession which the present Earl of Glasgow approaches upon the death of the party to whom he was heir-presumptive. He gets that succession, and the question then arises whether or not an allowance is to be made in respect of an incumbrance created; and if in estimating the value of a succession there is found to be an incumbrance created by the successor, or incurred by the successor, whatever that may mean, that is not to be given allowance for, because it is the party's own doing. But all other incumbrances are to be allowed for as truly diminishing the estate which reaches the successor, and which is his true succession. Now, in the case of an entail, in general there can be no voluntary incumbrance created except by the heir of entail in possession, and that cannot be done without consent. This was done in the lifetime of the late Earl of Glasgow, who was the heir of entail in possession. The fiar of the estate, who made the incumbrance, is the principal party undoubtedly. He is the only granter of the documents that passed, but for that purpose he was compelled to have the consent of his next heirs in order to make it effectual, and so as really to be a good security to the party. But still I think that the party who creates the incumbrance is the heir of entail in possession. What incurring an incumbrance means is not very clear, but in this case the incumbrance was created in the usual way that incumbrances are created, by such a bond as a fiar would have granted for a sum of money, and all that was necessary to give it validity as in a question with subsequent heirs of entail was the consent that was here given by the presumptive heir and the heirs who were more remote than the presumptive heir. Now, I cannot say

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that every consenter is to be held as either the creator or the incurrer of an incumbrance which is given by his consent.

But, then, it is said, the heir got some benefit by the transaction. And this brings us to considerations of very great delicacy. The late Lord Glasgow having no family of his own, and looking forward to his presumptive heir as likely to succeed him, had in his own mind, in all probability, as every man will have, that it was his duty to maintain the respectability of their position, if that was not already adequately provided for, and for that purpose he went into the market in order to enable him to act,—I do not say generously, though it was generous in one sense,—but justly. It was a claim upon him *ex jure sanguinis* to see that, for the sake of his father's memory and the respectability of the family and the good of the estate, the principal sum which he raised should be devoted in part to sustaining the respectability of the family and the comfort of his more immediate successors, and to that purpose the incumbrance was to a certain extent applied. But that was the mere application of the fund raised by the late Earl to the purposes of the late Earl. It was his desire and purpose not to make a profit of this transaction, but to enable him thereby to discharge the natural claims and charities that existed in this case. He got the money for that purpose, and he applied it to that purpose. Now, I cannot conceive that that is an incumbrance either created or incurred by the heir, particularly when he might never have succeeded.

With regard to the proposition which the present Earl has been by degrees moving towards, viz., maintaining that he should get an allowance for the annuity that has fallen, I concur with Lord Ormidale in thinking that that cannot be allowed. I do not think the English cases on that subject are applicable. I think that the terms of this bond are peculiar. It was not a bond that was to terminate upon the present Lord Glasgow succeeding to the estate. That is not the nature of it. It was to exist during the joint lives of the parties. Now, it might have happened that the bond might have terminated in various ways before the succession opened, or the succession might have opened before it had terminated. Supposing the late Earl of Glasgow had committed an irritancy, he would have forfeited the estate, and the next presumptive heir would have been entitled to take up the estate. It was a bond that was to continue during the joint lives, and therefore it was not an interest that was inseparably entwined in its own nature and constitution with the succession to the estate, and could not therefore be held as a loss to be set off against the benefit that was got from it. I look on that as an independent transaction in that way.

Lord Gifford.—I remain of the opinion which I formed as Lord Ordinary, and adhere to the views which I have explained in the note to the interlocutor which we are now reviewing. Upon the first question in the case, which relates to the incumbrances, I think that upon any sound construction of the statute they cannot be held as having been created by the successor. They were created by the late Earl of Glasgow, for whatever purpose, and not by the present Lord Glasgow. I reach that conclusion not only from the words of the statute, but from a consideration of its purpose and object. That is the only additional remark on this first point of the case that I wish to make. The object of the statute is to impose duties for the benefit of the Crown or the country upon a succession, that is, upon the amount or value of property which has passed by succession from the dead to the living, and directions are given in the statute as

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to what is to be understood by the term "predecessor," and what by the term "successor." The object, then, being a tax upon succession, it is essential to ascertain what the true amount or value of the succession is, that is, in other words, how much is the heir or successor *lucratus* or richer in consequence of the succession,—for that is the quantum upon which the law has thought proper to lay the tax or duty. It is plain that a man is not richer by a nominal succession if there are incumbrances or burdens by which it is either diminished or exhausted. A succession is not a succession at all for purposes of taxation if it is exhausted altogether by burdens or incumbrances affecting it. The heir may still succeed to an inheritance of some kind, but it is a very barren one if it is exhausted by the incumbrances or burdens affecting it. Therefore, in the general case, under the section with which we are dealing, section 34, all incumbrances must be deducted. But, then, it sometimes happens that a party is in such a position that, having the hope of a succession, he may anticipate it, and get some of it before the succession opens. By *post obit* bonds, and other devices which are known to impecunious or needy heirs, they can anticipate the benefit which is to come to them, and the purview of the statute was that a man should not escape the payment of the public tax or duty which is imposed upon the succession by anticipating the benefit of it and creating incumbrances upon it before the succession opened, and it is therefore that the statute provides, by section 34, that in estimating the value of the succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor,—that is to say, the party on whom the duty is imposed (the successor), shall pay for both what he has got before the succession opens and for what he beneficially receives after the succession opens, because in reality that is the true value of the succession. Now, I think, according to a fair construction of that principle, it leads necessarily to this, that it must be the successor that anticipated the succession and got a part of it before it opened. Now, I do not think that that has been said to be the case here. It was exactly the same, as stated in the illustrations in the note,—and I do not see any answer to it, and have heard none from the bar,—as if the parties had concurred in selling a part of the entailed estate. Suppose a power of sale had been asked and consent given, the succession can never be after that anything more than what is left of the estate, for there can be no succession to what has been sold or alienated by the possessor long before his death. And it is nothing to the purpose that, as the price of the consent which entitled and enabled the predecessor to sell, he has paid something to the successor. That is not the successor anticipating his succession. It is an *inter vivos* bargain between the predecessor and successor,—that is, between the late Earl of Glasgow and the heir presumptive, who never might have any right at all to the estate. On that ground, and upon the purview of the statute, as well as its words, I think that this incumbrance cannot be held in the sense of the statute to be incurred by the successor.

On the second branch of the case, which was argued before me in the Outer-House only as an alternative view, and therefore was not disposed of by me in the interlocutor or note which I pronounced then, but which, as Lord Neaves expresses it, the successor has been gradually bringing up in the course of the litigation,—that besides being entitled to deduction for the bonds and incumbrances, he is also entitled to deduction for the value of the annuity which happened to cease at the time of the succession opening—I concur with the opinions of both your Lordships who have hitherto expressed them. I think

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that the fallacy here is that the annuity which the successor was enjoying was an annuity which he was bound to relinquish, or which he was deprived of on succeeding. It is necessary to look at the very words of the statute, and the words of the 38th section under which this part of the case arises are these,—"When any successor, upon taking a succession, shall be bound to relinquish or be deprived of any other property," then the commissioners shall make deduction therefrom. The two expressions, under one or other of which the present Earl of Glasgow must shew that he comes in order to succeed in his contention, are, "bound to relinquish," or "be deprived of." Now, I think neither of these expressions apply to the position in which he is. He was not bound to "relinquish" his annuity, which came to a natural end. He stipulated for it for a limited period—no doubt a period depending on conditions, but depending on conditions which did not impose any obligations on him. He was not bound to relinquish; neither was he deprived of it, for a man cannot be said to be deprived of that which comes to its natural termination. It ends; there is no deprivation of it. The case intended by the clause to be provided for is, I think, a very obvious case, and is very familiar in our own law. It sometimes happens that entailed estates are so settled that they must always be kept apart, so that an heir of entail in one set of lands will not be entitled to succeed under another entail to other lands without giving up the first. They shall be separate families, and never be merged. Now, it is that kind of case which is intended to be provided for by the section in question; and it is quite in conformity with the purview of the statute, because the question is,—What will be his succession—how much will he be richer? Now, a man who is bound as a condition of taking up the succession to one entailed estate to give up another entailed estate, is only richer by the difference between the two, and it would be very unfair to make him pay on the whole value of the new one as the succession, when the condition to his succession was to give up, it may be, one-half the value in the previous estate. That is quite an intelligible case, and quite satisfies the purpose of this statute. And, therefore, I think the contention to which the defender has gradually come is rather an unreasonable one, especially looking to the fact that this bond of annuity is just part of the transaction which was entered into between himself and the Earl of Glasgow under the deeds in question. I am therefore of opinion that, in addition to the point disposed of by the interlocutor, this claim must be repelled.

Lord Justice-Clerk.—I concur entirely in the opinion of the Lord Ordinary and in the note he has appended to his interlocutor, and I only summarise my views in a few sentences because of the general nature of the points involved and their importance. In regard to the first of these points, the question is whether in this case the burden in question was created or incurred by the present Earl. In the ordinary legal phraseology with which we are conversant it is impossible to say that a substitute heir of entail, not being the heir in possession, can either incur or create a burden on the entailed estate. He has no power to do so. He may indeed grant rights to take effect after his succession and he may grant such rights, perhaps, during the period when the former heir is in possession, but he cannot grant a right which shall burden an estate; he cannot incur or create an incumbrance on this estate to take effect during the possession of a predecessor. No such act is alleged here. The alleged incumbrance was granted and made effectual by his predecessor, and was one which

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neither with nor without consent, the substitute heir, the present Lord Glasgow, had himself power to impose. A substitute heir of entail is not a proprietor in any sense; he is an heir-expectant under a protected destination, and the creditor for the preservation of that protection. He has a right to make his *jus crediti* good by action, and can thus prevent its being defeated; while the heir in possession is sole fiar, although limited in his enjoyment of his estate by the *jus crediti* of the substitute heirs. Thus the consents provided for in the recent entail statutes infer a renouncing by certain substitute heirs of their right of action in the event of a specific contravention; and if the requisite number abandon their right, the rest of the substitute heirs are excluded. But those provisions cannot and do not confer on a substitute heir, not in possession, any active right whatever as regards the estate. Now, as I read the English authorities, they tend strongly in the same direction. The apparent analogy in favour of the Crown arises solely from the difference in their mode of conveyance. In England the tenant for life is in possession; the tenant in tail has the radical right remaining in him, burdened by the right of the tenant for life, and on the expiration of that right, then the radical right of the tenant in tail emerges. Now, in the English cases it has been held under this clause that the joint act of a tenant for life and of a tenant in tail in creating a burden over the estate is to be held the incurring or the creation of an incumbrance by the tenant in tail, notwithstanding that he could not create an incumbrance without the consent of the tenant for life. That illustrates very strongly the view that I have now been taking; for the radical right remaining and being vested in the tenant in tail, he was in the position of the heir in possession. He had the fee, the other was only an incumbrancer. Here the fiar is the heir in possession. The right of the substitute heir is a *jus crediti*, not a real right in the estate; and I think, consequently—apart altogether from the views which Lord Gifford has stated, clearly and strongly—he cannot be said to incur or create an incumbrance of this kind.

As regards the allowance claimed for the annuity which fell on the late Lord Glasgow's death, I can see no ground for that. The present Earl was not deprived of anything by the late Earl's death in regard to the annuity, for he received all for which he stipulated; the annuity only ceased at its stipulated term. His succession to the estate was co-incident with the cessation of the annuity; but they were not cause and effect. The annuity would have ceased although the present Earl had never succeeded,—as, for instance, if the late Earl had had children. In like manner, the annuity might have continued though he had succeeded, as in the case of the late Earl having committed irritancy and forfeited the estate during his life. The decision in Harrison's case is unquestionably a very weighty one, and whatever I might have thought of its merits I should have had great hesitation in going against a decision of the House of Lords in regard to the construction of an imperial statute if the interests in question had been similar; but looking to the ground on which that case was determined, and especially to Lord Selborne's judgment, I cannot help seeing that the tenant in tail had the radical right and interest in him at a time when this annuity transaction was entered into, for Lord Selborne rather seems to think that it was a payment out of his own estate which was stipulated for by mere anticipation,—I say, looking at that, I cannot apply the grounds of judgment in Harrison's case to the relations in which the parties here stand. Your Lordships adhere to the Lord Ordinary's interlocutor.

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THE COURT adhered. The defender was found entitled to additional expenses, modified to two-thirds, on account of his 4th plea having been insisted in.

SOLICITOR OF INLAND REVENUE—HOPE, MACKAY, & MANN, W.S.—Agents.

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PETER BEATTIE, Pursuer and Appellant.—*Fraser—R. V. Campbell.*
JOHN ARBUCKLE, Defender and Respondent.—*Asher—M'Kechnie.*

Poor-Law Act, 1845, *sec.* 70—*Admission—Fraud.*—When a parish has admitted liability for the support of a pauper, and acted on the admission for a length of time, it cannot open up the question of liability on the ground that the admission was made in error as to the facts, partly induced by *bona fide* misstatements by the inspector of the parish to whom the admission had been made.

Poor—Admission—Rehabilitation.—Where a parish had admitted liability for the relief of a pauper, and continued to relieve her for five years and seven months, after which she resided with a sister for five months without drawing parochial relief, but then was removed to an asylum, the medical officer certifying that she had been insane for six weeks before her removal,—*held* that there had been no interruption of the pauperism so as to raise of new the question of settlement.

2D DIVISION. Sheriff of Lanarkshire. I.

ON 18th June 1862 Peter Beattie, the inspector of poor of Barony Parish, Glasgow, wrote to John Hall, inspector of poor of Cambuslang Parish, stating that a pauper, the wife of a man Moyes, had become chargeable in Barony Parish, and giving notice that Barony Parish claimed relief from Cambuslang, as the parish of the husband's birth-settlement.

Some correspondence followed between the inspectors, in the course of which Beattie supplied Hall with a statement of the husband's residences, from which it appeared he had no residential settlement in any parish, but no admission was given by Hall.

The pauper's husband died in July 1862, and she still continued chargeable.

On 25th February 1863 Beattie again wrote Hall as follows:—"Case of David Moyes' wife.—Dear Sir,—I have had this case carefully re-investigated, and there does not appear to be the slightest shade of an acquired settlement existing. . . . . I will thank you for an early admission of liability, with instructions."

Hall replied on 6th March 1863:—"Dear Sir,—I duly received yours of the 25th ult. in reply to my letter of the 16th July last; and from the facts therein contained, in connection with personal inquiries, I am now satisfied that said David Moyes had no resident settlement at the time of his death, and therefore admit liability." Hall accordingly reimbursed Beattie for his previous expenditure, and continued to relieve the pauper till 13th April 1868, when she became insane in Barony, and was removed by Beattie to Gartnavel Asylum, but her name was not removed from the books of Cambuslang. She was discharged from the asylum in June 1868, and continued to be relieved by Cambuslang until September of that year.

For the space of five months after this she resided with her sister, and did not draw any parochial relief, although it did not appear that her name was ever struck off the books of Cambuslang. On 13th March 1869 she again became insane and chargeable in Barony, having been, according to the medical officer's certificate, in a state of insanity for six weeks before. She was again removed to Gartnavel by Beattie, and kept there till 25th October 1872, when she was removed to the Argyle Asylum at Lochgilphead, where she was still detained at the date

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of this action. Statutory notice of this chargeability was duly sent to Cambuslang on 17th March 1869.

Beattie, founding upon Hall's admission of liability on 6th March 1863, claimed relief of the charges incurred since 13th March 1869 from Cambuslang, but Arbuckle, who had succeeded Hall as inspector of that parish, refused to admit liability. Beattie accordingly, on 31st March 1873, raised this action in the Sheriff-court of Lanarkshire, concluding for £130 odds, as outlays on behalf of the pauper. He stated in his condescendence—(Cond. 5) "On or about 6th March 1863 the parish of Cambuslang admitted liability for the pauper, and reimbursed the pursuer his advances to her and her children, and continued to afford them relief down to the month of April 1868." To this Arbuckle answered:—Ans. 5) "Explained that the admission of liability of Cambuslang was done under a mistake, and claim is reserved for the sums paid by Cambuslang Parish."

Arbuckle stated in his defences that the pauper's husband had, in point of fact, prior to 1862, acquired a residential settlement in Barony Parish, and that parish was therefore bound to relieve her.

The Sheriff-substitute (Clark), after a proof as to the husband's residence, pronounced, on 16th March 1874, this interlocutor:—"Finds that the pauper has been all along chargeable to the parish of Barony of Glasgow (of which the pursuer is inspector), in virtue of the residential settlement of her late husband acquired there prior to 8th August 1855: Therefore assoilzies the defender, inspector of the parish of Cambuslang, from the conclusions of the action: But, in the circumstances of the case, finds no expenses due by or to either party, and decerns." *

Beattie appealed, and on 5th August 1874 the Sheriff (Gillespie Dickson) adhered to his Substitute's interlocutor.†

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* NOTE.—(After a narrative of the facts)—"In this state of matters it was strongly contended by the pursuer's parish that the letter of admission, No. 7/1 of process, amounted to a *quasi*-contract, and formed a sort of binding obligation by which the defender's parish was barred in all time coming from reopening the question. This was denied on the part of the defender's parish, and it was argued that the letter, 7/1, was not binding, because it had proceeded upon an error in fact, and that the matter in question, being one affecting the interests of the ratepayers, could not be settled against them by the mere acts or admissions of an inspector. It appears to the Sheriff-substitute that it would be *ultra vires* of an inspector, or even perhaps of the parochial board itself, to enter into a contract as to the support of a pauper, which should have the effect of saddling the ratepayers in all time coming with the maintenance of the pauper, in the face of clear evidence afterwards emerging of non-liability. He cannot therefore sustain the pursuer's plea to the effect of creating estoppel. But, on the other hand, he is of opinion that it is a matter to be kept clearly in view in dealing with the evidence, more especially if it appears that, in consequence of the admission of chargeability, important evidence has been lost, which, if now available, would have seriously affected the issue.

"Rejecting, therefore, the plea of *mora* and acquiescence as a bar to prosecuting the inquiry, the important question presents itself, At what period, if any, did the pauper's husband acquire a settlement by residence in the pursuer's parish?" . . .

† "NOTE.—. . . . It must also be observed that the Barony Parish has itself to blame that liability was recognised by Cambuslang in 1863; for that was done in a great measure in consequence of erroneous information from the Barony inspector, which (unintentionally, no doubt), misled the Cambuslang officers and board (see per Lord Justice-Clerk Inglis in Innes v. Ironside, 1868, 1 Poor-Law Mag., new series, 531).

"It was contended for the pursuer that the arrangement in 1863 formed a

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Beattie appealed to the Court of Session.

Argued for Beattie (Barony);—An admission of liability under the 70th section of the Poor-Law Amendment Act was not for the sake of casual relief, but for the purpose of fixing the pauper's settlement until a new settlement was acquired, and was in a different position from statutory notice.[1] An admission such as this, which had been deliberately made and acted on for five years, could not be gone back upon, on the ground that the inspector who gave it had not inquired sufficiently before giving it. The decision of inspectors upon such questions were subject to the review of the parochial board, but after that they could not be recalled.[2] At all events, fraud would need to be averred and proved before such a contract could be reduced, and there was no mention of that in this record, the mistake being merely alleged to be that of the inspector of Cambuslang.[3] The mere fact of an interval of five months or so having elapsed, during which the pauper did not draw relief, but when it was not proved that her name was struck off the books did not so restore her to the class of self-supporting persons as to open up the question of settlement after it had once been fixed by an admission.[4]

Argued for Arbuckle;—The question was, whether an admission made in error was binding in all time coming. It was clear on the proof that the pauper's husband had a residential settlement in Barony. The inspector of Cambuslang was misled in his investigation in consequence of the positive statements made by the Barony inspector in his letters.[5] Whenever there was substantial error in point of fact, in respect of which something had been done which should not have been done, it was competent, and the duty of a Court of law, to put matters right. Error was always mutual unless there was fraud. There was no conclusive rule of law that because a party had the means of knowledge and did not use them he was to be barred from ever correcting a mistake

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complete bar against the defender disputing liability now, and that the defender is not entitled to challenge that arrangement on the ground merely of erroneous judgment on matter of law.

"To this it must be answered that the defender is not claiming repayment of the sums expended under a former arrangement, but is resisting a demand as to relief, which commenced after that arrangement had terminated by the pauper having returned to the general population. In such a case the parish against which relief is claimed is free to deal with the matter as a new one, without being encumbered by the old and erroneous agreement.

"This seems to follow from the decision in Beattie v. Wood, 1866, 4 Macph. 427.

"Besides, even if the pursuer's argument were right in principle, it is wrong in fact, for the former arrangement was made in essential error on matters of fact as to the date when the pauper's husband first came to Barrowfield.

"Accordingly, without indicating any opinion on the question whether Cambuslang has a good claim by way of *condictio indebiti* against Barony for the payments made under the arrangement referred to, the Sheriff cannot hold that arrangement to be a bar to the present defence."

[1] 8 and 9 Vict. cap. 83 (Poor-Law Amendment Scotland Act, 1845), sec. 70; Beattie v. Wood, Feb. 9, 1866, 4 Macph. 427, 38 Scot. Jur. 198.

[2] Taylor v. Strachan, Nov. 8, 1864, 3 Macph. 35, Lord Ardmillan, p. 38, 37 Scot. Jur. 16; Elgin Lunacy Board v. Bremner, July 10, 1874, *ante*, vol. i. 1155.

[3] Arthur v. Stewart, Feb. 8, 1871, 4 Poor-Law Mag. (N. S.) 278.

[4] Johnston v. Black, July 13, 1859, 21 D. 1293, 31 Scot. Jur. 675.

[5] Innes v. Ironside, June 5, 1868, 1 Poor-Law Mag. (N. S.) 531.

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made in consequence.[1] Even if the first admission were effectual, its effect could not extend over the period when the pauper was rehabilitated, and the whole question of settlement was opened up whenever a new statutory notice became necessary.[2]

At advising,—

LORD JUSTICE-CLERK.—This case raises a question of settlement under the Poor-Law Amendment Act which is of some importance.

The point arises under the following circumstances:—

In the year 1862 the wife of David Moyes became a pauper, and was chargeable in the Barony Parish, Glasgow. The inspector of Barony wrote to the inspector of Cambuslang, stating that as the woman's husband had been born in Cambuslang she was accordingly chargeable to that parish. The inspector of Cambuslang, after some correspondence, on 6th March 1863, wrote,—"I duly received yours of the 25th ult. in reply to my letter of 16th July last, and from the facts therein contained, in connection with personal inquiries, I am now satisfied that said David Moyes had no resident settlement at the time of his death, and therefore admit liability."

According to the statement made in this record this woman remained chargeable to the parish of Cambuslang down to 1868. It is then said that in April 1868 she ceased to be chargeable to Cambuslang. She seems afterwards to have become insane, and to have been removed from Barony Parish to Gartnavel Asylum.

This statement is not altogether accurate. The real state of affairs was, that the pauper received relief from Cambuslang until September 1868, and that, in the meantime, from April 1868, she became insane, and was placed in Gartnavel Asylum by the inspector of Barony, but her name was not removed from the books of Cambuslang,—on the contrary, when she was discharged from the asylum in June 1868 she got relief from Cambuslang. It rather appears that for some period about that time she got relief from both parishes.

From September 1868 the pauper seems to have been for three months and a half self-supporting, that is, at least getting no relief from either Barony or Cambuslang. Whether her name ever was struck off the books of Cambuslang does not appear. It is, at all events, clear she was on the books till September 1868. In March 1869 she again became insane and chargeable in Barony, and, as appears from the doctor's certificate, she must have been in a state of insanity for about six weeks before that date. The only period during which she can be said, therefore, to have been self-supporting was from September 1868 to January 1869.

The inspector of Barony now brings an action against Cambuslang, and founds upon the previous admission by that parish in 1863. The defence to this action is twofold,—(1) It is said that Cambuslang is not bound, because, first, the admission was not consistent with the true state of the facts, the settlement of the pauper's husband having been truly in Barony, and that the admission cannot be binding, because it was made upon the statement of the facts furnished by the inspector of Barony, to whom the admission was given; (2) The other defence is, that as the pauper became self-supporting after the admission, Cambuslang is no longer affected by the admission.

[1] Chitty on Contracts (9th ed.) 589; Townsend v. Crowdey, June 11, 1860, 29 L. J. (C. P.) 301; Dails v. Lloyd, May 2, 1848, 17 L. J. (Q. B.) 247.

[2] Johnston v. Black, and Beattie v. Wood, *supra*, and M'Donald v. Taylor, Nov. 26, Poor-Law Mag. 348.

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With regard to the first defence, I am of opinion that the mere allegation that the inspector of Cambuslang was in error in making the admission in 1863 is not a relevant ground for opening up an admission which has been given. By the terms of the 70th section of the Poor-Law Amendment Act, the admission of the parish of its liability is one of the statutory modes of determining chargeability, and the parish which is applied to as ultimately liable by the parish actually giving relief may delay giving an admission of liability for such period as may seem necessary for prosecuting inquiries as to the facts. That is just what was done here,—the inspector of Cambuslang did not give his admission until he had made inquiry.

It would be exceedingly inconvenient if it were not in the power of parochial boards to terminate all questions of this sort on reasonable and apparently satisfactory information.

We had a learned argument on the question that a contract proceeding on error in point of fact was not binding. That does not, however, apply to a case where the subject-matter of the admission or contract was the fact ultimately admitted, and when the admission was made only after inquiry, as was the case here.

The question here is not whether error in point of fact vitiates a contract, but whether there is a relevant averment of error sufficient to vitiate the contract. The admission precludes Cambuslang from alleging that the parish of the pauper's settlement was in Barony, because Cambuslang by the statutory admission has fixed it in Cambuslang. It is urged that the error was induced by the inspector of Barony, and if that were proved to be correct it might be possible, on the authority of the case of Innes v. Ironside, June 5, 1868, 1 Poor-Law Mag. N. S. 531, for us to get behind the admission. There is nothing, however, in the letter of the inspector of Barony to lead, in my opinion, to any such conclusion. I do not think the letter referred to bears the construction attempted to be put upon it. It says, "that prior to his marriage he had been up and down in lodgings in Barony two or three years," shewing that the exact time was not known. It amounted to the statement that the settlement was more or less doubtful, and served to put the inspector of Cambuslang on his inquiry. I see no indication of an intention to state what was known to be untrue, or what was not believed to be true.

In addition to that, the admission was not given on that letter alone. As it appears from his own letter the inspector of Cambuslang did inquire into the matter before giving the admission. I think that the inspector of Cambuslang has precluded himself from opening up this question by giving the admission after inquiry. If it were otherwise, the salutary provisions of the Poor-Law Amendment Act would be much weakened and neutralised.

On the two branches of the first defence, then, I am of opinion that the inspector of Cambuslang is bound by his admission in 1863.

The second question is, whether the fact of the pauper having been self-supporting,—that is, off the books,—for a short time creates a new chargeability, and raises of new the whole question of settlement when she again applies for relief. It is not necessary to decide this point in this case, because I am clearly of opinion that although when residing with her sister the pauper did not draw parochial relief from either parish, still her chargeability as a pauper never ceased. I think it would be a very strong thing to say that, because for a month or two a pauper did not call for her relief, the whole question of settlement had to be reconsidered and resettled.

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I am therefore of opinion that the contract originally made, and the admission given by Cambuslang, must still rule the question of the settlement of this pauper, and that accordingly the Barony Parish must prevail.

LORD NEAVES.—I see the importance of the questions raised in this case, and think that the principles laid down by your Lordship in the chair are well founded and essential to the proper working of the "Poor-Law Amendment Act."

The principle sought to be imported into the case of essential error does not, in my opinion, apply.

A pauper must be relieved by the parish in which he or she becomes chargeable; then that parish must look out for the parish which is to be ultimately liable. It is very much to the credit of the inspectors of poor throughout Scotland that these questions are so often settled in an inexpensive manner.

When evidence is supplied by one parish to another it is capable of being tested, and if it is not so tested it is just to save expense. To say that a *bona fide* error such as we have to consider here is to affect a contract to the effect intended for by the respondent is unreasonable. Neither party can know the exact state of the facts. What is known must in general be the result of inquiry.

In this case the information supplied by the one inspector was followed up, and appeared to be supported by inquiries made by the other.

To say that an error in such circumstances is to entitle one of the parties to open up the whole matter at a much later date is a contention that cannot be listened to. The result come to was mutual,—the two inspectors trusted to each other's honesty, and *mala fides* is not here supposable.

I am therefore of opinion that the arrangement so made is not to be disturbed by one party stating that the facts assumed were not the true facts of the case. To effect such a result *mala fides* would need to be clearly averred and proved.

On the other question, as to the break in the chargeability, I am of opinion that there was here no convalescence of the pauper from the original pauperism. There was, no doubt, a short period during which she was maintained by her sister instead of by the parish, but she never was self-supporting. The admission of liability ought not, on that account, to be disturbed. It was arrived at by a mutual arrangement, and it is mutually binding.

In these circumstances it is not necessary to decide whether, where there has been a cessation of chargeability, it is competent to go back upon a former admission.

The case of M'Donald v. Taylor[1] was one where there was a third parish in question, and the arrangement founded on had not been made between the parishes actually in opposition.

I am therefore of opinion that this admission must stand effectual till new circumstances occur which can set it aside, of which there is no relevant or sufficient averment here.

LORD ORMIDALE.—It appears to me that the question arising here is a very important one in the administration of the "Poor-Law Amendment Act" of 1845, more especially in the view which ought to be taken and held by the Court of the true meaning and effect of the 70th section of that Act.

[1] *Supra*, p. 333.

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By that section any pauper in a state of destitution, and requiring parochial relief, is entitled to such relief from the parish in which he or she happens to be at the time when necessity for relief arises, and that relief must be continued until the proper parish of settlement of the pauper is ascertained. Then, if a dispute arises as to the true parish of settlement, if the relieving parish cannot get the necessary admission, it may bring an action to have the question of liability determined, but should it be once determined judicially or by admission what parish is liable, I do not see how the parish so found liable can relieve itself of the burden put upon it as long at least as no material change of circumstances occurs. If an admission of liability is obtained, the result, under the 70th section of the statute, is the same as if there had been a judicial determination of the matter. The meaning of the statute is, that a parish is not entitled to proceed with an action if it should, without any action, obtain an admission of liability, and it would be most unreasonable to hold that a parish could go on with an action after a statutory admission,—for it is really such,—has been given. The admission being given, what more can the relieving parish require? What more can it be entitled to? Any expense after such admission that might be incurred in an action by it would most certainly be laid upon itself.

I do not mean to say, however, that in all circumstances an admission is to be for ever conclusive. Circumstances may undoubtedly emerge to render it no longer binding,—such, for example, as the pauper having become after a time self-supporting and acquiring a new settlement; but the parish which has given the admission must, I think, establish very clearly that such circumstances have emerged. What is said here by Cambuslang Parish is (first) that the admission was given by it on a misleading statement by the inspector of the Barony Parish, and (second) that it could only be operative so long as the pauper had not again become self-supporting, which, in point of fact, she did. With regard to the first of these points, I apprehend the statement of the inspector of Cambuslang in the record is quite conclusive, independently of the letter which your Lordship in the chair has commented upon. His statement in the record, in answer to the averment of the Barony Parish, is merely that "the admission of liability of Cambuslang was given under a mistake." It is not there or anywhere else said that the mistake was induced by the inspector of the Barony parish, and far less that there was any actual misrepresentation by that parish, nor is it even said that there was a mistake by any one except the inspector of Cambuslang himself. But I cannot hold that a mistake of the functionary representing and entitled to represent Cambuslang in the matter is entitled to relieve that parish from the statutory admission which has been unquestionably made and acted on for about five years, any more than it would be sufficient to enable it to get rid of a judgment of a Court, supposing that had been obtained in place of the admission which the statute refers to as equally effectual. But then it has been, in the second place, pleaded for Cambuslang that the pauper here became self-supporting in 1868. The circumstances, as regards this matter, are not clearly established. The utmost that can be said in regard to it is that the pauper neglected,—probably from supervening insanity,—to draw her regular allowance from Cambuslang for a few months; but undoubtedly there is no sufficient evidence of her having become self-supporting, and no allegation even that she had acquired any new settlement. I cannot hold, therefore, that Cambuslang has succeeded in relieving itself of the statutory admission which had been given by it, and acted upon by all concerned for a considerable time.

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I abstain from commenting upon the effect of the proof which was led in the Sheriff-court, as in the view I have taken of the case otherwise it is quite unnecessary for me to do so. I have only to add that inspectors for the poor ought to know that while it is highly commendable that, in order to save litigation and expense, a statutory admission of liability should, whenever the circumstances are such as to require it, be at once given, it is not when given to be got rid of except upon very sufficient and clearly established grounds.

LORD GIFFORD.—I agree with the opinion of all your Lordships that the admission of liability originally made by Cambuslang is binding on that parish, and that there is no cause stated why effect should be denied to it. It is extremely important that in questions between parishes, and in the practical administration of the poor-law, effect should be given to admissions when deliberately given, fairly obtained, and acted upon *in bona fide*. No doubt such admissions do not constitute *res judicata*, but they come in place thereof, and they are the things which prevent a *res judicata* following, and therefore they should have the same effect. An admission is better in some cases than *res judicata* if the parties acted fairly, and I am quite clear that an admission should not be displaced unless the party challenging it can establish very clear grounds for so doing. If not a statutory proceeding, it is at least recognised in the statute as one of the modes in which the liability of a parish for the relief of a pauper may be ascertained.

I adhere to the views which I expressed in the case of Arthur v. Stewart, reported in the Poor-Law Magazine, where my decision was acquiesced in, and I think that holding all parties bound by a deliberate admission is a most wholesome and salutary rule. At the same time, I do not in the least differ from what was laid down in the case of Innes v. Ironside, which was referred to. As to an admission obtained by bad faith or by fraudulent misrepresentation, even a decree got by bad faith or fraud would be reducible.

If, then, the admission be binding, the only question that remains is, For how long? The answer is, as long as the pauper is chargeable and the circumstances remain the same. When the chargeability permanently ceases, of course, the admission comes to an end, because the claim has come to an end. What would be the effect of rehabilitation, as it is sometimes called, and how long it must subsist, does not fall to be decided in this case. There was here no rehabilitation of the pauper. She was a pauper all through, and remains a pauper still. A relative, such as a sister, may sustain a pauper for a short time, as happened here, without asking parochial relief for her, but that will not have the same effect as marriage or the pauper becoming again self-supporting.

I am of opinion, first, that we must give effect to the admission; and, second, that the liability never was interrupted.

THE COURT pronounced this interlocutor:—"Find it proved that, on the 6th of March 1863, the inspector of the parish of Cambuslang admitted liability for the support of the pauper by his letter of that date: Find that no facts or circumstances have been proved which are relevant to relieve the respondent from the effect of that admission: Find it admitted from the bar that the parish of Cambuslang continued to support the pauper down to the month of September 1868: Find that from that date until the month of March 1869 the pauper received no relief either from Cambuslang or

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Barony, and that in that month she became insane, and was sent to Gartnavel Asylum, where she has been ever since, the insanity being certified by the medical officer to have, in March 1869, subsisted for six weeks previously: Therefore find that the parish of Cambuslang was effectually bound by the said admission, and that the same is still effectual: Sustain the appeal: Recall the judgment complained of, and decern against the respondent (defender) in terms of the conclusions of the summons: Find the pursuer entitled to expenses in both Courts; modify the expenses of the proof to one-half the taxed amount thereof, and remit," &c.

MACKENZIE, INNES, & LOGAN, W.S.—THOMAS CARMICHAEL, S.S.C.—Agents.

No. 69.

Jan. 19, 1875. Hume v. Young, Trotter, & Co.

J. A. ROSS HUME AND OTHERS, Pursuers.—*Balfour—Mackintosh.* YOUNG, TROTTER, AND CO. AND OTHERS, Defenders.—*D.-F. Clark—Sol.-Gen. Watson—Macdonald.*

Process—Jury Trial—River—Nuisance—6 *Geo. IV. c.* 120 (*Judicature Act*, 1825), *sec.* 28—13 *and* 14 *Vict. c.* 36 (*Court of Session Act*, 1850), *sec.* 49—29 *and* 30 *Vict. c.* 112 (*Evidence Act*), *sec.* 4.—An action of declarator and interdict to prevent the pollution of a river, being an action for nuisance, must be tried by jury, unless special cause is shewn to the contrary.

1ST DIVISION. Ld. Mackenzie. B.

THIS was an action by Mr J. A. Ross Hume and others, riparian proprietors on the river Whitadder, against Messrs Young, Trotter, and Company, and others, paper-makers, concluding for declarator that the defenders had no right to pollute the river, and for interdict. After the record was closed, the Lord Ordinary reported the case on a motion by the pursuer that the case should be tried before the Lord Ordinary without a jury. The defenders opposed the motion.

LORD PRESIDENT.—The 28th section of the Judicature Act contains a comprehensive enumeration of causes which are thereby required to be tried by jury, and not otherwise. The first relaxation of that enactment was introduced by the 49th section of 13 and 14 Vict. c. 36, which provided that it should be "competent for the Court to allow proof on commission in any of such enumerated causes, where the action is not an action for libel, or for nuisance, or properly and in substance an action of damages." The Legislature were therefore of opinion at that time that actions for nuisance were not suited for trial in any other form than by jury. The only other alteration in the law is to be found in the 4th section of the Evidence Act, 1866. That clause introduced a further relaxation so that even the cases excepted by the Act of 1850 may be tried without a jury, upon condition either that the parties consent to that course, or special cause is shewn. It appears to me that there is nothing in the Act of 1868, or the Act of Sederunt of 1870, which deals with this matter, or interferes with the 4th section of the Act of 1866.

I am therefore of opinion that we can lay down no general rule for the guidance of the Judges in the Outer-House. Where there is nothing special in the case it must be tried by a jury. I see nothing special in this case, except that it is an action for nuisance. That is just the reason why it ought to be tried by jury. It stands on a different footing from a case of right of way, which is not one of the excepted causes under the Act of 1850. In my opinion, this case is very suitable for trial by jury.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

WEBSTER & WILL, S.S.C.—J. & F. ANDERSON, W.S.—Agents.

WILLIAM JOHN ARMSTRONG AND COMPANY, Pursuers and Claimants.—*Sol.-Gen. Watson—Asher.*
D. M'GREGOR AND COMPANY, Defenders.—*D.-F. Clark—Balfour.*
HANDYSIDE AND HENDERSON, Claimants.—*D.-F. Clark—Balfour.*

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Jan. 19, 1875.

Armstrong and Co. v. M'Gregor and Co.

Sale—Ship.—A seagoing steam-ship lying at Glasgow, ready to sail, was sold by missive, "with all belonging to her on board and on shore." *Held* that a chronometer, previously used in the vessel, which was in the hands of an optician on shore for the purpose of regulation at the date of the sale, was included in the sale, a chronometer being a necessary instrument of navigation, and there being no local or general usage of trade to lead to a different construction of the missive.

1ST DIVISION. Sheriff of Lanarkshire. M.

JOHN WILKIE, shipbroker, Glasgow, acting for Handyside and Henderson, shipowners, Glasgow, entered into the following memorandum of agreement on 30th November 1871 with Armstrong and Company, shipowners and shipping agents in Glasgow, for the sale of the ship "Macedon," which was ready to sail on a voyage:—"Glasgow, 30th November 1871.—Memorandum of Agreement.—John Wilkie, acting as broker for owners, agrees to sell, and W. J. Armstrong and James Hay, jointly and severally, agree to purchase the screw-steamer 'Macedon,' now at Glasgow, with all belonging to her on board and on shore, for the sum of five thousand one hundred and fifty pounds (£5150), immediate settlement, and cash against bill of sale; two hundred and fifty pounds deposit payable by buyers on signment hereof."

At the date of the sale the chronometer which had been previously used in the vessel was in the hands of M'Gregor and Company, opticians, for the purpose of being regulated. It was sent back by the opticians immediately after, as the ship was about to start on a voyage. When the vessel came back from her voyage the chronometer was again sent to M'Gregor and Company to be regulated, and they refused, by the orders of Handyside and Henderson, to restore it to the ship. Thereupon Armstrong and Company raised an action in the Sheriff-court against M'Gregor and Company for delivery of the chronometer, and for damages. Handyside and Henderson also raised a multiplepoinding in name of M'Gregor and Company, as possessors of the chronometer. The actions were conjoined.

Handyside and Henderson averred;—"The chronometer so placed on board the 'Macedon' did not belong to or form any part of a ship's fittings; and at the time of the sale before mentioned none of the contracting parties contemplated or intended that it, or any chronometer whatever, should be embraced in the sale, or be covered by the memorandum of agreement between them, nor is the value of any chronometer included, or intended to be included, in the price agreed to be paid by the other claimants. Moreover, according to the custom of trade and daily practice then existing and relied on the terms of said agreement would not include the chronometer in question."

Armstrong and others made the following answer to this averment;—"Denied. Explained that the terms of the memorandum of agreement were expressly used and meant to include the said chronometer, and some other articles belonging to the steamer which were temporarily on shore at the time. The alleged custom and practice of trade is denied."

A proof was led.

The Sheriff-substitute (Buntine) pronounced this interlocutor:—"Finds that the chronometer in question is the property of the claimants, William John Armstrong and others, having been included in the memorandum of

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sale of the s.s. 'Macedon:' Therefore, in the original action at the instance of William John Armstrong and others against D. M'Gregor and Company, repels the defences, and ordains the defenders, within six days, to deliver over to the pursuers the chronometer in question, under certification: (2) In respect of the above finding in the said first action, dismisses the action of multiplepoinding, reserving to pronounce further, and to dispose of the question of expenses."*

On appeal the Sheriff (Dickson) pronounced this interlocutor:—"Repels the defence stated by the claimants, Armstrong and others, to the competency of the multiplepoinding: Finds that the chronometer in question is the property of the claimants Handyside and Henderson, and accordingly assoilzies the party M'Gregor and Company from the conclusions of the petitory action: Sustains Handyside and Henderson's claim in the multiplepoinding: Ranks and prefers them to the chronometer in question; and accordingly decerns and ordains the nominal raisers, D. M'Gregor and Company, to deliver it to the said Handyside and Henderson, and, on their doing so, exoners and discharges them of all claims with reference thereto at the instance of the other claimants, Armstrong and others, owners of the 'Macedon,' under the present actions: Finds the said Armstrong and others liable to Messrs M'Gregor and Company, and Handyside and Henderson respectively in expenses in both actions: Allows," &c.†

Armstrong and Company appealed, and argued;—No usage of trade was proved. The agreement included a chronometer, which was essential for the navigation of the ship.[1]

The respondents answered;—A usage of trade had been proved, which established that a chronometer was not a part of the ship, and did not pass with it. There was no reason why a chronometer should pass with the ship.[2]

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* "NOTE.— . . . . . In the view of the Sheriff-substitute there is no ambiguity in the clause 'with all belonging to her.' It means all her necessary appurtenances; everything that is essential for her proper navigation, or is habitually used for that purpose, whether absolutely essential or not, if it belongs to the owners. A fixed chronometer is part of a ship, as much as her compass, or her masts, sails, or rigging."

† "NOTE.—The proper principle of interpretation is thought to be the same as in all mercantile contracts,—that unless where general words have a recognised meaning in law, the question what they include is not to be decided by paraphrasing or amplifying them, without regard to their understood meaning according to the usage of the trade; but, on the contrary, with special reference to such usage, as being that which the parties are presumed to have had in view when contracting.—(See Bell's Commentaries, 465, and cases noted in the Sheriff's work on the Law of Evidence, sec. 232, *et seq.*) On this principle it was held, in an American case (Richardson v. Clark, quoted in 1 Parsons on Shipping, p. 81), that, 'in the absence of any agreement of the parties or proof of usage of trade, a bill of sale does not include the chronometer as an appurtenance of the ship.'

"Upon the evidence, the Sheriff held that usage of trade had been proved in favour of the construction excluding the chronometer from the sale."

[1] Langton v. Horton, June 6, 1842, 5 Beavan, 9, 11 L. J. (N. S.), p. 299; 1 Bell's Com. 440; Kircher v. Venus, February 4, 1859, 12 Moore's Privy Council Reports, 361; Sweating v. Pearce, 1861, 9 Scott's C. B. Reports (N. S.) 534.

[2] Gale v. Lawrie, 1826, 5 Barnwell and Cresswell, 156; the "Dundee," Jan. 28, 1823, 1 Haggart's Admiralty Cases, 109; Parsons on Shipping, pp. 78 to 81.

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LORD PRESIDENT.—My Lords, the memorandum under which the sale of the "Macedon" was made bears date November 30, 1871, and is in these terms :— "John Wilkie, acting as broker for owners, agrees to sell, and W. J. Armstrong and James Hay, jointly and severally, agree to purchase, the screw-steamer 'Macedon,' now at Glasgow, with all belonging to her on board and on shore, for the sum of five thousand one hundred and fifty pounds (£5150) immediate settlement, and cash against bill of sale; £250 deposit payable by buyers on signment hereof." The question which has arisen under this contract is, whether or not it carries the chronometer. Now, it must be borne in mind that the "Macedon" was a seagoing ship, for which a chronometer was necessary, and it must also be borne in mind that the words used have no technical sense, and so, apart from any interpretation put upon them by usage of trade, they must be fairly and reasonably interpreted. It has been said in the course of the argument that nothing can be said to belong to a ship unless it is specifically appropriated or devoted to that ship, and even that it would be necessary to have the ship's name on it. I cannot entertain that idea as a reasonable one. Things may belong to a ship which might be used just as well in any other ship. There are many small things belonging to a ship which may be transferred from one to another, such as nautical instruments, charts, tools, &c., without which it would be impossible to get on in the voyage, and why the chronometer, which is just as necessary as any of them, should be held not to fall under the same category I cannot see. Its peculiarity seems to be that it does not remain constantly on board the vessel, but the reason for that is that it is necessary that it should be taken on shore from time to time in order to be rated. In practice, when a seagoing ship returns from a voyage, the chronometer is taken to the makers, and stays there till the next voyage, but it does not on that account cease to belong to the ship. It may be transferred from one ship to another, and perhaps more easily than most things, but with that exception I cannot see any difference between a chronometer and any other instrument; they are all equally necessary, and cannot be used except in reference to each other.

I see no ground for any distinction. The law, so far as there is any law in the matter, is well expounded in the "Dundee" case, which came first before Lord Stowell in the Admiralty Court, where the question was to what extent the "Dundee" was liable for damage done by a collision, under the Act 53 Geo. III., cap. 159. The "Dundee" was a whaler bound for the Greenland fishery, and a question arose whether the fishing stores fell under the term "appurtenances." It was contended by the owner of the sunken vessel that all stores necessary for the purposes of the particular voyage on which she was sailing were included in that word. Lord Stowell said,—"A cargo cannot be considered as appurtenances of the ship, being that which is intended to be disposed of at the foreign port for money or money's worth vested in a return cargo. Its connection with the ship is merely transitory, and it bears a distinct character of its own. But those accompaniments which are essential to a ship in its present occupation not being cargo, but totally different from cargo, though they are not direct constituents of the ship (if indeed they were they would not be appurtenances, for the very nature of an appurtenance is that it is one thing which belongs to another thing), yet if they are indispensable instruments without which the ship cannot execute its mission and

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perform its functions, it may in ordinary loose application be included under the term "ship," being that which may be essential to it—as essential to it as any part of its own immediate machinery." Accordingly sentence was given against the owners of the "Dundee" for the value of the ship, including her fishing stores. Proceedings in the same case were afterwards taken in the Court of Queen's Bench in the shape of a prohibition against the execution of the sentence, which came before Lord Chief-Justice Abbott, a very high authority on such questions, and the Court arrived at the same result as Lord Stowell, the Lord Chief-Justice observing:—"We think that whatever is on board a ship for the object of the voyage and adventure on which she is engaged belonging to the owners constitutes a part of the ship and her appurtenances within the meaning of this Act, whether the object be warfare, the conveyance of passengers or goods, or the fishery." Now, giving effect to that judgment, the question one naturally asks is whether the chronometer was necessary for the voyage, and the answer must be in the affirmative. It is said to be a peculiarity in this case that the chronometer was not on board at the time of the sale, and that, therefore, the judgment of Vice-Chancellor Wigram in the case of Langton v. Horton does not apply. Now, that seems to me to be a very narrow distinction to draw, and I can see no sound principle for it, for this chronometer would not have been absent from the vessel except for the purpose of making it useful for the next voyage, and so we find that the maker, who knew nothing of a sale having taken place, brought it back again as a matter of course. The chronometer was understood to belong to the ship, and thus was in use to be taken away and brought back as matter of course. I think it was as clearly belonging to the ship as anything could be. Yet we are told that the usage of the trade does not include a chronometer in such a sale as this. I think it would be a very curious usage which selected the chronometer for such exclusion, but I am quite satisfied that no such usage has been proved; indeed, I never saw a more inadequate attempt to prove usage. You must have a thing universally understood and acted on in order to establish usage, and if your Lordships will only think whether on the evidence before us you are prepared to affirm a principle of consuetudinary law you will see how weak the evidence is. I am for adhering to the judgment of the Sheriff-substitute.

Lord Deas.—I am of the same opinion with your Lordship and the Sheriff-substitute. I think that, under this memorandum of sale, the chronometer is carried to the purchaser. I do not say that because this was a written bargain, and because the sale of a ship must always be made by a written document, that the same rule would apply to the chronometer. If the chronometer had been verbally excluded at the time of sale that might have been enough. Wilkie says that he was told to exclude the chronometer, and that he did so, while Armstrong denies that anything was said on the subject. I see nothing against the credibility of either of these witnesses, and nothing to enable us to prefer the memory of the one to the memory of the other. The result seems to be that nothing is proved on either side but the fact that Wilkie was told to exclude the chronometer, and that is a fact against the seller.

The *prima facie* reading of the document of sale is against the sellers, and the case against them becomes considerably stronger by its being admitted or proved that many other articles, such as telescopes, barometers, sextants, &c., go with the vessel. It would require a very distinct and discriminating usage of trade to

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admit all these articles and exclude a chronometer, which is in precisely the same position, except that it is more frequently taken on shore than the other articles.

I agree in thinking that the proof of usage is of the weakest kind. I can give no effect, in this question, to the alleged usage of shipbuilders, and beyond what relates to their practice there is nothing to overcome the words of the contract.

Two circumstances tell against the sellers. I have already referred to one of them—that the sellers thought it necessary to instruct their agent Wilkie to except the chronometer. The other is that the ship was about to commence her voyage at the time of the sale, and it is not maintained that she could have done so without a chronometer. The sellers ought consequently to have been careful to make an exception as to the chronometer. Therefore any special circumstances we have here are in favour of the purchasers.

Taking into view the whole circumstances, I think we ought to recall the judgment of the Sheriff, and return to that of the Sheriff-substitute.

LORD ARDMILLAN.—Both the Sheriff and the Sheriff-substitute have very carefully considered this case, and they have arrived at opposite conclusions. I have come to be of the same opinion as your Lordships that the judgment of the Sheriff-substitute is right.

The competency of a proof of usage I admit when the words of the contract are doubtful. When the words have a clear meaning no proof of usage is competent. But, when competent, the proof of usage must be satisfactory, and the usage proved must be sufficient, for proof of a divided usage will not sustain a judgment against the words of the contract.

Here I cannot say that the words in the contract are so clear as to exclude a proof of usage. But the proof must be clear and the usage uniform. Both parties are Glasgow merchants and shipowners, and must be held to have known of any such established usage of trade.

On the proof, I am of opinion that it has been established that a chronometer is a usual, proper, and necessary instrument on board a seagoing vessel. I think that the fact that the chronometer happened to be on shore at the time of sale is of no consequence, because the only reason for its being on shore was that it required to be rated or regulated. It is not material that the owners may change, and occasionally do change the chronometers from one vessel to another. Neither is it, on the other hand, material that the chronometer was sent back to the ship before she sailed, because it is admitted that this was done in ignorance of the fact that the ship had been sold. But it is of more importance that the vessel had a chronometer on her last voyage, and, when sold, was about to proceed on another voyage, and that she did require a chronometer for that voyage, and that she did sail with the chronometer on board, and that the captain would not have sailed, or would most reluctantly have sailed, without a chronometer. I think the case of purchase of a ship from a builder is different. It has been proved that the builder of a ship does not usually supply a chronometer. But the reason is that the owner prefers to select his own chronometer.

This forms a large part of the defenders' proof of usage, and I do not think that such a limited proof of usage in sales by builders can be held sufficient to control the very general words of the contract. Nothing but a clear proof of a settled usage, so general and so recognised as to amount to a rule of trade, would be sufficient. I am disposed to think that the proof, so far as it goes, and

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including transactions with shipbuilders, is rather in favour of the sellers, but that, apart from shipbuilding transactions, the proof adduced to instruct usage as limiting the words of the contract is insufficient. It is in its import and character conflicting, and the usage is divided, not uniform. The seller has not established a settled usage of trade among merchants and shipowners which can take off the effect of the very general words of the contract.

LORD MURE concurred.

THE COURT pronounced the following interlocutor:—"Recall the interlocutors of the Sheriff-substitute and the Sheriff, dated respectively the 20th April 1874 and 21st October 1874: Find that when the appellants, in the month of November 1871, purchased the screw-steamer 'Macedon,' then lying at Glasgow, 'with all belonging to her on board and on shore,' under the memorandum of sale No. 11/1 of process, the chronometer in question on shore belonged to her: Find that it is not established by the proof that there is any local or general usage of trade that under such a clause the ship's chronometer was not included or intended to be included in the said purchase; but find that the chronometer in question did, in terms of the said clause, pass with the said ship at the time of the said purchase, and is the property of the appellants, William John Armstrong and others."

J. W. & J. MACKENZIE, W.S.—HAMILTON, KINNEAR, & BEATSON, W.S.—Agents.

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Watson v. Watson's Trustees.

ROBERT WATSON AND ANOTHER, Pursuers.—*Balfour.*
REV. JAMES ALEXANDER GEORGE AND OTHERS (Watson's Trustees), Defenders.—*Sol.-Gen. Watson—Trayner.*

Expenses—Trustee.—It is a question of circumstances whether testamentary trustees who have unsuccessfully defended the trust-deed in an action of reduction will be allowed their expenses out of the estate.

1ST DIVISION. Lord Gifford, M.

JAMES WATSON, banker in Airdrie, died on 26th April 1873. He left three testamentary writings, (1) a trust-disposition, dated 19th February 1873, in favour of the Rev. J. A. George and other trustees; (2) a trust-disposition, dated 11th March 1873, in favour of different trustees; and (3) a codicil to the deed of 19th February, dated 27th March 1873, by which he revoked the second deed.

The testator's property amounted to about £5100.

He was not married. His nearest of kin were a brother, Robert Watson, and a sister, Mrs Martin. They were beneficiaries to a considerable extent under the first and second deeds, but not at all under the codicil. The first deed contained a bequest of £200 to Jessie Robertson, a servant of the testator, and £150 to her sister, Maggie Robertson. By the second deed these bequests were not materially altered. But by the codicil Jessie Robertson was to receive £1000, Maggie Robertson £500, and other relations of theirs £200. All the deeds contained provisions in favour of the children of a deceased brother, and some legacies for charitable purposes.

Robert Watson and Mrs Martin brought an action of reduction of the codicil, which was defended by the trustees of the first deed. The case was tried before the Lord President and a jury on the issues of (1) no

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deed; (2) impetration by Jessie Robertson. The jury found for the defenders on the first issue and for the pursuers on the second.

When the verdict was applied the defenders moved for their expenses out of the trust-funds. The pursuers opposed the motion.[1]

LORD PRESIDENT.—As I tried this case perhaps your Lordships will expect me to state my impression on this question of expenses. The jury found for the defenders on the first issue, and thus completely negatived the allegation that the testator was incapable of making a deed. Had the verdict on that issue been different, it might have been an important consideration in the question of expenses, that the trustees ought to have satisfied themselves of the testator's capacity. But the verdict on the second issue was in favour of the pursuers, and the jury thereby found that the deed was impetrated by Jessie Robertson.

I am bound to say that the trustees stand perfectly free from any accession to the proceedings of Jessie Robertson, and I may say, further, that the case was a very narrow one, and in every respect a fair case to try. I think therefore that the trustees are entitled to their expenses out of the trust-funds.

I do not think any general rule can be laid down on this subject. If trustees have been accessory to impetrating a deed it is very obvious that that is a ground for refusing their expenses, or finding them liable in expenses. On the other hand, if they have defended the deed in good faith, they will be, as a general rule, entitled to their expenses. But it is more to the purpose to say that every case of the kind depends on its own circumstances. I think that the circumstances here are strongly in favour of the defenders.

LORD DEAS.—I do not think that much turns here on the fact that the defenders were successful on the first issue while unsuccessful on the second; because it is a usual and convenient course to put these two issues before the jury, and the expense is not much affected by that course being followed.

There is no general rule obliging us to find the defenders entitled to expenses on the one issue, and liable in expenses on the other. The whole question of expenses is, on the contrary, a question of circumstances, and to attempt to apply to it any general rule is only calculated to mislead.

I attach, of course, very great weight to the opinion of your Lordship who tried the case, and I am satisfied that, in the circumstances, the trustees were fairly entitled to defend the deed, and ought to get their expenses out of the trust-funds.

LORD ARDMILLAN and LORD MURE concurred.

THE COURT allowed the defenders their expenses out of the estate.

DAVID DOVE, S.S.C.—P. S. BEVERIDGE, S.S.C.—Agents.

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[1] *Authorities quoted.*—Graham v. Marshall, Nov. 22, 1860, 23 D. 41, 33 Scot. Jur. 21; Chalmers' Trs. v. Scott, June 23, 1830, 8 S. 961; Morrison v. Morrison's Trs., Dec. 23, 1848, 11 D. 297, 21 Scot. Jur. 73; Munro v. Strain, June 18, 1874, *ante*, vol. i. 1039.

No. 72.

Jan. 20, 1875. Peebles & Son v. Caledonian Railway Co.

ALEXANDER M. PEEBLES AND SON AND MANDATARY, Pursuers.—*D.-F. Clark—Blair.*
THE CALEDONIAN RAILWAY COMPANY, Defenders.—*Sol.-Gen. Watson—Johnstone.*

Railway—Retention—Carrier—Tolls—Railways Clauses Consolidation (Scotland) Act, 1845, 8 *and* 9 *Vict. c.* 33, *sec.* 90.—The 90th section of the Railways Clauses Consolidation (Scotland) Act, 1845, provides,—"If on demand any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods; or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls payable as aforesaid."

Goods were delivered by a manufacturer to a railway company to be forwarded to his agent, who had accepted bills against the consignment. *Held* that, as against the onerous consignee, the company were not entitled under the enactment above quoted to detain the goods in security of a general balance due to them by the manufacturer for carriage of goods.

Observations on the scope and meaning of the 90th section of the Railways Clauses Consolidation (Scotland) Act, 1845.

Railway—Retention—Carrier—Railway and Canal Traffic Act, 1854, 17 *and* 18 *Vict. c.* 31, *sec.* 7—*Special agreement.*—Goods were delivered for carriage to a railway company, with a consignment-note initialed on its face by the sender, bearing, "the Caledonian Railway Company will please receive the under-mentioned goods, and forward them, subject to the conditions on the back hereof," one of the conditions on the back being as follows:—"That all goods delivered to the company will be received and held by them subject to a general lien for money due to them, whether for carriage of such goods or for other charges, and in case the general lien is not satisfied within a reasonable time from the day when the company first received the goods the same will be sold by the company by auction or otherwise, and the proceeds of sale applied to the satisfaction of such lien and expenses." *Held* that this was not an effectual condition, in terms of the 7th section of the Railway and Canal Traffic Act, 1854, in respect (1) that the condition was not duly signed; and (2) that if the condition was meant to give the company a general lien over the goods for arrears of carriage due by the sender to the prejudice of an onerous consignee it was not just or reasonable.

2D DIVISION. Lord Young. R.

THIS was an action at the instance of A. M. Peebles and Son, paper-merchants, London, against the Caledonian Railway Company, for delivery of a quantity of paper to the value of £184, 15s. 8d., delivered to the defenders on 28th and 30th January 1874 by Robert Philp, paper-maker, Bridge of Allan, to be forwarded to the pursuers in London.

The facts, as ascertained by a proof, are thus stated by the Lord Ordinary:—"Philp is a paper-maker at Bridge of Allan. The pursuer is his agent in London, and sells paper for him on commission, making advances on the consignments by accepting bills. The consignments were made from time to time, according to the actual or anticipated demand, of which Philp was apprised by the pursuer, sometimes to enable the pursuer to implement orders already accepted, and sometimes to be kept in stock with a view to future orders. The consignments of 28th and 30th January referred to on record were made in the ordinary course of business, partly for stock and partly to implement existing orders, two bills for £100 each being drawn by Philp and accepted by the pursuers against the consignments. The bills were returned to Philp accepted on the receipt by the pursuers of the ordinary advice that the consignments had been made and that the goods were on their way, and these bills have been discounted, and are now current. The goods (the bundles of paper

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in question) were, on 28th and 30th January, delivered by Philp to the Caledonian Railway Company (the defenders) at Bridge of Allan, addressed to the pursuer, the contemplated and arranged course of carriage being (as it had always been) by rail to Grangemouth, and then by sea to London in one of Carron Company's steamers. The practice was for Philp to pay directly to the railway company (with whom, by arrangement, he ran an account, payable monthly) the carriage to Grangemouth, and for the pursuer to pay the sea carriage on delivery, charging the same against Philp on settlement.

"The goods in question were detained by the defenders at Bridge of Allan in security of a general balance of £176 due to them by Philp for carriages in November and December preceding, and the question in the case is whether they are entitled to do so against the pursuer.

"A general lien at common law is not maintained. But the defenders say they have such lien in this case,—1st, by express written agreement;* and 2d, by section 90 of the Railway Clauses Act, 1845." †

The Lord Ordinary, on 16th July 1874, pronounced this interlocutor:—"Repels the defences, and ordains the defenders forthwith to deliver to the pursuers the bundles of the paper referred to in the summons, reserving to the pursuers to move for decree for the value thereof in money, should the same not be delivered in obedience to this order: Finds the pursuers entitled to expenses," &c.‡

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* The alleged agreement was thus constituted. Consignment or forwarding-notes were furnished by the defenders to those trading with them in the following terms:—"The Caledonian Railway Company will please receive the undermentioned goods, and forward them, subject to the conditions on the back hereof." A schedule followed for the species and weight of the goods, name of consignee, &c. Upon the back were printed a number of conditions, one of them being:—"10. That all goods delivered to the company will be received and held by them subject to a general lien for money due to them, whether for carriage of such goods or for other charges, and in case the general lien is not satisfied within a reasonable time from the day when the company first received the goods, the same will be sold by the company by auction or otherwise, and the proceeds of sale applied to the satisfaction of such lien and expenses." These notes were filled up and sent along with the goods to be forwarded, a counterfoil being retained by the sender. The forwarding-note sent with one of the parcels of the paper in question was initialed, but on its face only, by Philp's clerk, who had authority to sign forwarding-notes on his behalf.

† "If on demand any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods; or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the monies arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto; or it shall be lawful for the company to recover any such tolls by action at law."

‡ OPINION.—(After the above narrative)—"The questions thus raised, though not, in my opinion, attended with difficulty, are of such magnitude and interest to the mercantile community that it is important they should be so decided as to dispel any doubts which may exist respecting them.

"It is not, as I have observed, maintained by the defenders that carriers have a general lien at common law, but I nevertheless think it not amiss, as preliminary to and having a legitimate bearing on the remarks which I have to offer on the questions presented, to say that I consider it is quite settled in our law that they have not.

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The defenders reclaimed.

Argued for them;—The contract of carriage was entered into between

"The interests of third parties (I refer to consignees) in goods delivered to carriers for conveyance to their destination are such that it is, I think, improbable that a usage for a general lien will ever come to exist, though, if it should, the fact of its general recognition and allowance by the trading community would probably be received as sufficient evidence of its consistence with public policy and mercantile convenience, to induce the Court to receive it as part of the law merchant.

"A common carrier is not at liberty to refuse goods tendered to him for carriage to their destination, or so far on their way thereto as his means of conveyance extends. Further, the delivery of goods to a carrier has much legal significance and effect in creating or perfecting rights in the consignee. In the case of a sale, such delivery may, and generally does, divest the consignor (the seller), and invest the consignee (the purchaser), with the property of the goods; and when there is no transference of property, as in the case of consignment to an agent or factor, a valuable interest may be, and frequently is, created by the fact of such delivery, for the consignee may (as happened in this case) have made advances or accepted bills on the faith of the consignment so soon as delivery to the carrier on his account was notified.

"These considerations are hostile to a general lien in favour of common carriers. Their position is exceptional, particularly in these two respects which I have noticed, viz., first, that on grounds of public policy they are not permitted to refuse to carry goods tendered to them for carriage; and, second, that on similar grounds the delivery of goods to them raises, or may and often does raise, rights with respect to these goods in third parties, in whose favour consequently the law imposes duties upon the carrier, for the performance of which he is directly responsible to them, although not parties to the contract of carriage. In the case of the Scottish Central Railway Company v. Ferguson (February 27, 1864, 2 Macph. 781, 36 Scot. Jur. 385) it was held, and I think on clear grounds, that the consignee of goods, although no party to the contract of carriage, has a right of action against the carrier for delivery.

"But these considerations are not only adverse to a general lien at common law; they also bear on the question of general lien by agreement. The rule, no doubt, is that the absolute owner of goods may make any contract about them he pleases, and so by agreement subject them to lien for a prior debt or general balance, just as he may pledge them to any extent. But, independently of the Act of 1854, which, on considerations of public policy, disallows unreasonable agreements with carriers, I should greatly doubt the validity at common law of an agreement between a carrier and the sender of goods which professed to create a general lien to the prejudice of the consignee, to whom the carrier was legally bound to carry them at the usual rate of carriage. It is, however, unnecessary to dwell upon this view, for I think it clear that such an agreement must be disallowed under the Act as unreasonable. A carrier has a particular lien on every parcel of goods for the carriage thereof, and should he choose to give credit and allow his customers to run an account he has the ordinary legal remedies for recovery of his debt. But he remains subject to the public law, which obliges every carrier to receive and carry goods for the ordinary charge, and it would be unreasonable and detrimental to the interests of third parties and of trade to allow him, on the tender of a new parcel for carriage to a purchaser or other consignee, to exact an agreement subjecting it to a lien for the prior debt of the sender.

"I cannot, therefore, allow the defenders' plea that there was here a general lien by special agreement. I may add that I do not think the agreements founded on are signed agreements within the meaning of the Act.

"With respect to the plea founded on section 90 of the Railways Clauses Act, 1845, I have no difficulty in disallowing it. I am disposed to agree with the view that the term 'tolls,' as used in the clause, is not limited to tolls for the use of the road merely, and tables of which must be exhibited, but extends

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the railway company and Philp, the owner of the paper. Peebles and Son were not the purchasers of the paper; they were the general agents of Philp. The case of Ferguson, Rennie, and Company,[1] merely decided that an agent consignee has a general title to sue for delivery, and this the defenders did not dispute. But it was a different question whether

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to charges for the carriage of goods. But I think the provision does not apply apply to goods with respect to which the law has imposed on the company as common carriers an obligation or duty in favour of a third party, as in the case of goods received by them for carriage to, or so far on their way to, a consignee according to the address. When they have within their premises goods belonging to their debtor, and in which no other has any legal interest, or with respect to which they have incurred no duty or obligation to any other, they may detain and sell them for the carriage of other goods which were removed without payment. This is sufficient to satisfy the provision, without extending it so as to injure the rights of third parties, or annul the company's obligations as common carriers in their favour,—an extension never hitherto, so far as I know, contended for. This is sufficient for the decision. But I must add that I think the clause, so far as it authorises the detention and sale of goods on the premises for tolls due for goods that have been removed without payment, applies only where goods have been improperly, or without the consent of the company, removed before payment of the tolls demanded therefor. The language and provisions of the group of clauses regarding tolls shew that the Legislature contemplated an immediate demand and payment of the tolls exigible for carriages of goods before removal from the company's premises, and that the sharp and summary remedy of clause 90 was intended to apply to cases of evasion, and not to cases where credit was given by contract. At the date of the Act, railway companies had not settled into the position of common carriers which they now occupy, and practice of running monthly or other periodical accounts for tolls was not contemplated in any of the provisions of the Act. In this view I think it is in the power, and according to the duty of the Court, by construction, to restrain the powers of section 90 within reasonable limits, and to refuse to permit them to be exercised under circumstances, or in a manner which would do injustice or inflict hardship not contemplated by the Legislature. When a railway company has, by agreement (or otherwise), deliberately allowed a customer to run an account and get largely into their debt for carriages, it would, in my opinion, be unreasonable and unjust, and not according to the true intent and meaning of the Act, to permit them to detain and sell goods subsequently handed to them for carriage to the persons to whom they were consigned in the ordinary course of trade.

"It is so important that the law on the several points to which I have adverted should be settled one way or other that I have stated my opinion and the grounds of it at a length somewhat disproportioned to any difficulty which I have experienced. The result may be summarised in these propositions:—First, That common carriers have not a general lien at common law. Second, That a common carrier is bound to receive goods for conveyance at the ordinary rate of carriage, and is not entitled to refuse to receive them except on the condition of the sender agreeing to subject them to a general lien for his debts to the carrier. Third, That with respect to goods consigned to third parties in the ordinary course of business, and delivered to a carrier for conveyance, an agreement between the consigner and the carrier that they shall be subject to a general lien for the debts of the former to the prejudice of the interests of the consignees must be disallowed as unreasonable under the Act of 1854. Fourth, That when a railway company allows a customer to run an account for carriages, they are not warranted by section 90 of the Railways Clauses Act to detain and sell for any debt due on such account goods which the customer has delivered to them as common carriers for conveyance to persons to whom they have been consigned in the ordinary course of business."

[1] Scottish Central Railway Co. v. Ferguson, Rennie, and Co., Feb. 27, 1864, 2 Macph. 781, 36 Scot. Jur. 385.

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he took the goods free of all liability attaching to them in the person of the consigner. The paper was the property of Philp, and the defenders were entitled to retain it in security of the arrears due by him for carriages, both under the special agreement constituted by the consignment note, and under the statute founded on. Although a more limited sense had been given to the word "tolls" by the Court of Exchequer in England in the case of Wallis,[1] the Court of Session, in the case of North British Railway Company v. Carter,[2] assumed as not doubtful that the term included dues payable to the company as common carriers.

At advising,—

Lord Justice-Clerk.—The questions raised under this reclaiming note are of very considerable importance. The action is brought by Messrs Alexander Peebles and Son, who are paper-merchants in London, and it appears from the proof that they acted as consignees and agents for the sale of paper manufactured by Robert Philp, paper-maker, Bridge of Allan. The course of dealing, as explained by Mr Peebles, was that the London agents sold in their own name to customers, sometimes out of stock transmitted by Philp, and sometimes in anticipation of consignments of paper to be sent, crediting Philp in either case with the price received, charging their commission against the manufacturer. Philp was in the habit of drawing on his consignees against consignments either already made or in anticipation of those which had been ordered.

Without going into the proof, which is clearly summarised in the Lord Ordinary's opinion, it seems sufficiently clear that Philp had drawn on the pursuers for the two parcels of paper in question to the extent of £200, and that these bills had been accepted by the consignees before delivery. These parcels of paper were delivered on the 28th and the 30th of January 1874 to the defenders the Caledonian Railway Company, addressed to the pursuers, the consignment note bearing that they were to be forwarded to A. M. Peebles and Son, by Carron Company's steamer to London, from Robert Philp. There is no doubt that the company undertook to deliver on board the Carron Company's steamer, at Grangemouth. Philp sent the invoices to the pursuers, and advised them by post that the goods had been sent. The company received the goods, but they did not forward them, claiming a right to detain them in liquidation of an unpaid balance on general account alleged to be due to them by Robert Philp. The account in question is produced, and contains a record of transactions extending over several months, and amounts in all to £176, 0s. 7d., being charges for goods carried on his account. The question is whether this claim for retention and liquidation is good against the pursuers.

In regard to the position of the pursuers, I am of opinion that they are onerous consignees,—that Philp was under an onerous obligation, in respect of their advances, to deliver goods to them to the amount which these advances covered, and that this obligation was duly fulfilled by Philp, by delivery to the railway company, as carriers, of the parcels in question. From the date of delivery to the defenders the goods were at the disposition of the pursuers for the purpose of the consignment, they paying the charges incident to the carriage. It is im-

[1] Wallis v. London and South-Western Railway Co., Jan. 17, 1870, L. R. 5 Exch. 62.

[2] North British Railway Co. v. Carter, July 15, 1870, 8 Macph. 998, 42 Scot. Jur. 611; see also Guild v. Caledonian Railway Co., Nov. 20, 1874, *ante*, vol. i. p. 198.

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material in this question whether the consignees were proprietors or not, seeing that they were consignees for value. If they had sold by anticipation,—Mr Peebles explains that he cannot precisely tell whether it was so or not in the present instance,—they might be held to be substantially in the position of buyers. But that is immaterial.

It is certain that the railway company, as public carriers, had no right at common law to retain these goods in liquidation of a general balance due by Philp. But the claim is maintained on two grounds,—1st, that the goods were delivered subject to certain conditions endorsed on the back of the consignment note, one of which bears, "Art. 10. That all goods delivered to the company will be received and held by them subject to a general lien for money due to them, whether for carriage of such goods or for other charges, and in case the general lien is not satisfied within a reasonable time from the day when the company first received the goods, the same will be sold by the company by auction or otherwise, and the proceeds of sale applied to the satisfaction of such lien and expenses." It is said that the goods were delivered on this condition only, and the plea is founded on the terms of the Railway and Canal Traffic Act, 1854, cap. 31, sec. 7.

This section requires, first, that to make such conditions effectual they must be signed by the customer, and, secondly, that they must be such as the Court shall adjudge to be just and reasonable.

In regard to the first of these requisites I am of opinion that the initials of the clerk adhibited to the consignment note is not a subscription in terms of the statute, and in regard to the second that the condition is not in itself just or reasonable. It is an attempt to introduce by convention not only a general lien for a general balance, but in addition a right of distraint and sale without judicial authority to enforce these conditions against consignees. I agree with the Lord Ordinary in his observations on this head. It is inconsistent with the ordinary duties of carriers, and plainly adverse to the public interest, that the carrier having undertaken to carry and deliver the goods as addressed can convert his contract into one of pledge, as here, for an illiquid balance arising out of prior transactions. The case of the Scottish Central Railway Company against Ferguson, Rennie, and Company[1] seems to be conclusive on this head.

The second ground on which the defence is founded rests on the 90th section of the Railway Clauses Act, and raises some considerations of great public importance. That section is as follows:—"If on demand any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods; or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls payable as aforesaid."

It has been found in England, in the case of Wallis, that this clause only applies to tolls due for the use of the line. Had the case turned on this question I should have been anxious to have had further argument. My first impression was that that judgment could not be supported. The reverse was

[1] Scottish Central Railway Company v. Ferguson, Rennie, and Company, Feb. 27, 1864, 2 Macph. 781, 36 Scot. Jur. 385.

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certainly assumed in the recent case of Carter[1] in the First Division, and has been very elaborately maintained by Lord Shand in the case of Guild v. The Caledonian Railway.[2] But although I think the judgment by the English Court is placed on very narrow ground, when rested on the meaning of the word "tolls," I wish to reserve my opinion as to the scope and construction of this clause. The clause does not appear to me intended to create any lien between carrier and customer, but to create a right of retention and sale between the owners of the railway and the carrier using it. It was intended to give the owners of the line a right against the carriages and goods of the traders carrying their own goods along the line, or common carriers using the line to carry the goods of others, and that for payment of the tolls due for the use of the line. The right is incident to the contract of hire, not to the contract of carriage; and when the company become themselves common carriers, I doubt if the section applies. It certainly would not, as far as I see, without something in the special Act, give any such claim to a railway company running over the line of another company, and I do not think it was meant to regulate the relations of carrier and customer at all.

But the words are general, and certainly ambiguous, and assuming that they have the construction contended for by the defenders they have two important qualifications. The primary right created by the clause in any view of it is to enable the owners of the line to retain carriages or goods for payment of the dues of carriage for which they are liable at common law, and also to sell without judicial authority after a demand has been made. This last power is of course a stringent and important privilege. But as regards goods other than those the tolls on which are in arrears, these are only subject to the terms of the clause, first, provided the goods primarily liable have been removed from the company's premises, and, secondly, when they are the property of the debtor.

It is thus seen that the clause does not introduce a general lien for a general balance over any goods in possession of the company belonging to the debtor. The lien is, in the first instance, special over the goods, the carriage of which is unpaid; and it is only in the event of their being removed that the company can have recourse to other goods within the company's premises. The Lord Ordinary thinks that these words refer to improper or surreptitious removal. This is perhaps stating the proposition too broadly. I think it also includes the case of carriages and goods necessarily removed from the custody of the company, owing to the nature of the service required. But I doubt greatly if this substituted or accessory lien will ever emerge, if possession is voluntarily parted with, without demand for the tolls, and much more if delivery be voluntarily made on an established course of credit, by which payment of the debt is conventionally postponed. A specific lien is discharged by credit being given for the debt; and though it may revive when the period of credit expires, if the subject of it remain in the possession of the creditors, yet if possession be voluntarily parted with it is absolutely extinguished.

I have thought it right to indicate these views, because they seem very material on the construction of this clause, and would certainly prevent rail-

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[1] North British Railway Company v. Carter, July 15, 1870, 8 Macph. 998, 42 Scot. Jur. 611.

[2] Guild v. Caledonian Railway Company, Nov. 20, 1874, *ante*, vol. i. p. 198.

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way companies, which act as common carriers, combining a system of giving credit for their tolls with this substituted right of lien. But even supposing that the clause is to be construed as the defenders contend for, the ground on which I wish to place my judgment, coinciding as I do in the result at which the Lord Ordinary has arrived, and in his forcible exposition of the views by which he reaches it, is that these bales of goods could only be dealt with by the railway company as the property of their debtor, subject to the onerous right acquired in them by the consignee. The pursuers had an absolute right to delivery in any question with the carriers, whatever the right of the latter might be, if they were only in a question with their debtor; and holding that the goods were not the property of the debtor in the sense of the statute, I think the case must be decided on the same principle and in the same way as the analogous case of Ferguson[1] to which we have been referred.

LORD NEAVES.—I entirely concur in the opinion expressed by your Lordship. The law of Scotland proceeds reasonably in all matters relating to the delivery of moveable goods. When they are in possession of the seller or the person giving them in pledge, the proper mode of completing the transference is by corporal delivery of the articles, the principle being that the new party must be brought into the same relation to the goods transferred in which his author stood. Where the goods are not in possession of the first party but in the hands of a custodier, the law does not require actual delivery to the buyer or pledgee to complete the transference. The principle is still the same. What is required is, that the custodier shall be placed in the same relation to the new party as he stood to his author. We were familiar with this principle long before the days of railways in the case of bills of lading. The transference of the bill of lading operates as a complete transference of the cargo. In the same way with regard to land carriage, when goods are put into the hands of a carrier with a document setting forth that they are to be delivered to another party, if there is a substantial contract between the sender and the consignee for the purpose of creating a real right in the goods in the latter, that new right is completed, whether it be the right of a purchaser or of an agent making interim advances upon the goods. These principles ought not to be interfered with except upon the best grounds.

In the present case a manufacturer sends paper to his London agent. No doubt, if it turns out that there is no onerous contract between the parties, that the agent is coming under no obligation in regard to the paper, that may give the railway company right to deal with the consignee as with the principal. But this must be clearly proved. In transactions of this kind onerosity is presumed. We are bound not to injure the right of the consignee, unless there be clear ground to entitle the company to detain the goods in a question with the consignee, particularly where the detention is attempted, not merely for the carriage of that particular parcel, but for arrears due by the sender.

The grounds founded on by the company are, in the first place, the indorsement on the consignment note. To this there are more answers than one. I do not think that the signature complies with the statute in any way. The Legislature intended that the signature should be adhibited with some degree of solemnity. But, however well signed, I think the condition is not just and

[1] Scottish Central Railway Company v. Ferguson, Rennie and Co., Feb. 27, 1864, 2 Macph. 781, 36 Scot. Jur. 385.

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reasonable if it is to act in prejudice of an onerous consignee. I do not think that an article received for carriage to a particular party named and designed should be subject to retention for the debt of another party. The first thing that the company here do, having received the article for the purpose of carrying and delivering it to a certain party, is to refuse to carry it. They propose not to give it back, but to sell it, it may be, on very short notice.

Then comes the question in regard to the Railways Clauses Act. I concur with your Lordship in the doubts which you have expressed as to the meaning and scope of the word "tolls." I am of opinion that to this case the 90th section does not apply. I think that section only confers upon the company the common law right of special lien, with the addition of a power of sale at their own hands, instead of having to apply to the Sheriff for a warrant, and with this further addition, that if by some accident a particular article be removed without payment of carriage, the company shall have recourse against the next article belonging to the party that comes into their hands. The section cannot apply to a case where the parties deal on the footing that there shall be no lien. In any view, all that the company can take in lieu of the articles removed is something belonging to their debtor. I cannot hold that this article belongs to their debtor, subject as it is to a real right on the part of an onerous consignee. The company are not entitled to extend their lien to the prejudice of one who has a *jus quæsitum* in the article.

Lord Gifford.—I am of the same opinion. It was not contended for the defenders that a carrier has at common law anything but a special lien over the particular goods conveyed for the carriage of the same. It is quite clear that at common law, and apart from statute and from special contract, a carrier has no general lien. The Caledonian Railway Company, however, maintain two points, 1st, that a general lien was conferred by statute, and 2d, that such general lien has been conferred by special contract.

The statute founded on is the Railway Clauses Consolidation Act of 1845, sec. 90. I concur with your Lordships that it is not necessary to determine whether the word "tolls" applies to the charges for carrying all goods put into the hands of the railway company as common carriers. I concur with the Lord Ordinary, and notwithstanding the case of Wallis,[1] I think it does. But the province of the statute certainly does not cover a case like the present. It only enables the railway company to detain goods which are the property of their debtor. The words are that the railway company "may detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls." Now, I think it clear that the goods in question could not be said to be the property of the debtor. It was conceded that if the goods had been the subject of an ordinary contract of sale they could not have been detained for a debt due by the seller; and I do not think that the case is different where the consignee, instead of buying the goods, has made advances upon them, In both cases delivery to the carrier is delivery to the consignee, so far as the consignee is interested in the goods either as purchaser or as pledgee.

The only other ground maintained for the defenders was the condition

[1] Wallis v. London and South-Western Railway Company, Jan. 17, 1870. L. R. 5 Exch. 62.

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printed on the back of the consignment note. The question only arises as to one parcel, for one consignment note only can be held to be signed at all. I agree with your Lordships that even this note is not signed in the sense of the Railway and Canal Traffic Act. The conditions themselves must be signed, and not merely referred to as existing elsewhere, and although there may be cases where the signature on one side of the same piece of paper may be held as affixed also to what is printed on the back, I do not think that is the case here. The initials on the face of the consignment note can hardly be held as a statutory signature of the conditions on the back. But even if the conditions are to be held as signed, I agree in thinking that they are not just and reasonable. Still further, I think that the words of the condition are not sufficient to cover goods in which the consignee has a real right. It is stipulated, or attempted to be stipulated "that all goods delivered to the company will be received and held by them subject to a general lien for money due to them;" but it fails to define to whom the goods belong. It cannot mean that goods belonging to one man shall be subject to a lien for the debt of another.

LORD ORMIDALE was absent at the debate.

THE COURT adhered.

JOHN LATTA, S.S.C.—HOPE, MACKAY, & MANN, W.S.—Agents.

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Jan. 22, 1875.
Anderson v. Hamilton and Co.

WILLIAM ANDERSON (Watson and Campbell's Trustee), Pursuer.—*D.-F. Clark—Balfour.*
WILLIAM HAMILTON AND COMPANY, Defenders.—*Sol.-Gen. Watson—J. Guthrie Smith.*

Bankrupt—Trustee—Power to implement or cancel Bankrupt's Executory Contracts—Current Contract—Delectus Personæ—Mora.—A firm contracted to supply shipbuilders with iron for certain vessels which were to be built, and had partially implemented the contract, which was a beneficial one for them, and was daily becoming more so, when they became insolvent. The day after the insolvency the shipbuilders wrote cancelling the contract. Two days afterwards the firm's manager wrote asking for time to make arrangements. Twenty-six days after the insolvency the trustee on the sequestrated estate wrote offering to go on with the contract or to come to terms upon which it might be cancelled, which offer was refused. In an action for damages at the instance of the trustee, *held* that, without deciding whether the contract was one which the trustee could competently have taken up as not involving *delectus personæ*, in the circumstances he had not declared his option to go on with the contract *tempestive*, and that the shipbuilders were not liable in damages.

Question, whether the contract was one that could competently be taken up by the trustee and creditors?

2D DIVISION. Lord Young. R.

ON 4th December 1873 Watson and Campbell, iron merchants in Glasgow, through their manager, applied to William Hamilton and Company, shipbuilders, Port-Glasgow, for an order. Hamilton and Company informed them that they expected to get an order to build certain vessels, and that they would take the iron for such of these vessels as they might get orders for.

The following missives then passed:—"Messrs Wm. Hamilton and Co., Port-Glasgow.—Glasgow, 4th Dec. 1873.—Dear Sirs,—We have to-day sold you say 2000 tons, more or less, as you may require, best ship plates and angle iron, to your specifications, at the sum of £13 p. ton overhead, also all filling and stanchion iron required for the above quantity of angles and plates at the sum of £12, 10s. p. ton overhead, all delivered

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at your works, payable on the following conditions:—Payments to be made after the completion of each specification ('which we guarantee to be delivered *in seriatim*'), on the first cash day of the second month following completion of said specifications.—Yours, &c., pro WATSON & CAMPBELL, J. C. STEEL. All iron to be delivered not later than six weeks after receipt of specification.—(Initld.) pro W. & C., J. C. S." On the same day Hamilton and Company addressed to Watson and Campbell a letter, in which they said:—"We have your sale-note of even date for plate angles, &c., which we hereby accept."

Watson and Campbell subsequently delivered a portion of the iron thus contracted for, but on 13th March 1874 they became insolvent. On 13th March Hamilton and Company had written to them demanding an assurance that the iron would be duly delivered, and having received no answer, they, on 14th March, wrote cancelling the contract.* The estates of Watson and Campbell were sequestrated on 17th March, and William Anderson, C.A., Glasgow, was appointed judicial factor on the estate. Mr Anderson was afterwards elected trustee in the sequestration on 27th March, and his election was confirmed by the Sheriff on 30th March.

Anderson, as Watson and Campbell's trustee, and with the consent of the commissioners on the estate, raised, on 12th May 1874, this action against Hamilton and Company for £4000 as damages incurred through the defenders not taking delivery of iron under the contract.

The pursuer averred;—(Cond. 7) "On 19th March 1874, the pursuer, as judicial factor foresaid, addressed to the defenders a letter in the following terms:—'Gentlemen.—Watson and Campbell.—Yours of the 17th inst., addressed to this firm, has been handed to me. I am not aware that there has been any delay in the execution of your contracts, and I cannot accept your notice of cancelment.' To this letter the defenders returned no reply." (Cond. 9) "After receiving the act and warrant of confirmation in his favour, the pursuer, of date April 8, 1874, addressed to the defenders a letter in the following terms:—'Gentlemen.—Watson and Campbell's sequestration.—As trustee on this estate I am prepared to complete the contract entered into between you and this firm on 4th December last for plates and angles; or, if you prefer it, I am prepared to arrange the terms on which I can cancel the contract.' Notwithstanding of this, and the previous offers of due fulfilment on Watson and Campbell's part of the said contract, and that such fulfilment would have been duly given, the defenders have persisted and still persist in their refusal to take delivery of the iron contracted for, and have thus been guilty of a breach of the said contract."

The defenders pleaded;—(1) The contract founded on being for continuous deliveries of iron over a lengthened period the defenders were entitled to rescind it on the insolvency of the sellers, and their failure timeously to make and intimate satisfactory arrangements for its being carried on. (2) The bankrupts not being ready and willing to deliver the said iron at the time of their failure, and having acquiesced in the defenders' proposal that the contract should be abandoned, the defenders were thereby discharged from all liability. (3) The pursuer having failed within reasonable time to intimate to the defenders that he was prepared to implement the contract, the defenders are no longer bound thereby. (4) The pursuer was not entitled, after the time for implement of the first specification had elapsed without its being implemented, to insist on the contract being carried on. (5) The defenders, not being bound by the terms of the said contract to take more iron than they might ask to be delivered, are not liable in damages.

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A proof was allowed.

The parties admitted that specifications for iron had been sent to Watson and Campbell by Hamilton and Company on 24th and 26th February 1874, and on 7th, 9th, and 10th March 1874, the quantities ordered being respectively 80 tons, 11 tons, 4 cwt., 40 tons, and 9 tons—in all 140 tons 4 cwt. They also admitted that Watson and Campbell had, by 13th March (the date of the insolvency), delivered 51 tons of the 80 tons ordered on 24th February, 4 tons of the 11 tons ordered on 26th February, the whole 4 cwt. ordered on 7th March, and no part of the 49 tons ordered on 9th and 10th March. The quantity thus admitted to have been delivered was 55 tons 4 cwt., leaving 85 tons still to be delivered.

It was also admitted that between the date of the contract and 14th March 1874 the price of iron had fallen £1 per ton, and by the date of the action £2 per ton, and had still continued to fall from that date, the contract thus being a beneficial one for Watson and Campbell.

From the proof which was led it appeared that Messrs Hamilton had agreed to take, and Watson and Campbell to supply the iron, in the expectation that the shipbuilders would obtain orders for four steamers and a sailing vessel, and that the amount of iron in the contract (2000 tons) was the quantity which they calculated would be required for these vessels.

Hamilton and Company did obtain an order for steamers, which they were bound to supply respectively on 7th November 1874, 14th February 1875, and 14th May 1875, under the penalty of paying, as liquidated damages for delay, a sum at the rate of 7½ per cent on the advances made for the time being to them, and on £3000 deposited under the contract.

Hamilton and Company stated on record and in evidence that although Watson and Campbell had supplied them with a certain amount of the iron under the contract the iron so supplied was not delivered *seriatim* so as to be capable of being used for the building of the steamers which had been commenced, and that in consequence the work in their shipbuilding yard had been brought to a standstill.

It appeared that they had frequently written to Watson and Campbell complaining of the inconvenience they were suffering and the risk of heavy penalties they were incurring owing to the delays caused by the irregular delivery of the iron under the specifications. In particular, on 13th March they wrote that unless they were assured by the next day that the rest of the iron already ordered was to be delivered within a week they would need to put the contract into the hands of other parties. To this they received no answer, and accordingly on 14th March wrote as follows:—"Dear Sirs,—Not having heard from you in reply to ours of yesterday, we now beg to intimate that we are compelled to cancel our contract for iron with you of date 4th December '73, as we are compelled by contract to deliver our ship within a limited time under a heavy penalty. We are exceedingly sorry that you are unable to carry out the contract, as it will put us to great loss and inconvenience through the detention which will be caused by putting the specification into other hands."

To this letter Watson and Campbell's manager replied, by the instructions of Anderson:—"16th March 1875.—Gentlemen,—Yours of 14th inst. to hand. We must ask you to keep our contract with you on your books for a few days longer, till we get the necessary arrangements made for its fulfilment. We hope to write you definitely on the subject in a day or two."

To this Hamilton and Company replied:—"17th March 1874.—Dear Sirs,—In answer to your note of yestdy., we were obliged to cancel our contract and place our specifications in other hands. From the uncertainty of your business we could not wait any longer, as we are bound under heavy penalty with the ship."

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Anderson produced his letter-book at the proof in support of his statement that he wrote on 19th March the letter quoted in the condescendence, *supra*, in answer to the above letter.

Hamilton and Company, however, denied that they had ever received this letter, and no trace of it was to be discovered in their office.

Afterwards, on 8th April 1874—the day after the six weeks from the date of the first specification on 24th February expired—Anderson wrote the letter quoted in article 9 of the condescendence, *supra*, p. 356.

In answer to this Hamilton and Company referred him to their letters of 14th and 17th March above quoted.

Anderson thereafter raised this action. It appeared that he had never informed the general body of the creditors of the existence of the contract, and had not therefore been instructed by them to continue to supply the iron.

The Lord Ordinary, after a proof, pronounced this interlocutor:—"Assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuer liable in expenses, and remits," &c.*

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* "NOTE.—The pursuer, as trustee in the sequestration of Watson and Campbell, seeks to recover damages from the defenders for breach of the contract contained in the missive offer and acceptance quoted in article 1 of the condescendence.

"The contract was made with the bankrupts, and it is not alleged that there was any breach on the part of the defenders prior to the bankruptcy. The alleged breach on which the action is founded consists in the refusal of the defenders to go on with the contract after the pursuer's letter of 8th April (quoted in article 9), wherein he expressed his readiness to complete it, and their adherence to their determination to cancel notified to the bankrupts on the 14th and again on the 17th March.

"The defenders contend that they were entitled to cancel the contract on 14th March, and that at all events on 8th April, when the pursuer intimated his election to adopt the contract, they were no longer bound to proceed with it. The pursuer disputes this, and so the main question in the case (for there is a subsidiary question) arises.

"The defenders are iron shipbuilders in Port-Glasgow, and the contract may, for the purposes of the question which I have stated, be represented as made by them with the bankrupts, who were iron merchants in Glasgow, for the iron that might be required to build certain ships for which at the date of the contract they expected (and in the event obtained) orders. This fact, which is clear on the evidence, and was in the knowledge of both parties, explains the language of the missives, and enables the Court to read and understand them as the parties did. It appears that the defenders expected orders for five ships, and that the quantity of iron stated in the missives was the quantity which the parties thought would probably be required for that number, but that in the result they got orders for only three ships. This is important with reference to a subordinate question in the case, but is immaterial to that which I have represented as the main question. It could not be accurately known how long it would take to build the ships, and the views of the parties regarding the period over which the execution of the contract would extend must therefore be taken as only matter of reasonable judgment. From the defenders' statement and evidence it appears that, according to the building contracts as afterwards made, the last of the ships was to be delivered on 14th May 1875, which would give the iron contract a currency of about eighteen months from its date—the supplies of iron under it to be furnished as required during that time.

"Between 24th February and 10th March the defenders specified for, i.e. required to be supplied with, 140 tons of the iron contracted for, and received from the bankrupts 55 tons, leaving their specification unfulfilled to the extent of 85 tons. It is the import of the evidence, in my opinion, that the specifications were not fairly answered, and that the defenders suffered considerable in-

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Argued for him;—(1) On the general question of law involved.—Bank-

convenience and detriment in their business in consequence. But although I think the defenders were entitled to complain, as they did, of a failure on the part of the bankrupts to furnish them with the supplies which they had repeatedly and urgently required, I am not of opinion, and did not understand it to be contended, that the failure prior to the public stoppage of the bankrupts was such as to entitle the defenders to cancel the contract.

"The stoppage of the bankrupts became publicly known on 13th March, and the defenders having received no reply to their communications of 12th and 13th March, pressing for deliveries, wrote to them on 14th cancelling the contract. On the 16th the bankrupts wrote to the defenders requesting them to keep the contract on their books for a few days longer, till they should get the necessary arrangements made for its fulfilment, which, by letter of the 17th, the defenders declined to do, intimating that they had placed their specifications in other hands. The sequestration was awarded on that day, 17th March.

"Regarding the case as at this date—that of the sequestration—the question occurs, whether or not the defenders were then entitled to cancel the contract. They contend that it was important to their business that they should have a contract on which they could rely for due supplies of the iron required for the ships which they had in hand, and that the contract which they made having failed by the stoppage and bankruptcy of the contractors they were at liberty to make a new one with a responsible party, and were not bound to delay in order to see what might be the views of the trustee or the creditors of the bankrupts, as to the expediency of taking up the contract for the benefit of the estate. To have done so would, they say, have been not only to go in the meantime without the iron which they immediately required, but to take upon themselves the risk of an unfavourable change in the iron market, which is exceedingly uncertain. For although the market was then falling, it might immediately rise, in which case (as the trustee and creditors would then certainly decline to take up the contract) they would be under the necessity of making a more unfavourable contract than it was in their power to make at the date of the failure.

"The pursuer answered that he, as trustee, was entitled to exercise his judgment with reference to the current contracts with the bankrupts, and to take up such of them as he thought advantageous for the estate; that the contract in question was subsisting at the date of the sequestration, the failure of deliveries prior to that time not having been such as to entitle the defenders to cancel it; that the bankruptcy did not itself cancel the contract, and that after his letter (as judicial factor) of 19th March, he was entitled to a reasonable time to exercise his option, which he did, without undue delay, on 8th April, when he notified his readiness to fulfil the contract. He admitted that the bankrupts had no iron, and that he had none, but said he was prepared to procure it in the market at the cost of the estate under his charge. It did not appear that the creditors had been consulted, or that the trustee had any authority beyond that conferred on him by the Bankrupt Act.

"My opinion is in favour of the defenders' contention, and against that of the pursuer.

"It appears from the evidence that at the date of the bankruptcy iron was lower than at the date of the contract, and that the market was falling, and continued to fall for some time. This circumstance exposes the defenders to the remark that it was their interest to get free of the contract. But I am not of opinion that their conduct ought on that account to be regarded by a Court of law with disfavour or suspicion. The exigencies of their business required that they should make themselves secure of supplies of iron sufficient to build the ships for which they had contracted, and the building of which was to extend over a period of about fifteen months from the bankruptcy of Watson and Campbell. Their iron contract was an important matter, and might well make all the difference between profit and loss on their building contracts; and with

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ruptcy did not of itself necessarily rescind a contract. Contracts were habitually taken up by trustees and creditors. A trustee so taking up a a market so sensitive and so liable to be affected by speculators as the iron market the delay of a few weeks or even days might have been ruinous. The rule governing their rights in the circumstances in which they were placed by the bankruptcy of Watson and Campbell must, I think, be founded on considerations more certain and satisfactory than the momentary condition or probable prospects of the iron market.

"With respect to the right of a trustee in bankruptcy to adopt advantageous contracts made with the bankrupt, and to enforce their execution for the benefit of the estate, I did not understand it to be disputed. But it exists within limits, and without attempting to express and guard a rule on the subject for general guidance, but confining my attention to the particular case, I venture to doubt whether it is according to the right and duty of a trustee in bankruptcy to involve the estate in the risk of a contract of so speculative a character, and having so long currency as that now before the Court. It was not capable of immediate execution with a certain or ascertainable amount of gain or loss, but extended over the period necessary to build the ships, and was to be implemented according to specifications furnished as the work proceeded. He may possibly have found an iron merchant willing to take it over at a premium. But a contract by a shipbuilder for materials, and extending over a period of time, implies confidence in the contractor, and when he is disappointed by the bankruptcy of the party whom he selected I think he is clearly not bound to submit to a sale of the contract by the trustee, to the effect of making his supply of materials for a considerable time dependent on a party not of his selection, and in whom he may have no confidence. Nor is he bound, in my opinion, to accept of the security of the bankrupt estate for the fulfilment of a contract having a tract of future time. To fulfil or secure the fulfilment of such contracts is beyond the scope and purpose of sequestration in bankruptcy, which is realisation and distribution. These considerations are inapplicable to the case of a contract which is capable of immediate execution. In that case the estate, on the one hand, is involved in no speculation by the adoption of the contract, and the party, on the other, is exposed to no hardship or risk, for he obtains immediately and certainly what he contracted for. To cases of this class, therefore, I should be inclined to say, generally, that the right and duty of the trustee to adopt apparently advantageous contracts is limited, though I am indisposed to lay down any rule going beyond the exigencies of the case in hand.

"But whatever opinion may be formed regarding the right of the trustee to adopt the contract, there is and can be none as to his right to repudiate it. The estate might be liable to make good any damage, though, for reasons which it is unnecessary to state, I think this more than doubtful; but the trustee was clearly at liberty to refuse implement, and assuming (contrary to my opinion) his right to bind the estate to give implement, it would have been a strong proceeding on his part to do so without consulting the creditors and obtaining their authority. This suggests the question, how long were the defenders to wait or abstain from protecting what I must regard as their legitimate and reasonable interests by a new contract. The pursuer's answer must be—at least till the 8th of April, for that is the date of his letter announcing his election to adopt the contract. In other words, the pursuer's contention is that the defenders, who had only received about the half of the iron specified for in February (55 out of 91 tons), and no part of that specified for on 9th and 10th March, were bound, on being informed that their contractors had publicly stopped payment, to allow the matter to stand over for three or four weeks longer to allow him as trustee to judge whether or not he would take up the contract for behoof of the creditors. But by that time the market might have so risen that he would certainly or probably have elected otherwise than he did, and left to the defenders the whole loss of the rise, with only a claim (I think a very problematical one) for a dividend on its amount. I do not think that the law on the subject is such as to expose a party to the risk of being placed in such a position.

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contract became the contractor, as if he himself had made the original contract and bound himself personally, and could not rescind the contract

I should have thought the 8th of April too late even for an actual tender of delivery under the specifications of February and March; but it may not be immaterial to remark that the pursuer never tendered delivery, and in fact had no iron to tender. The bankrupts were possessed of none at the date of the sequestration, and the pursuer had, in the exercise of his undoubted right, cancelled their current contracts with ironmasters. All he did or could do on 8th April was to express his willingness to take up the contract with the defenders as a promising speculation for the estate, and for that purpose to go into the market as a purchaser on account of the estate.

"I am therefore of opinion that the defenders acted according to their right, and with no undue disregard of the rights of others, when they cancelled the contract on 14th March, and made a new contract with another party. Further, assuming that cancellation to have been premature, and that the trustee was at liberty to adopt the contract (both of which assumptions are contrary to my opinion), I think the trustee's letter of 8th April came too late, and that then, at all events, the defenders were entitled to decline to be longer bound by the contract.

"I may refer to the opinion of the Judges in the case of Kirkland v. Cadell, 9th March 1838 (16 S. 860), for some important observations generally to the effect that the primary duty of a trustee in bankruptcy is to ingather and distribute the estate, and that he is neither bound nor entitled to adopt the undertakings of the bankrupt 'having a tract of time,' or to carry on any such undertaking as a speculation for behoof of the creditors.

"The importance of this topic in the present case is not, of course, that the defenders were concerned with the interests of the creditors or the duty of the trustee as in a question with them, but that they were entitled to take immediate measures for the protection of themselves and the interests of their business, on the footing that their contract with the bankrupts was not such as the trustee would, in the ordinary course of his duty, take up and bind the estate to fulfil. With the opinion which I entertain I must approve of and uphold their conduct, proceeding on this view of the matter.

"According to the opinion which I have formed on the main question, the defenders are entitled to absolvitor, and it is unnecessary to decide any question which bears only on the amount of damages. But a subordinate question of this character having been raised and argued, I think it proper to express my opinion upon it. It regards the construction of the contract with respect to the quantity of iron contracted for. The pursuer contends that the contract imports an absolute sale of 2000 tons or thereby of plates and angle iron, with the filling and stanchion iron required for that quantity of plates. The defenders, on the other hand, contend that the bargain was conditional on their obtaining contracts to build all or one or more of five ships (four steamers and a sailing-vessel) which they had in prospect, and was only for so much iron as might be required for the execution of these contracts, or such of them as they should obtain. The dispute must, of course, be decided upon a just construction of the missives when read in the knowledge of the facts proved to have been known to and in the view of the parties when the missives were written and exchanged. Evidence of such facts is generally admissible with a view to the construction of such missives, and the language of those in question being such as, in my opinion, to require it in order to enable the Court to read them as the parties certainly or probably did, I admitted the evidence, although objected to by the pursuer. The parties between whom the contract was made agree in their evidence as to these facts, and reading the missives, with the light thereby thrown on them, I have experienced no difficulty in adopting the construction of the defenders.

"The three steamers for which the defenders obtained contracts required, according to the evidence, about 1050 tons of plates and angle iron, together with about 105 tons of filling and stanchion iron.

"In my view these quantities are to be taken as the limit of the contract, according to which damages for breach, if held to be due, must be estimated."

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if he had once elected to go on with it.[1] When a contract was adopted in this way it was not the insolvent estate that was bound, it was the trustee personally, and the creditors as cautioners. The rights of the other contracting parties were thus preserved intact, and they were under no hardship. The only exception to the general rule was not as laid down by the Lord Ordinary that a contract extending over a tract of time could not be taken up, but that one involving *delectus personæ* could not competently be executed by a trustee. (2) On the special character of this contract.—This was not a contract involving *delectus personæ*. Neither was it a contract for any particular brand of iron. The subject-matter of the contract was simply a marketable commodity which could be bought from any one. (3) There was no breach of contract on the part of the trustee or the bankrupt, but only on the part of the shipbuilders, who had at their own hands, on 14th March, cancelled the contract. After that letter had been received it was unnecessary for the bankrupts or their trustee to go on fulfilling the contract. The defenders would not have taken delivery. They had repudiated the contract, and not being, in the circumstances, entitled to do so, the present claim for damages arose. Up to the 14th of March the iron had been delivered under the contract by the bankrupts in the proper way.

Argued for Hamilton and Company;—Although bankruptcy did not, *eo ipso*, rescind every contract, it altered all contracts to the extent that notice of the intention of the trustee and creditors to fulfil the contract in full must be given to the other contracting party, and for the reason that he could not compel fulfilment.[2] When this notice was not given the practical conclusion was that there was no intention of fulfilment. This contract was one which the defenders were entitled to assume would not be taken up. It was a contract of risk. The whole structure of the Bankruptcy Acts was that no speculative contract should be taken up by the trustee. It was against the policy of these statutes that a trustee should trade. A trustee who speculated did not bind the creditors. Decree against him was not *res judicata* against any creditor, even though he had assented to the speculation being gone into.[3] In this particular case the trustee professed to act within his competency, and not under the authority of the creditors. The consent of the commissioners, which he asserted he had, was of no use in such a case. In the special circumstances of this case it would be unreasonable to hold the defenders bound by the contract, so as to be compelled to wait an indefinite time for the trustee to make up his mind as to whether he would take up the contract or not. It was evident that the trustee had been induced to offer to go on with the contract on 8th April by the fact that iron had fallen £1 a-ton since the contract had been entered into. Supposing that the defenders, owing to the delays and neglects of the bankrupts and their trustee, incurred the heavy penalties contained in their contract for the steamers, how could they operate their relief? Only by ranking for the loss and damage on the bankrupt estate. That was a very anomalous state of affairs. Even prior to the insolvency the bankrupts had been in breach of the contract, and that gave the de-

[1] Cuthill v. Jeffrey, Nov. 21, 1818, F. C.; cases collected in Murdoch on Bankruptcy, p. 116; Kirkland v. Cadell, March 9, 1838, 16 S. 860, 10 Scot. Jur. 363.

[2] *Ex parte* Chalmers, in *re* Edwards, Jan. 31, 1873, L. R. 8 Chanc. 289; Morgan v. Bain, Nov. 22, 1874, L. R. 10 C. P. 15; Bloomer v. Bernstein, L. R. 9 C. P. 588.

[3] Kirkland v. Cadell, *supra*, Lord President, and Lords Gillies, Mackenzie, and Corehouse, p. 881.

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fenders the right to cancel, which they exercised on 14th March. The true meaning of the contract was that the defenders were to be supplied with iron in the order in which it could be worked up from day to day throughout the six weeks which were allowed for supplying each specification. They had supplied a certain weight of iron, but it was useless, not having been sent *seriatim*, as stipulated in the contract. No offer had been made to go on with the contract till 8th April, and by that time twenty-nine tons were over-due under the specification of 24th February. Moreover, at that date the trustee had no iron ready, and a still longer delay must have taken place before the contract could have been fulfilled.

At advising,—

LORD NEAVES.—This case involves questions of importance and delicacy in bankruptcy and commercial law.

The Lord Ordinary has treated the subject fully in his opinion, and in the result to which his Lordship has come I concur. At the same time I wish to guard myself from being supposed to adopt all the views expressed in that opinion. His Lordship has been careful to avoid laying down any stringent rules upon the point, but in my opinion some things are said that seem unnecessary for the decision of this case, and as to which I desire to reserve my judgment.

It is a general principle in bankruptcy that all beneficial contracts may be taken up by the trustee and creditors, subject to certain limitations. For instance, no trustee or creditors are entitled to take up a contract the execution of which involves a *delectus personæ*. Where it is of the essence of the contract that the thing to be done requires special skill, genius, art, or even strict personal supervision, such a contract cannot be taken up by a trustee and creditors. Reliance is there placed on the personal power of the party contracting to do the special thing. This is so not only in such a case as the painting of a picture, but, generally, wherever it appears that a *delectus personæ* is involved.

Of those things, which it is competent for a trustee to take up with the consent of the creditors, or some of them, it seems a general condition that they must be carried out in a manner imposing no hardship or loss on the other contracting party.

There are two parties to such a contract, the one solvent and the other insolvent. If the trustee of the insolvent party can arrange to take up the contract and carry it out as efficiently as the bankrupt could have done, well and good, but he cannot expect that he will be entitled to subject the solvent contracting party to undue hardship.

That is the sort of question which we have to consider here.

A beneficial contract is certainly one of the assets of a bankrupt's estate, if it can be well carried out.

Let us see what the circumstances are here. It is plain that we must construe the contract as to its mode of fulfilment with due attention to the subject-matter and the object of the contract. There is a provision that six weeks shall be allowed for the delivery of the iron, but I do not think it the fair construction of this stipulation that the debtors in the contract were to be allowed five weeks and some days during which they need furnish no iron whatever, and then suddenly deliver the whole on the last day of the time allowed. The true object of the parties was, without doubt, that delivery was to commence as early as pos-

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sible, and then to go on continuously in a reasonable and regular order, those parts being supplied which required to be completed before the others were superadded.

If the trustee had said at once, I will go on with the contract without delay, Hamilton and Company could not, I think, have refused to take delivery of the iron he offered, unless some special ground of objection had arisen. But the question comes to be, were Hamilton and Company bound to wait, with all the workmen in their yard standing idle, for an indefinite period, when also they had no security that the contract would ever be fulfilled?

In contracts of this sort it is the duty of the bankrupts and their creditors to see that there is no delay. If they delay they subject the other party to hardship if he is obliged to await their arrangements, and this, it is thought, they are not entitled to do. If the bankrupts are embarrassed and doubtful what to do, they ought to call their creditors together and make them aware in good time that they have a valuable contract, and then, whether sequestration follows or not, it is in the power of the leading creditors to make arrangements immediately, so that the other contracting party shall not suffer hardship. That, I think, could be done by any one interested in the bankrupt's estate who wishes to reap the profits of such a contract for the general behoof. But that was not what was done here. Delay was asked by Anderson for a very short time, and then nothing was done, or concluded, until 8th April. It is impossible here to overlook the letter written by Hamilton and Company on 14th March, in which they intimate that they have cancelled the contract. It was urged on behalf of the trustee that the terms of that letter justified him in doing nothing. But the fact of Hamilton and Company saying that they have cancelled a contract would not entitle them to cancel it, if they had not the power to do so. The letter must be read as merely a strong expostulation against any further delay. No answer was made to that letter, or any assurance given that the contract would be proceeded with, from the middle of March until the 8th of April. To be sure there was the letter of 16th March, wherein delay is asked, but that gives no assurance or even indication of an intention to fulfil the contract, and when the six weeks expired nothing more had been done.

It is in these special circumstances, there being failure on the part of the bankrupts and their creditors to make immediate arrangements and to assure the other party that the contract was to be kept on, that this case fell to be decided. The iron might easily have been got in the market and sent to the shipbuilders. This, I consider, was not a contract in which there was any *delectus personæ*, or any element which could make it non-transferable. But when weeks passed without any iron being tendered to them the shipbuilders were entitled to go elsewhere for their iron, and that is a bar against the other party afterwards reverting to the original contract.

In so far as the Lord Ordinary has decided upon that ground I entirely concur with him, and any remarks of his which go beyond that it is not necessary to discuss here.

The result of my opinion is that where there is no *delectus personæ* in a contract the creditors and trustee of a bankrupt contracting party are, in general, entitled to take it up, provided they do so timeously, and do not interfere with the equitable rights of the other contracting party, who must not be subjected to indefinite delay or disappointment.

In the special circumstances, we ought to adhere.

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LORD ORMIDALE.—I concur so far with Lord Neaves in thinking that the Lord Ordinary, in his very able and learned opinion, appears to have indulged in some speculations which, when taken by themselves, and not in connection with the particular case which he had to dispose of, could not be adopted. But it is important to observe that he says,—"With respect to the right of a trustee in bankruptcy to adopt advantageous contracts made with the bankrupt, and to enforce their execution for the benefit of the estate, I did not understand it to be disputed. But it exists within limits, and without attempting to express and guard a rule on the subject for general guidance, but confining my attention to the particular case, I venture to doubt whether it is according to the right and duty of a trustee in bankruptcy to involve the estate in the risk of a contract of so speculative a character, and having so long currency as that now before the Court." It may be inferred from this that the Lord Ordinary was designedly careful to express the result at which he arrived in reference alone to the particular case with which he was dealing; and so the views which might otherwise be called speculative must be taken very much, if not entirely, in connection with the specialties of the present case.

One thing I agree with Lord Neaves in holding, and it was not indeed disputed at the bar, is, that where the element of *delectus personæ* does not enter a contract it cannot be doubted that the creditors of the insolvent party have it in their power to adopt such contract and to proceed with it notwithstanding the bankruptcy. And there can be as little doubt that they have it in their power to repudiate any contract, whether it involves the element of *delectus personæ* or not.

It is important, in this case, to observe the position of the solvent contracting party—the defenders. They were under a contract to build three steamers; this contract was one of considerable magnitude, and involved large outlays, and the risk of very heavy penalties, in case it should not be completed within the stipulated time. Prior to the insolvency the bankrupts had evidently been remiss and out of time in furnishing the iron, as contemplated in the contract in question; but on the insolvency being announced, as it was on 13th March, and more completely by the sequestration on 17th March, there was not only no offer made of continuing to deliver iron under the contract, but the pursuer caused a letter to be written to the effect that no promise could be given that the contract would be fulfilled, and asking for delay for a few days. Had the disputed question turned on a few days' delay it might not improbably be determined differently from what it is likely to be.

The shipbuilders—that is, the defenders—were entitled to be informed at once—or, at any rate, with very little delay—whether the contract was to be implemented or not. They wrote a letter on 14th March, which was perhaps somewhat premature and absolute in its terms, stating that they held the contract as cancelled. On 27th March a meeting of the creditors of the other party took place, and the pursuer was then elected trustee on their sequestrated estates.

It is not explained why—and it is certainly a remarkable circumstance—that this matter of the contract with the defenders was not brought under the consideration of the creditors at that meeting, and their instructions regarding it taken. The pursuer, however, in place of acting on his own responsibility then, allowed nearly a fortnight to elapse; and it was not till 8th April that he wrote saying that he was prepared to complete the contract, or, alternatively, that he

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was ready to arrange terms on which it might be cancelled. Observe, in that letter he does not say, "I have hitherto been offering or ready to complete the contract;" and he could not in truth have said so, for he had not previously said whether the contract was to be adopted or given up.

It was, however, very plausibly and forcibly argued for the pursuer, that as the defenders had already, so early as 14th March, rescinded the contract, it would have been idle and absurd for the pursuer to have, after that date, offered to implement it. Why, then, did he in his letter of 8th April make such an offer? The reason was doubtless because he knew that, without doing so, he could not be in a position to insist for damages against the defenders, as no party can be heard to insist for damages, or for breach of a contract, unless it is made clear that he himself was ready, duly and timeously, to implement his part of it. In other words the pursuer, being here alone *in petitorio*, must establish his case before he can prevail. But can it be held that he has established his case if he is unable to say and to instruct that he duly and timeously offered to implement the contract, so far as it was incumbent upon him? I am very clear that he has not. The iron was over-due for a considerable time before 8th April, and the building of the three steamers is proved to have in consequence been brought to a stand. Even up to the present moment it does not appear that the trustee, who pursues this action, had the instructions or consent of the creditors to carry out the contract, and it is by no means free from doubt whether a trustee can take up such a contract as that in question at his own hand, or whether the other parties would be bound to recognise and accept of him as equivalent to the parties originally bound to them. But I am not to be understood as deciding these points. I have merely referred to them as shewing the embarrassing position in which the defenders were put, from no fault on their part. It is sufficient, in my opinion, for the decision of the case as it stands that the offer to implement on the part of the pursuer on 8th April—supposing it to be otherwise unobjectionable—was then too late. Things were no longer entire. The shipbuilding yard of the defenders had, in consequence of the delay, been previously brought to a stand, and they had incurred, and were continuing to incur, the risk of very heavy penalties. Not only was this so, but it was also admitted on the part of the pursuer in the course of the discussion that on 8th April he had not any iron to deliver, and had not even ordered any. It is therefore clear that considerable farther delay after 8th April must have taken place before any supply of iron could have been obtained from the pursuer.

For all these reasons I am of opinion that the pursuer has no sufficient grounds on which he can prevail in the present action; and if authority were necessary in support of this conclusion it is to be found, I think, in the English case of *ex parte* Chalmers *in re* Edwards,[1] which was cited in the course of the argument.

Lord Gifford.—I entirely concur in the opinions pronounced by your Lordships, and in the result at which your Lordships and the Lord Ordinary have arrived.

The Lord Ordinary seems, however, to have been of opinion that this contract was not one which could be taken up by a trustee and creditors, in respect that it involved a long period of time, that it might unduly delay the realisation and

[1] *Supra*, p. 362.

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distribution of the sequestrated estate, and that the shipbuilders were entitled to some security on which they might rely that the materials would be regularly furnished. I agree with both of your Lordships that there is nothing in this contract to prevent it being taken up by the trustee on the sequestrated estate, or by the creditors. No doubt the object of a sequestration is the winding up of a business, and not the continuance of the bankrupt's trade, but that is a matter which it is *jus tertii* for the other party in such a contract as this to plead. The creditors are the only parties to judge whether they will adopt or not a beneficial contract in which there is no *delectus personæ*, as to which they are in the full and absolute right of the bankrupts, and so I think that if this contract had been timeously taken up and carried on for the behoof of the creditors it would have been perfectly competent to do so.

At the date of the bankruptcy the contract had not been so violated as to entitle the shipbuilders to put an end to it at once, but at the same time it had not been fully implemented by the bankrupts before they were sequestrated. Prejudice was being suffered by the shipbuilders, prior to the insolvency, by delay in delivering the materials, and by failure to deliver them in the proper order. It is in evidence that the shipbuilders' yard was at a standstill, or nearly so. In these circumstances it was a very serious matter for the shipbuilders, and, to say the least of it, they were entitled instantly to know whether the creditors were or were not to take up and implement the contract. The shipbuilders could not compel implement; all they could have done would have been to rank on the estate for damages.

When they found themselves insolvent, Watson and Campbell should have called a meeting of their creditors, and informed them of this contract, and taken their instructions; for it is quite manifest, from the nature of the contract, that, if it was to be taken up by the creditors at all, this must be done without a single day's delay.

The contract, however, stood over, and nothing was done till 8th April. I think it is clear that the delay from 17th March to 8th April was too long, and also that, by that time, it was too late to offer to implement the contract.

The shipbuilding yard could not be allowed to stand idle for so long, nor were the shipbuilders to be exposed to the risk of incurring these heavy penalties which they were under if the steamers were not finished in time. I think, therefore, that this trustee came into the field too late.

The only doubt I had was that raised by the Dean of Faculty, that it was not the trustee who broke the contract, but the shipbuilders themselves, who, whenever the bankruptcy occurred, intimated that they held the contract at an end, and would go elsewhere for a supply of materials. But really this is not so. I read the shipbuilders' letter as merely stating in strong terms, "we cannot wait any longer for you—we must go on with our steamers, and in order to do so must go elsewhere for iron." Though perhaps the shipbuilders were sharp enough in giving this intimation, it was done at their own risk, and if the trustee had come next day and offered to deliver the rest of the iron, or part thereof, they would have been bound to take it or else pay damages. But no notice was taken of their statement that they had gone elsewhere, and so the breach was really with the bankrupts and not with the shipbuilders.

I think the Lord Ordinary's conclusion perfectly sound, but it is not necessary for this case to hold, as the Lord Ordinary seems inclined to do, that contracts with a tract of future time cannot be taken up by a trustee and creditors.

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LORD JUSTICE-CLERK.—As I heard only the speeches in reply, I would not have spoken if my vote had differed.

The plain and simple ground on which I go is, that the defenders here were not bound to wait from 13th March to 8th April without knowing whether they had a party bound to them or not. I do not think the pursuer has made out any case for damages. It is not necessary to go further for a good ground of judgment.

THE COURT adhered.

HAMILTON, KINNEAR & BEATSON, W.S.—WILLIAM ARCHIBALD, S.S.C.—Agents.

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JOHN WARDLAW, Pursuer.—*D.-F. Clark—Pearson.*
JAMES LEECHMAN WARDLAW AND OTHERS (Wardlaw's Trustees), Defenders.—*Sol.-Gen. Watson—Millie.*

Fee and Liferent—Minerals.—Where a testator by a general settlement left his estate (the minerals under which were wrought during his life, and were let on a lease current at the time of his death) to his two daughters, one-third each *pro indiviso* in fee, and to his granddaughter the other one-third *pro indiviso* in liferent allenarly, and to the heirs of her body in fee,—*held* that the granddaughter as liferentrix was entitled to enjoy the one-third of the mineral rents during her life, and to concur with the fiars in renewing the leases when necessary, provided there was no substantial danger of exhaustion of the minerals.

2D DIVISION. Lord Young. R.

ON 9th July 1833 Mr William Thomson of Stevenson's Beath executed a disposition and deed of settlement whereby he conveyed his lands of Stevenson's Beath, Cowden Beath, and Mowbray's Beath, in the county of Fife, as follows, viz.—"To and in favour of my daughter, Mrs Agnes Thomson *alias* Stenhouse, spouse of James Stenhouse, Esquire, of North Fod, and to her heirs and assignees, one-third *pro indiviso;* to my other daughter, Miss Margaret Thomson, residing in Edinburgh, and her heirs and assignees, one-third *pro indiviso;* and to my granddaughter, Mary Leishman, daughter of the marriage between Mr James Leishman and the late Mary Thomson *alias* Leishman, in liferent for her liferent use allenarly, and to the heirs lawfully procreated of her body (whom failing to the said Agnes Thomson *alias* Stenhouse and Margaret Thomson and their foresaids) equally in fee, the remaining one third *pro indiviso.*" The disposition and deed of settlement contained this clause:—"And, farther, I hereby make and constitute my disponees my cessioners and assignees . . . . in and to the rents, maills, and duties thereof to become due from and after the period of my death and in all time thereafter, surrogating hereby and substituting my said disponees for their respective interests foresaid in my full right and place of the premises for ever."

Mr Thomson died on 11th March 1837.

His granddaughter, Mary Leechman, was married in 1841 to Adam Low Wardlaw, surgeon in Kinross. She and her husband enjoyed the liferent of the one-third *pro indiviso* of his estate of Stevenson's Beath, &c., settled on her by her grandfather during her life. On her death, on 9th January 1865, John Wardlaw (the pursuer), her eldest son, succeeded under Mr Thomson's disposition to the fee of the one-third *pro indiviso* liferented by his mother.

Under the lands of Stevenson's Beath, &c., there existed valuable seams of coal, &c., which had been wrought to a certain extent, at any rate from the beginning of the present century. In particular, a lease had been granted of the whole coal and ironstone under the lands to Matthew Parker and William Scott by Mr Thomson himself before the year 1828.

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Another lease for twenty-one years was granted by Mr Thomson to Robert Gibbon in 1835 at a fixed annual rent of £90, or one-tenth of the gross output. This lease was allowed by Mr Stenhouse, who managed the property after Mr Thomson's death for behoof of the *pro indiviso* proprietors in fee and liferent, to be assigned by Gibbon to Messrs Dixon and Wright about the year 1840. The workings were of small extent during Mr Thomson's lifetime and for some years after his death. From the evidence it appeared doubtful whether Mr Thomson ever recovered the fixed rent from his tenant Mr Gibbon, but after his death Mr Stenhouse, as acting for his representatives, always did so, whether the colliery was being worked or not. In 1849 a greater demand for Fife coal having arisen, Mr Stenhouse and Dr Wardlaw, as acting for the *pro indiviso* proprietors, were granted a lease for thirty-one years at the enhanced fixed rent of £500 a-year to the Forth Iron Company, who had obtained an assignation from Messrs Dixon and Wright of the remainder of their lease. This lease was current at the death of the pursuer's mother in 1865.

In these various leases, both during Mr Thomson's life and after his death, the right given to the lessees was substantially the same. The rents and output, however, were gradually increased with the increasing demand for the coal. There was not, however, any allegation of approaching exhaustion of the coal field, which proved, on being properly opened up, a very valuable one.

During his wife's lifetime Dr Wardlaw received the one-third of the mineral rent, as well as of the ordinary agricultural rent of the estate, in virtue of her liferent. After his mother's death the pursuer, being of age, entered into possession in virtue of his own right of fee.

Dr Wardlaw died in 1873, and John Wardlaw, the pursuer, then claimed from his trustees repayment of the mineral rent received by him and his wife from Mr Thomson's death in 1837 down to her death in 1865, on the ground that they were not included in her right of liferent.

He brought this action against them, concluding for declarator that his mother's right was one of liferent allenarly,—that he was entitled to the fee,—that she in virtue of her liferent right to the one-third *pro indiviso* of the lands had no right to the coal, ironstone, lime, or other minerals in the same, beyond what was necessary for her beneficial possession, and that the rents and profits received for such coal, &c. from 1837 to 1865 belonged to him as fiar,—and further, for a count and reckoning for these rents and profits.

The pursuer pleaded;—3. The pursuer's mother having been merely a liferenter, she was not entitled to grant a lease of the coal, ironstone, and other minerals in the said lands, or to work the same, or cause them to be worked, beyond what was necessary for her beneficial possession of the lands, and the pursuer is accordingly entitled to decree in terms of the third declaratory conclusion of the summons. 4. The said Adam Low Wardlaw, or his wife, Mrs Mary Leechman or Wardlaw, having received payment of the rents or royalties of the minerals belonging to the pursuer, the defenders are bound to count and reckon with the pursuer, in terms of the conclusion to that effect.

The defender pleaded;—3. Mrs Wardlaw had right to one-third *pro indiviso* of the produce of the coal and ironstone mines in the said lands during the period of her survivance, in respect (1) that she was a testamentary liferentrix; (2) that the mines were open mines at the commencement of her possession; and (3) that Mrs Wardlaw's two aunts as proprietors of one-third each . . . . had power to work the minerals,

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and that the sum which the pursuer claims is the produce of mineral workings in operation independently of the act of the liferentrix. 4. Mrs Wardlaw having *bona fide* uplifted and consumed the said rent and royalties on a probable title, her representatives are not liable in repetition.

The Lord Ordinary, on 21st October 1874, pronounced this interlocutor:—"(1) Finds and declares that the pursuer, under and by virtue of disposition and deed of settlement, dated the 9th day of July 1833 and 20th day of May 1834, and registered in the Books of Council and Session upon the 31st day of May 1837, granted by William Thomson, Esq. of Stevenson's Beath, in the parish of Beath, and county of Fife, and by Mrs Mary Inglis or Thomson, became entitled, upon the death of Mrs Mary Leechman or Wardlaw, the pursuer's mother, to the fee of one-third part *pro indiviso* of All and Whole the several lands and heritages pertaining and belonging to him, or that might pertain and belong to him at the period of his decease, and especially, without prejudice to the foresaid generality, of one-third *pro indiviso* of All and Whole his lands of Stevenson's Beath, Cowden Beath, and Mowbray's Beath, houses, biggings, yards, tofts, crofts, parts, pendicles, and whole privileges, teinds, and pertinents thereof, lying within the parish of Beath and shire of Fife, and to the rents, maills, duties, and profits thereof, and that the same pertain and belong to him still: . . . . (3) Finds that the minerals in said lands of Stevenson's Beath and others had been wrought by or on behalf of the testator during his own lifetime, and were at the time of his death under lease granted by him: Finds that, according to the formal construction of the said disposition and deed of settlement, it was the said testator's intention that his granddaughter, the said Mrs Mary Leechman or Wardlaw, the pursuer's mother, under her right of liferent, should be entitled during her life to the rents and royalties of the minerals pertaining to the one-third *pro indiviso* share of said lands and others: Finds accordingly that she was entitled during her life to said rents and royalties, and that the pursuer is not entitled to count, reckoning, and payment therefor: Appoints the case to be enrolled with a view to the application of these findings and for further procedure, and decerns: Finds no expenses due to or by either party."

Against this interlocutor the pursuer obtained leave to reclaim.

Argued for him;—

1. A liferentrix by constitution has no right to work minerals not actually worked at the date when her liferent opens. She is only entitled to the enjoyment of the estate *salva rei substantia*.[1]

2. When minerals are worked at the date of the opening of the liferent, under leases then current, the liferentrix is not necessarily entitled to the rent, unless there is evidence of such being the intention of the testator or other person in constituting the liferent. There is in the present case no evidence of such intention, except the facts (1) that the settlement is a universal settlement; (2) that there was a lease current which was not excluded from the liferent. But that is not enough to take the case out of the ordinary rule, and to bring it up to the only two cases[2] that have been decided in favour of the liferentrix. They were both decided on

[1] Ersk. 2, 9, 57; Lady Preston, 1677, M. 8242; Belschier v. Moffat, 1779, M. 15,863; Stair, 2, 3, 74; Bankton, 2, 6, 6; Bell's Com. (M'Laren's ed.) i. pp. 60, 61; Swinton v. Duchess of Roxburghe, Feb. 1, 1814, F. C.; Duke of Roxburghe v. Duchess of Roxburghe, Jan. 19, 1816, F. C.

[2] Waddel v. Waddel, Jan. 21, 1812, F. C.; Guild's Trustees v. Guild, June 29, 1872, 10 Macph. 911, 44 Scot. Jur. 497.

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specialties. Waddel's case was decided on the ground that there was a universal settlement and a current lease, but a current lease of such an extraordinary kind that it really created the mineral rent a perpetual annuity for 999 years. The Court looked upon the settlement as intended to give a right not to the minerals but to this perpetual annuity into which they had been converted. Neither was Guild's case decided on the ground merely that there was a universal settlement and current lease. It went on the ground that although the liferentrix worked the clay field she did so really *salva rei substantia*. It so happened that on the clay being cleared away the land could be feued for much more than the clay rent, and so in working the clay she was benefiting the estate. These two cases, therefore, did not touch the general principle that something more is necessary to shew intention than a general settlement and current leases. And failing that the liferentrix is not entitled to the mineral rents. That there was no *nominatim* fiar in the present case does not alter the general rule. The liferentrix was fiduciary fiar for her heir, and as such bound to accumulate the mineral rents for his benefit.

3. Even if a liferentrix is entitled to the profits of current leases she is not entitled to let new leases to new tenants at increased rents, and so as to extend the workings and increase the output. Under the circumstances, she could not indeed prevent the leases being granted, but she was all the more bound to accumulate the proceeds.

4. The plea of *bona fide* consumption is, in the circumstances, untenable. Dr Wardlaw was the only person really interested. He was at once the guardian of his son, and in right of his wife's liferent. His representatives cannot be heard to plead his *bona fide* consumption in the one character of what fell under his own administration in the other. But the plea can only be stated where there is a colourable, though imperfect, title. And in this matter there is a strong distinction between an onerous and a lucrative title. The holder of a lucrative title must have something more to found on than a mere assumption in his own mind that his title is good. He must have a probable title in law, or else a tacit acknowledgment on the part of the person having the opposing interest, such as in the Roxburghe[1] case.

Argued for the respondents;—No doubt, the general rule is that a liferentrix must enjoy the subject *salva rei substantia*. But this rule suffers exception where the original proprietor has done anything to alter the nature of the subject, and turn part of the substance into annual fruits, as by working or leasing minerals.[2] In that case, the liferentrix is entitled to continue such working under these limits:—(1) That there is no hazard of exhaustion; (2) that her use follows the measure and method of the use enjoyed by the original fiar. In the present case Mr Thomson was not working the coal himself, but he had granted leases of it, and these leases must be taken as the measure and method of his working. The liferentrix did not exceed that measure and method, even in granting new leases, because the new leases were in substantially the same terms as the old, excepting in the matter of rent. The institutional writers referred to are all dealing with rights of fee and liferent coexisting, and created by force of law, or otherwise than by testamentary deed. The strict rule laid down by them does not apply to liferents constituted by testamentary deeds. In such cases the testator's intention must be the guide. Where a testator is working his own minerals for profit, and still more so where he has leased them out and is turning them into an

[1] Duke of Roxburghe v. Duchess of Roxburghe, Feb. 17, 1815, F. C.
[2] Stair, 2, 3, 74; Dig. 7, 1, 13, secs. 4 and 5.

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annual fruit-bearing subject, the strong inference is that he intends to give the liferentrix who succeeds him the same beneficial enjoyment of the estate that he has himself.[1] The present case is more strongly in favour of the liferentrix than any that have previously occurred, for here there is no *nominatim* fiar. The fee is conveyed to an uncertain person, who cannot be ascertained till the death of the liferentrix. To all intents and purposes, excepting the disposal of the estate, she is fiar during her life, and it would be a very strong thing to hold that she was debarred from enjoying such a natural part of the annual profits as the mineral rents, but was bound to account for them to the person who should turn out to be fiar on her death. Even assuming that she had no legal title to the mineral rents, her representatives are protected by her *bona fide* consumption from any claim for repetition. Of the *bona fides* there can be no doubt, and that the title was sufficiently probable is evidenced by the fact that the Lord Ordinary has sustained it as good.

At advising,—

LORD JUSTICE-CLERK.—The question whether the general grantee of the fruits of an heritable subject acquires a right to the annual produce of coal workings on the property has been a question ever since the days of Sir Thomas Craig. That acute and ingenious writer discusses the question whether a widow is so entitled in respect of her terce, and although he resolves the question by assimilating the produce of coal mines to growing timber and against the right of the widow, he refers to a case in which in his own time the reverse was very deliberately decided.

Lord Stair treats this question with his usual discrimination, and lays down the principle which, with more or less consistency, our lawyers have followed ever since. That principle seems to be that unworked minerals cannot be considered as fruits of the heritable subject, but simply as *partes soli* and accessories of the land,—but that when the fiar has himself worked the minerals and let them on lease the minerals themselves cease to be mere accessories, become a separate rent-yielding subject, and therefore are presumed to pass to those to whom the fruits of the subject are conveyed.

No doubt this doctrine is laid down with two reservations,—1st, That there is no danger of exhaustion of the minerals, and 2dly, That the measure of the fiar's use shall not be exceeded. But these, after all, are only elements which, in the question of intention, as such questions under settlements necessarily are, are only exceptions to the general presumption, which I take to be this,—that where a testator, being the fiar of an estate containing coal workings which had been let under lease, conveys a general liferent of his whole estate, he must be presumed to give right to those mineral rents which he himself had treated as the fruits of the heritable subject, unless the reverse is established by contrary expression or presumption of intention. If the mineral be in danger of exhaustion and be shewn to be so, that element may indicate a contrary intention on the part of the granter. The measure of the former workings is a much more slender presumption, and in the general case it is more easy to presume that the granter contemplated the letting of his minerals for what they would bring, assuming that there is no danger of exhaustion, than that the liferenter was to

[1] Waddel v. Waddel, and Guild's Trustees v. Guild, *ut supra*, p. 370, note: Spencer v. Scurr, July 28, 1862, 31 Beavan, 334, and 31 L. J. Ch. 808.

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lose the accruing benefit which a better market and enhanced prices would give.

We had occasion to consider the authorities in the recent case of Guild, which, however, was decided on the question whether the workings complained of diminished the value of the estate. On the very able review of the authorities which we have had from the bar I have come to be of opinion that, in the general case, it is to be presumed that a liferenter is intended not only to enjoy the rent of going collieries, but to let new leases as long as there is no substantial danger of exhaustion of the mineral. It is a presumption of intention and nothing more, but one which derives much additional strength in the present day from the increased mercantile value of the commodity, and the much larger proportion which such rents generally bear to the income of an estate. In the case of Waddel, in which the very able opinions of great Judges entirely sanctioned the views I have expressed, Lord Gillies says,—"It is said that the minerals are more valuable than the lands themselves, and when the testator gave a total liferent I cannot conceive that he meant that she should want the most valuable part of it." Mr Bell in his Principles indicates very clearly his opinion that the case of Waddel substantially affirmed the doctrine which I have deduced from it.

I think this is the general presumption as regards the intention of the granter of such a universal right. In the present case I have no doubt of it whatever. The testator divided his estate into three *pro indiviso* parts. Two of these he left to his two daughters *pro indiviso*, and their heirs and assignees in fee. The third he left to his granddaughter in liferent allenarly, and to the heirs of her body in fee, whom failing to his two daughters. There was a lease of the minerals current at the testator's death. There can be no doubt that the testator intended that the liferentrix should enjoy the rents under that lease. There seems as little doubt that he intended that whatever the fiars enjoyed as the produce of the land during their lives the liferenter should enjoy during hers, and that when the mineral lease expired she should have her share of any renewed use of the subject, whether it yielded more or less than it did before. If the question of legal right be solved, the question of intention seems to exclude any other theory. He never could have intended that on the expiration of the current lease this source of revenue should terminate. The opposite view came to this, that the liferentrix, while she could not help the coal being worked and the rents being paid, was under an obligation to accumulate the latter for the benefit of a possible but uncertain heir, seeing that until her death it could not be known who the heir might be; that the testator intended to lay her under an obligation to accumulate these rents for the benefit of her aunts in case she herself had no family; and that after the expiration of the lease, as she had no right as liferentrix to enter into a new lease, it was intended that she should prevent the minerals from being worked, and so force a division of the subject. And it is now maintained in this action that because she did not do these unusual things her representatives are to be liable to account for all the profits which the minerals yielded during her life.

This contention carries the doctrine of a fiduciary fiar to a practical extent of which I know of no example. On the hypothesis of the argument, Mrs Wardlaw had no interest of any kind in these coal workings, and we are asked to presume that the testator meant her to undertake the labour and responsibility of collecting and accounting for these rents during the whole period of her life, from

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which she was not to receive a single farthing of profit. I cannot affirm a proposition which seems to have so little foundation either in law or intention.

In regard to the second plea on *bona fide* consumption, I think it unnecessary and undesirable that we should express any opinion. The *bona fides* of Mrs Wardlaw is unquestionable; but if her title, as regards these mineral rents, made her only a fiduciary fiar for behoof of a possible heir, and carried with it the consequences for which the pursuer has contended, there might be difficulties in the way of sustaining that plea, which it is not necessary, in my opinion, to solve.

LORD NEAVES.—I concur. I think that the law is settled, as explained by your Lordship.

In their natural state, while yet unworked, minerals are *partes soli*. But it is laid down by high authorities that the proprietor, whose will with regard to the disposal of his property must be the guide where it is well declared, may so deal with the mineral estate while in his own person that it may become not the subject of sale from time to time, but the subject of a lease. I do not think it can be maintained that the contract of lease is incapable of being applied to minerals. If once minerals are leased they are brought into the category of a subject bearing fruits. By granting such a lease the proprietor turns his right of bare property into a right to receive the prospective fruits. If it were held that what is popularly termed a lease of minerals is not truly in law a lease, it can be nothing but a periodical sale, and the sums paid as the consideration must be regarded as a price paid by instalments. To this extraordinary position, for which there is no countenance in law, are the parties driven who plead that minerals are, and always must be, dealt with as *partes soli*.

If a lease of minerals is possible and implies the conversion of the proprietor's ordinary right of disposal into a right to prospective periodical payments or rents, this has been done in the present case. And on that footing I cannot doubt that the liferentrix was entitled to these rents for her lifetime, just as she was to any of the ordinary fruits of the soil.

The circumstances, moreover, of the present case are peculiarly favourable to the liferentrix. The testator plainly intended the three *pro indiviso* thirds, into which he distributed his estate, to be all managed in the same way. The two absolute fiars were surely not to be crippled by the inability of the liferentrix to concur with them. For if it were held that she could not concur with them in granting a lease of the minerals practically they would be debarred from doing so at all. What he meant obviously was that the estate should be managed as if there were three *habile* fiars in existence.

If, then, the pursuer's mother had the power to concur in a new lease of the minerals, where do we find the obligation on her to accumulate or account for the profits? The mere fact that she was what, *fictione juris*, is termed a fiduciary fiar, or fiar in trust for a possibly existent and surviving heir, does not necessarily imply an obligation to accumulate. There is nothing that can lead us to hold that she was a mere steward, bound to administer a third of the mineral estate, to superintend the workings and to uplift the rents, and then to pay them into bank, or otherwise to invest them for the benefit of the future fiar. Such an implication seems to be absurd and untenable.

The minerals having been converted by the testator into a subject yielding annual fruits, I agree with the Lord Ordinary in holding that the liferentrix has

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followed the intention of the testator in appropriating and consuming her third share of them. Holding this strong opinion on the merits of the case, I abstain from deciding or expressing any formal opinion on the question of *bona fide* consumption, though I am inclined to think there are fair grounds for contending that there was *bona fide* consumption on a sufficiently colourable title to protect her had she required the defence.

LORD ORMIDALE.—The disputed question between the parties in this case appears to me to depend upon what is to be held to have been the intention of the testator, looking at the terms of his settlement, the nature of the estate with which he was dealing, and the other circumstances under which his settlement was executed, so far as they have been disclosed to the Court.

It is easy to understand that the testator might have made it quite plain that no part of the profits of the colliery, so far as his granddaughter, the liferentrix, was concerned, were to go to her, but that they were to be preserved for the fiar. He has not, however, so expressed himself, or, to put it differently, he has not in so many words stated that such was his desire and object. His true intention must therefore be collected from the considerations to which I have alluded. And having regard to these considerations I cannot doubt,—and I found my opinion very much on the grounds stated by your Lordships,—that the testator intended to place his granddaughter during her life in much the same position, so far as the beneficial enjoyment of his estate, including the colliery, went, as his two surviving daughters. She was not to be entitled to dispose of the fee, but she was to have the enjoyment of the annualrents or profits of a third *pro indiviso* share of his estate, but limited to her own lifetime, in the same way as his two daughters.

In arriving at this conclusion, the first and main consideration by which I have been influenced is the condition of the testator's estate at his death, and in particular the circumstance of it having then, and for some time previously, consisted of a going colliery yielding annual profits or returns. That colliery could not, so far as I can see, have been worked by two of the *pro indiviso* proprietors to the extent merely of their own shares, but necessarily required to be worked if worked at all, for the three parties having an interest in it. Unless this were done the colliery would soon be closed up, and in that way the machinery and workings would go to waste, and the capital,—and it might have been considerable,—which had been expended in opening and setting it a-going, would be lost. I cannot suppose that any such result could have been contemplated by the testator. Then, if it is to be assumed that the working of the colliery was to go on, it almost necessarily follows that he must be held to have intended that his granddaughter was to enjoy one-third of its annual fruits or profits during her life, for he makes no provision whatever for preserving such fruits or profits for the future fiar. He does not constitute a trust for that purpose, and he lays no obligation on his granddaughter to that effect.

The only conclusion, therefore, that can, in my opinion, be arrived at is that the annual rents or profits of the colliery in question, to the extent of one-third thereof, were intended by the testator to be enjoyed by his granddaughter during her life. This conclusion is also, I think, sufficiently supported by authority, if authority were necessary, especially by that of Lord Stair, and the cases of Waddel and Guild.

The only doubt in my mind is, whether the liferentrix, assuming her to have

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had right to a third of the annualrents or profits of the colliery arising under the lease which was current when the testator died, was entitled to renew or prolong that lease in the manner she did. Was that not, it has been asked, exceeding the measure and method of the use which the testator himself had and exercised of the colliery. The affirmative of this question would, I think, require a very narrow view to be taken of the matter,—so narrow that, on careful consideration, I feel myself unable to entertain it. I feel myself, on the contrary, well warranted in concurring with your Lordships in holding that in continuing, by prolongation or renewal, the workings of the colliery which existed at the testator's death, the liferentrix did not, in any reasonable sense, exceed the measure and use which had been exercised of it by the testator himself. It may be that the workings have been increased and much larger lordships paid under the renewed leases, but that arose from altered times, and in particular from changes which had taken place in the coal market, and not from any undue or unreasonable acts of the liferentrix, and indeed the record contains no averment on the part of the pursuer to that effect.

On all these grounds I entirely concur with your Lordship. And with regard to the question of *bona fide* perception and consumption, I also concur in thinking it quite unnecessary to enter upon it, seeing that it is not only superseded, but all room for it excluded, by our holding that the annualrents or profits of the colliery, to the extent of one-third thereof, accruing during the life of the testator's granddaughter, belonged to herself in her own right.

Lord Gifford.—I take the question in this case to be different from that which would arise under a disposition of a special subject to one in liferent and another *nominatim* in fee. The question arises under the terms of a universal *mortis causa* disposition and settlement, whereby the late William Thomson of Cowden Beath provided for the disposal of his whole means and estate, and it raises simply a question of construction,—What was the intention of the testator? In order to arrive at that we must place ourselves as nearly as possible in the position of the testator when he left this deed, and have in view the exact nature and position of the subjects of which he was disposing, and on a consideration of the deed and of the whole circumstances we have to say whether he intended his granddaughter to receive a third of the mineral rents. Now, keeping everything in view, I have no difficulty in holding that the testator intended his granddaughter to enjoy her share not only of the agricultural rents but also of the mineral rents.

I reach that conclusion on these grounds:—1. This was an old going colliery open and under lease at any rate in 1816, and wrought from a much earlier period, and not a new and unwrought mineral subject. 2. It was a colliery always under lease, and not wrought by the proprietor himself. If it had been worked by the proprietor himself, either for his own purposes or for sale, other considerations would have been introduced which might affect or restrict the right of liferent. 3. The testator's settlement was a universal settlement. And a liferent given by such a deed is much more nearly a liferent by reservation than one by constitution, and therefore to be interpreted favourably for the liferenter. 4. There is in the disposition and settlement no direction for accumulation, which is the only possible alternative to the liferenter's personal enjoyment of the profits, for the fiar is an uncertain person till the date of the liferenter's death. No trustees are appointed who could accumulate for the future, nor

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No check is placed on the liferentrix. No obligation is laid upon her to accumulate, and no indication of any intention that there was to be accumulation. These considerations seem to me to be conclusive that Mr Thomson intended Mrs Wardlaw to enjoy the mineral rents just as he himself had done, and just as his daughters who had the other two-thirds of his estate were to do.

If Mrs Wardlaw was entitled to enjoy the profits of the existing lease she was also entitled to join with the other parties interested in prorogating the lease, and also to concur in granting new leases. None of the leases extend the subject let. It is always the same minerals which are let, and the increase of rent or lordship is quite immaterial. The amount of lordship depends on the extent of the working, and this is the act of the mineral tenant and not of the liferentrix.

Were we not satisfied on these points, I think that there was a sufficient colourable title to support the plea of *bona fide* consumption, but it is not necessary to decide the separate question as to *bona fide* perception and consumption.

THE COURT adhered.

DEWAR & DEAS, W.S.—MACGREGOR & ROSS, S.S.C.—Agents.

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ALEXANDER WEBSTER AND OTHERS (Grant's Trustees), Complainers.—*Scott.*
WILLIAM ROGER MORISON, Respondent.—*Balfour—J. P. B. Robertson.*

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Property—Title—Proof.—When a written contract relating to heritage is impugned by one of the parties, and the other, while denying his opponent's averments, admits that the documents do not give a true account of the agreement, the proof is not limited to writ or oath.

Property—Title—Proof.—In a suspension and interdict brought to prevent the sale of a heritable subject by the respondent, who held a disposition in his favour as a purchaser from the complainer's author at the price of £250, qualified by a back-letter, bearing that the disponer should have power to redeem on payment of that sum within a certain time, failing which the respondent should have power to sell, the respondent admitted that he had not paid £250 for the property, but only £125. *Held* that the complainers were not limited to proof by writ or oath of their averments as to the true nature of the transaction.

1ST DIVISION. Ld. Mackenzie. B.

THIS note of suspension and interdict was brought by the marriage-contract trustees of John Scott Grant, rope manufacturer in Arbroath, against W. R. Morison, merchant, praying that the respondent should be interdicted from selling certain subjects in Arbroath occupied by Grant as a rope manufactory.

The title to these subjects was as follows:—(1) Disposition by the previous owner to Grant, dated 30th March 1871, for the price of £125. (2) Disposition by Grant to Morison, dated 15th June 1871, for the price of £250. (3) Letter, styled a letter of reversion, by Morison to Grant, dated 18th August 1871, and signed by both, in these terms:—"Considering that, by disposition and assignation granted by you in my favour, dated the 15th day of June 1871, you, in consideration of the sum of £250 sterling, advanced by me to you, sold and disponed to me, my heirs and assignees whomsoever, heritably and irredeemably, (First), All and Whole," &c. . . . "And whereas it was agreed on between you and me that although said disposition and assignation in my favour was conceived in an absolute form yet the same should be held by me only as a

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security for the said sum of £250 sterling, which was that day advanced and lent by me to you, the said John Scott Grant, and of any subsequent advances I might make to you or on your account, and interest thereof as aftermentioned, and that I should grant a letter of reversion in your favour in terms underwritten." It bore further, that in case Grant should fail to pay the principal sum before Martinmas 1871, or to pay the interest regularly, it should be in the power of the respondent to sell the subjects, he being bound to hold count and reckoning with Grant for the balance.

The complainers, to whom Grant had assigned his rights, averred substantially as follows:—When Grant purchased the property for £125 the price was advanced by Morison. The disposition to Grant by Morison was in security only, and the price was stated at £250 to secure previous advances, which Morison had from time to time made to Grant. In October 1874 Morison had called upon Grant to pay £250, intimating that if he failed to do so within ten days the property would be advertised for sale. Nothing was now due except the £125 advanced as the price of the property, and that he was ready to repay.

They pleaded, that as they were ready to pay the whole sums due under the letter of reversion, as they might be ascertained by the Court, they were entitled to interdict.

The respondent averred, that Grant, desiring to purchase the ropework, but having no means, proposed to the respondent that he should purchase it, and offered, if he would hold it for a few years, to give him a handsome profit, and buy it from him for £250. The respondent agreeing to this, Grant purchased for him at the price of £125. As the sellers insisted on introducing into the conveyance a clause binding the purchaser to protect the ground from the encroachment of the sea, and the respondent was unwilling to undertake this obligation, it was arranged that the title should be taken to Grant, with the obligation, and that he should reconvey to the respondent, omitting the clause, and that the respondent's obligation to convey to Grant, on payment of £250, should be embodied in a separate letter.

The respondent pleaded;—(4) None of the complainers' material allegations could be proved otherwise than by writ or oath.

The Lord Ordinary, on 19th January 1875, sustained the fourth plea for the respondent.*

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* "NOTE.—The complainers aver that the *ex facie* absolute disposition by John Scott Grant in favour of the respondent was granted only in security of £125, and that the amount specified in this disposition, and also in the relative letter of reversion executed by the respondent and by Mr Grant, was stated at £250, in order also to secure the current balance on the accounts between Mr Grant and the respondent's firm of W. R. Morison and Company, which balance has been extinguished. They further aver that they are Mr Grant's marriage-contract trustees, and that by this contract Mr Grant conveyed to them his right, title, and interest under that letter of reversion: And they maintain that they are entitled to a proof at large, for the purpose of establishing these averments, on the ground that where a party, founding on a deed, admits on record that it does not contain a true account of the agreement of parties, parole proof is competent.

"But the respondent does not, the Lord Ordinary thinks, admit that the said deeds do not truly carry out the agreement between Mr Grant and him. The respondent's averment is that Mr Grant came to him in 1871, and stated that the rope-work premises in Arbroath, then held by him on lease, were for sale, and could be got a great bargain, but that he had no means wherewith to purchase them, and that if the respondent would purchase them, with the working

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The complainers reclaimed, and argued that, as the respondent did not stand upon the documents, but himself gave a different version of the facts, the way was left open for proof at large.[1]

LORD PRESIDENT.—On the face of the titles it appears that in February 1871 Grant purchased those subjects, and obtained a disposition which bears that the

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plant, which could be done for £125, he would agree to buy them from the respondent in a few years at the price of £250. The respondent also avers that he agreed to enter into the transaction proposed by Mr Grant, and that, in implement of the agreement so made between them, Mr Grant purchased the subjects for the respondent at the price of £125. The respondent further avers that this agreement and purchase were attended with serious risk to him, as the sellers of the subjects found it exceedingly difficult to resist the encroachments of the sea, and as if these encroachments were not successfully resisted, or, if the subjects ceased to be used as a rope-work, for which purpose alone they are suitable, they might become almost valueless. The respondent also states that the sellers insisted upon introducing into the disposition a clause binding the purchaser to take precautions for defending the ground from the encroachments of the sea, with the view of protecting an adjoining property belonging to them, and that, being unwilling to undertake this obligation, while Mr Grant was ready to do so, it was arranged that the agreement above-mentioned should be carried out by the disposition from the sellers being taken in favour of Mr Grant, subject to the obligation to defend the ground from the sea; that Mr Grant should convey the subjects to the respondent by a disposition which should not convey that obligation; that the respondent's obligation to convey the subjects to Mr Grant at the price of £250 should be embodied in a separate letter of reversion; and that this arrangement was accordingly carried out by a disposition from the sellers in favour of Mr Grant, and by the disposition of Mr Grant in favour of the respondent, and letter of reversion above-mentioned.

"By this letter of reversion, which proceeds upon the narrative of the disposition in the respondent's favour, it was agreed to between Mr Grant and the respondent that, although the disposition in the respondent's favour was conceived in an absolute form, yet that the same should be held only as a security for the sum of £250 sterling, and of any subsequent advances which the respondent might make, together with the expenses of the disposition in the respondent's favour and of the letter of reversion, the premiums of insuring the premises, the expenses incurred by the respondent in completing his title, and the interest of the said sum of £250, and of any subsequent advances, at the legal rate. By the letter of reversion the respondent bound and obliged himself, upon payment of these sums and interest, to reconvey the subjects to Mr Grant, and, as the letter bears, Mr Grant did, by subscribing the same, 'accede to and approve of the terms hereof in all respects.'

"This letter of reversion is a formal deed executed both by the respondent and Mr Grant. It embodies, in clear and distinct terms, the conditions on implement of which Mr Grant is entitled to have the subjects reconveyed to him. The respondent makes no admission in the record contrary to the terms of the disposition in his favour and of the letter of reversion, or of the original agreement between Mr Grant and him, under which he purchased and paid the price of £125 for the subjects, and in pursuance of which these deeds were executed. The Lord Ordinary is therefore of opinion that the complainers, who are now litigating, as in right of the letter of reversion, are not entitled, except by the writ or oath of the respondent, to contradict the terms of that letter, and to prove that they are entitled to a reconveyance of the subjects upon payment of £125."

[1] Hotson v. Paul, June 7, 1831, 9 S. 685; Miller v. Oliphant, March 7, 1843, 5 D. 856, 15 Scot. Jur. 358.

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price paid was £125. Thereafter he conveyed the same subjects to Morison by an *ex facie* absolute disposition, the price contained in the disposition being £250. But a letter of reversion, as it is called, was granted at the same time to Grant by Morison, in which he says,—"Considering that, by disposition and assignation granted by you in my favour, dated the 15th day of June 1871, you, in consideration of the sum of £250 sterling, advanced by me to you, sold and disponed to me, my heirs and assignees whomsoever, heritably and irredeemably, (First) All and Whole—[here follows description of property]—and whereas it was agreed on between you and me that although said disposition and assignation in my favour was conceived in an absolute form, yet the same should be held by me only as a security for the said sum of £250 sterling, which was that day advanced and lent by me to you, the said John Scott Grant, and of any subsequent advances I might make to you or on your account, and interest thereof as after mentioned, and that I should write a letter of reversion in your favour in terms underwritten,—therefore, in case you shall repay to me, or my heirs, executors, or successors, the foresaid principal sum of £250 sterling, and any subsequent advances made by me to you or on your behalf, at the term of Martinmas 1871, or at any term of Martinmas or Whitsunday thereafter previous to the term of Whitsunday 1872," and on certain other conditions with reference to interest, expenses, and insurance,—"then I and my foresaids shall be bound and obliged, as I hereby bind and oblige myself and my foresaids, to redispone to you, the said John Scott Grant, and your heirs and successors, heritably and irredeemably, in fee, All and Whole the foresaid subjects in usual form." Then, if Grant does not repay the advances before Martinmas 1871, or fails to pay the interest, the letter stipulates for a power of sale in favour of Morison, subject to the obligation of accounting for the price.

Now, the complainers, who are the marriage-trustees of Grant, allege that £250 was not actually advanced, that nothing was advanced but £125, and therefore they seek to interdict the respondent from bringing the subject to sale under the power of sale contained in the letter. If the respondent had met that allegation by a simple statement that the disposition and letter of reversion truly express the arrangement which was entered into, if he had taken his stand on these documents, I do not see that the complainers could have proposed to prove their averments otherwise than by writ or oath. But the respondent has not taken up that position. It is his case that the letter is false, as much as it is the case of the complainers. The parties are not agreed on what the truth is, but they both agree that the letter is not true. The respondent says in substance—"I agreed at Grant's request to purchase the property for £125, and to hold it for a few years, on the footing that Grant was afterwards to take it off my hands for £250. I did not become the direct disponee, because the seller insisted on inserting conditions by which I did not wish to be bound. Therefore the disposition was taken to Grant, and he reconveyed to me without these conditions. The letter correctly enough narrates the substance of the transaction,—that is, that I am not bound to reconvey till I receive £250,—that being my stipulated profit for holding the subjects for a certain number of years." But he admits very distinctly that £125 was the only sum advanced by him. That is a direct contradiction of the letter, which speaks of the contemplated payment of £250 as repayment of a loan.

Now, it appears to me that when a party, who professes to found upon deeds of this description, admits that they give an untrue account of the facts, he loses

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the protection of the rule of law which would otherwise entitle him to say that allegations impeaching the accuracy of the deeds can only be proved by writ or oath. It is agreed that the deeds are false. The consequence is that the truth must be ascertained in the ordinary way. Neither party is now in a position of any advantage in this respect. I think the principle of the cases of Hotson v. Paul and Miller v. Oliphant is applicable. I therefore cannot agree with the interlocutor of the Lord Ordinary.

LORDS DEAS, ARDMILLAN, and MURE concurred.

THIS interlocutor was pronounced:—"Find that the disposition and assignation dated 15th June 1871, and letter of reversion dated 16th and 18th August 1871, are admitted by the respondent to contain an untrue account of the transaction between the parties: Therefore recall the interlocutor of the Lord Ordinary, repel the respondent's fourth plea in law, and remit to the Lord Ordinary to allow the parties a proof of their averments in common form, reserving all questions of expenses."

RENTON & GRAY, S.S.C.—WEBSTER & WILL, S.S.C.—Agents.

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Sellar, &c. v. Aiton.

ALEXANDER SELLAR AND OTHERS, Suspenders.—*D.-F. Clark—Brown.*
WILLIAM AITON, Respondent.—*Sol.-Gen. Watson—Pearson.*
WILLIAM AITON, Pursuer and Appellant.—*Sol.-Gen. Watson—Pearson.*
ALEXANDER SELLAR AND OTHERS, Defenders and Respondents.—*D.-F. Clark—Brown.*

Lease—Proof—Writ—Rei interventus.—Letters between the proprietor of a fishing village and his son and factor shewed that the landlord had been negotiating with the fishermen in the village, who were possessing on tacit relocation, as to their either purchasing their houses or taking leases for fifty-seven years at a certain increased rent; that by the landlord's desire the final answers of the fishermen had been obtained and marked by the factor in a list which specified neither the rent nor the term of endurance of the lease; and that thereupon the landlord, wishing that a larger number should purchase, directed his factor to inform the fishermen that the question of lease or purchase might lie over for another year. From the following term the fishermen were allowed to occupy their houses at the increased rent, and continued so to occupy for four years.

In an action of removing against three of the fishemen who had been marked as willing to take leases, *held* (1) that verbal contracts for leases of fifty-seven years had been proved by writ of the landlord; and (2) that sufficient *rei interventus* had followed to prevent the landlord from resiling.

2D DIVISION. Sheriff of Aberdeenshire. I.

ON 30th September 1872 William Aiton of Boddam raised a summons of removing against Alexander Sellar, Alexander James Stephen, and James Sellar, fishermen, tenants of dwelling-houses in the village of Boddam, belonging to the pursuer, concluding to have the defenders decerned to remove from their respective dwelling-houses at Martinmas 1872.

The defenders alleged that they were lessees of their houses under a concluded agreement of lease for fifty-seven years from Martinmas 1867, followed by possession and *rei interventus*. In support of their averments they referred to letters and documents in the hands of the pursuer and those acting for him, which they were allowed to recover under a diligence granted before the closing of the record.

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The defenders pleaded ;—(1) The defenders have a good and valid right and title to possess the subjects in question in virtue of their agreement with the pursuer, extending for years beyond the term at which they are sought to be removed. (2) The agreement between the parties has been validated and completed by *rei interventus*, as well as by homologation and acquiescence on the part of the pursuer. (3) In respect of said concluded agreement the pursuer is bound to grant a lease to the defenders of the subjects in question for fifty-seven years from Martinmas 1867. (4) The pursuer is, in the circumstances, barred by his acts and conduct from maintaining that the said agreement was not entered into.

The Sheriff-substitute (Comrie Thomson), on 24th June 1873, pronounced the following interlocutor :—"Finds the defenders entitled to prove by the writ or oath of the pursuer the lease which they allege the pursuer granted to them : Finds that the defenders may prove *prout de jure* the alleged *rei interventus*, and appoints the case to be enrolled for farther procedure."

The defenders appealed to the Sheriff (Guthrie Smith) who, upon 8th October 1873, recalled his substitute's interlocutor, and, before answer, allowed the defenders a proof of their averments, and the pursuer a conjunct probation.

A proof was accordingly taken.

The general facts of the case were shortly as follows :—

The fishing village of Boddam was formed about 1830. Most of the houses were built by the fishermen upon sites leased from the proprietor of Boddam for twenty-one years from Martinmas 1830, which period was extended by subsequent agreement for seven years more. The defenders averred that the fishermen had a right to remove the materials of their houses when they left the village, or to be paid for the same, and adduced some evidence to this effect. The existence of this right was denied on the part of the pursuer. In 1865 the pursuer purchased the estate of Boddam, and a correspondence passed between him, his son Mr John Aiton, civil engineer in Glasgow, and Mr Robert Stephen, fish-curer, Boddam, who collected his rents in the fishing village.

The parts of the correspondence chiefly founded upon were as follows :—

On the 26th August 1867 the pursuer wrote from Wales, where he was then residing, to his son :—"It would be well if you could learn what the fishermen intend doing about their houses, as I must have their final answers by the 15th of Sept. at latest, so as to have time to warn them away at Martinmas if we cannot agree."

On 3d September 1867 Mr Robert Stephen wrote to Mr John Aiton : —"You was to send a list of all the houses in Boddam, to see those who was to buy their houses and those who was to take a lease of their houses. Please do so, that I may give you the information before the 15th, as you intimated to me before you left Boddam."

On the same day Mr John Aiton wrote to Mr Stephen a letter which crossed the last :—"Glasgow, 3d Sept. 1867.—Mr Robert Stephen, Boddam. Dear Sir,—Herewith I send you list of occupiers of houses in the village of Boddam, to be filled up according as they may purpose to purchase said houses or lease them. Opposite the name of one who intends purchasing write, Will purchase house, and opposite the names of intending leaseholders write, Will lease house, in the respective columns ; and those who will neither purchase nor lease, write such opposite his name. If the full name of each person is not written down, please write it, and if junr. or senr. can be added anywhere put it in, so that the full name may be put upon the roll. When that is done send

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the list to me, and I will at once make out the roll, inserting the value of each house and the payment to be made by intending purchasers, also length of lease, opposite the name of purchasers, and opposite the name of intending leaseholders I will insert the length of their lease and annual rent, and then send the whole to you to be signed by each tenant personally. They are not to sign the list I now forward to you to be filled up. Please return it as soon as possible.—Yours truly,

"JOHN AITON.

"*P.S.*—Since writing the foregoing I have bethought me to add to the list in pencil the valuation of each house and the annual rent put thereon in case some may have forgot, and may ask you for the information.

"J. A."

Mr Stephen replied:—"Boddam, 4th Sept. 1867.—Mr John Aiton.—Sir,—Yours to hand of yesterday's date, with list of houses, which I shall call on all the tenants in Boddam and see if they are to purchase or lease their houses."

Some other letters followed between Mr John Aiton and Mr Stephen, asking and giving information on details.

On 11th September 1867 Mr Stephen wrote Mr John Aiton:—"Sir,—Enclosed I hand you your schedule, which I hope you will find correct. Those in the schedule without lease or purchase written after their name has not as yet decided whether they will purchase or lease until they see if they have any privilege round their houses, but they will do either of them."

The schedule * sent with this letter contained 117 names, with three columns, headed "Lease," "Purchase," and "Open,"—66 names being noted under the first, 21 under the second, and 30 under the third.

On 13th September 1867 Mr John Aiton wrote to Mr Stephen from Glasgow:—"Sir,—I have got the lists you sent me, but I see I will have to trouble you for further information than is contained therein. . . . If any of the fishermen should change their mind before I send you the roll for signature, and will purchase instead of lease, be kind enough to advise me of it."

To which Mr Stephen replied on 14th September, saying, *inter alia*;—"If any of the fishermen should change their mind about their houses I shall at once let you know."

On 17th September 1867 the pursuer wrote from Wales to his son:—"After looking carefully over all the information you have been kind enough to send me regarding the fishermen's houses at Boddam, I think that the best way would be to leave them the option of lease or purchase open for another year, but upon the distinct understanding that they pay £2 rent for next year, that is, from Martinmas '67 to Martinmas '68."

On receiving this letter Mr John Aiton wrote to Mr Stephen:—"Glasgow, 18th Sept. 1867.—Sir,—After a careful consideration of the information you have sent me, and due attention being given to the fact that this season's herring fishing is likely to turn out but a poor average for the fishermen of Boddam, the proprietor writes me that, under these circumstances, and a knowledge of their wishes, he will be willing enough to leave the fishermen the option of a lease or purchase of house property in the village of Boddam open for another year, if they should wish it,

* This schedule, which was produced by Mr John Aiton, was not the same as that mentioned in his letter of 3d September 1867 as having been sent to Stephen, and as containing certain pencil marks. The latter was not recovered.

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but upon the distinct understanding that they pay the lease rental, that is, two pounds (£2) rent for the year from Martinmas 1867 to Martinmas following, and that without any garden ground.

"I think that what has been proposed above will meet with a unanimous acquiescence from the fishermen, as it gives them a very fair chance of providing themselves by next season with means for the purchase they all desire to make; but put the proposal to them, and let me know the result; at the same time write the proprietor direct on the subject. Ascertain as far as you can generally if they be satisfied, and if there be any dissenting, let me know who they are, and what it is."

On the following day (19th) the pursuer himself wrote to Mr Stephen a letter containing the following passage:—"I wrote John to say that if the fishermen wished it I would keep the question of their purchasing their houses open for another year, but on the distinct understanding that they pay the £2 rent for next year. They quite understand already that they are to have no gardens after this year. Please to let me know whether they wish the chance of purchase kept open, or wish their leases at once."*

On 27th September Mr Stephen wrote to the pursuer:—"I have had an interview with the most of the fishermen in Boddam, and they are very thankful that you have been so good as let their houses lie over for another year; they quite understand that they are to have no garden ground after this year, and they are quite willing to pay the £2 of rent for the year until they see if they are able to purchase. If they are not able to purchase after the year is done, they will take a lease and pay £2 rent."

On the same date Mr Stephen wrote a letter in similar terms to Mr John Aiton.

The correspondence after this date was incomplete, all the writings recovered being a few letters from the pursuer to his son and to Mr Stephen, extending over the year 1868. On the 21st August 1868 he wrote to his son:—"I am glad to hear that the herring fishing is doing well, and I hope a good many of the fishermen will be able to purchase their houses at Martinmas."

On 10th October the pursuer wrote to Mr Stephen:—"I expect to be north in November, and would like to know what prospect there is of the fishermen buying up their houses this season, so that something definite could be done when I am on the spot. I suppose the fishing has been a good one in Boddam, and should enable the most of the fishermen to secure their houses at this term."

In a letter of 3d December 1868 to his son, in reference to persons who made the getting of additional land a condition of purchasing, he wrote:—"You must tell these two persons that no additional land will be given; and seeing that to be their objection to purchase, and not inability to do so, I shall not give them a lease of their houses at all, but just keep them in my own hands, unless they choose to purchase, pure and simple, as they are valued. This rule to apply to all who make additional land a condition of purchase."

On 14th December 1868 the pursuer wrote to his son, *inter alia*, "you need be in no hurry with the leases."

In addition to the correspondence the defenders founded upon an entry in Mr John Aiton's note-book, "fishermen's answers anent houses, June

* The pursuer in his examination as a witness for himself, being shewn this letter, and asked to explain the meaning of the concluding sentence, deponed,—"The word 'leases' there referred to the 999 years' leases."

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1867." The names of most of the fishermen were entered, followed by a jotting, which was in most cases "Depends upon fishing." "At end of herring-fishing will see about it." "Will purchase if fishing turns out good," or something similar. Some few names had opposite them the words "£1, 2s. 6d., years 999," and two, one of which was that of the defender, Alexander James Stephen, the words, "£2, 57 years."

The fishermen, other than those who elected to purchase, and, amongst others, the defenders, paid £2 a-year for the next four years instead of £1, 2s. 6d. as before. In September 1872 each of them was served with a notice that the house occupied by him as tenant would be let for one year from Martinmas following at £4 a-year, and requiring him to retake it if he wished to continue as occupier. The present summons of removing was then raised.

The parole evidence for the defenders was to the effect that two proposals, and only two, were made in the summer of 1867 to the community by the pursuer and those acting for him, viz., purchase or lease, the purchase to take the form of a lease for 999 years at a rent of £1, 2s. 6d., the tenant paying half the estimated value of the house, and the lease proper to be for 57 years, with a rent of £2 a-year, except for a few of the smaller houses.

With regard to the question how far Mr John Aiton and Mr Robert Stephen had power to bind the pursuer, Mr John Aiton deponed:—"I had no authority from my father to grant leases. I simply collected information for the proprietor. I had authority from my father to ask the tenants whether they were willing to purchase or lease."

With reference to the entries in his note-book, and the list made up by Mr Robert Stephen, he explained,—The entries were made to give information to pursuer. They were not made for the purpose of fixing any arrangements with fishermen. Nothing was fixed except the valuations, and the rental from Martinmas 1867 to Martinmas 1868. Pursuer fixed those. The lists made up were made without instructions from pursuer, to give him information. He did not even know that I was making them."

Mr Robert Stephen deponed,—"I cannot reply whether I had any authority from pursuer to conclude a bargain. The documents are there, and speak for themselves."

The Sheriff-substitute (Dove Wilson), upon 23d February 1874, pronounced the following interlocutor:—"Finds in fact (1) that in the year 1867 the pursuer offered to the defenders a lease of their respective premises libelled for fifty-seven years from the term of Martinmas 1867; (2) that the defenders accepted said offer; and (3) that since Martinmas 1867 the defenders have been in possession under said offer and acceptance: Finds in law that the pursuer is not now entitled to resile from his offer, and therefore assoilzies the defenders from the conclusions of the libel: Finds them entitled to expenses of process," &c.

Against this interlocutor the pursuer appealed to the Sheriff (Guthrie Smith), who, upon 10th April 1874, pronounced this interlocutor:—"Recalls the said interlocutor: Finds that the defenders have failed to instruct by competent evidence an agreement for a lease of the subjects in question for a term of years as alleged: Therefore repels the defences, decerns removing in terms of the conclusions of the summons, but only at the term of Martinmas next 1874, reserving the defenders' claims for the materials of the houses so far as competent: Finds no expenses due, and decerns."

The defenders presented a note of suspension of the decree of the Sheriff, which was passed by the Lord Ordinary on the Bills, and a record was adjusted and closed before Lord Gifford.

The pursuer appealed to the Court of Session against the Sheriff's

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interlocutor, in order to maintain two points—(1) that he was entitled to decree of removing as at Martinmas 1872, in terms of the conclusions of his summons, whatever might be the legal effect of such decree; and (2) that he was entitled to expenses in the Sheriff-court.

In respect of the dependence of the appeal at the pursuer's instance, Lord Gifford, in the process of suspension, made avizandum to the Inner-House.

Argued for the defenders;—Their case was rested on a verbal agreement of lease, proved by writ, and followed by possession under the lease.[1] The letter of 26th August 1867 by the pursuer to his son shewed that the negotiations which had been going on were so far complete that nothing remained to be done but for the fishermen to give their final answers to the pursuer's offer, and their answers were given in writing in the list made by Mr Stephen, the landlord's agent. All the essentials of the lease were proved by writing. About the subject, viz., the respective dwelling-houses, there could be no question. The rent was proved by the receipts. The duration was also proved by writ, for the letters shewed that the same terms were offered to all,—Mr John Aiton's note-book shewed that the duration of the defender, Alexander Stephen's lease, was to be fifty-seven years, and therefore that was the duration of all the leases. Even if it were held that the duration was not proved *scripto*, the letters shewed that there was a definite term of years in the view of the parties as the duration of all the leases, and it was competent to resort to parole evidence to explain the writings and find out what that period was.[2]

Argued for the pursuer;—The terms of the lease must be proved *scripto* of the landlord, there being no proposal to refer to his oath. There was no evidence to shew that either Mr John Aiton or Mr Robert Stephen had authority to grant leases, or to make an agreement binding upon the pursuer. The utmost that the letters shewed was that they were instructed to place certain proposals before the community, and collect information, as a preliminary step to the landlord dealing with the fishermen severally. Even if their letters could be held to be writ of the landlord they did not instruct the alleged lease. It was not every memorandum under the hand of the landlord or his factor which, when followed by possession, constituted a lease. It must be a memorandum made with the view of putting on record the relation of landlord and tenant.[3] The cases relating to entries in rental-books did not support the defenders' case. A rental-book was kept for no other purpose but to shew the state of let of the landlord's property, and therefore there could not be a more authentic record of what the landlord believed to be the rights of the tenant. Here the writings founded on by the defenders merely shewed that there were negotiations going on about leases. The list sent by Mr Robert Stephen to Mr John Aiton was not a list of tenants but a list of persons willing to do a certain thing. The direction by Mr John Aiton, in his letter of 3d September 1867, that the fishermen were not to sign the list, was alone conclusive against there being any binding agreement at that date. Lastly, no *rei interventus* had been proved. Mere posses-

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[1] Bell on Leases, pp. 305, &c., and cases there cited; Macleod v. Urquhart, May 25, 1808, Hume, p. 840; Macrorie v. Macwhirter, Dec. 18, 1810, F.C.; Lord Arbuthnot v. Campbell, Feb. 27, 1793, Hume, p. 785; Russell v. Freen, May 14, 1835, 13 S. 752, 7 Scot. Jur. 351; Hunter's Landlord and Tenant, vol. i. pp. 415, &c.

[2] Macleod v. Urquhart, *supra*.

[3] Maxwell v. Grierson, 1812, Hume, p. 849.

sion was in this case of no significance. For ten years past the houses had been let from year to year, and the payment of a rent of £2 per annum was equally consistent with a yearly tenancy as with a lease for fifty-seven years.

At advising,—

LORD GIFFORD.—I have found this case to be one of very great delicacy and difficulty both in point of fact and in point of law. For although the question raised is mainly one of fact, whether the leases alleged by the respondents, the fishermen of Boddam, are sufficiently instructed, this question involves most important legal considerations as to the competency and sufficiency of the evidence adduced, and as to the nature of the *rei interventus* which is necessary to validate the tenant's right.

The case is also one of considerable importance to the parties. For although the heritable subjects are individually not of great value a lease of fifty-seven years involves important rights both to landlord and to tenant. It is a claim of heritable right—the right of the respondents to their dwelling-houses, and while we can only deal with the three individual cases which are raised in the present action, it is quite right to keep in view that the cases of many others of the fishermen may be practically decided by our judgment.

The question is whether the three defenders in the action of removing have sufficiently, and by competent evidence, established valid and subsisting leases between them and the pursuer, Mr Aiton of Boddam, for fifty-seven years from Martinmas 1867, of the cottages or houses respectively possessed by the respondents, and that at the annual rent of £2 each. While fully admitting the difficulties and the force of the legal objections pleaded by the landlord, and very ably argued at the bar, I have come to be of opinion, on the whole, that the defenders have succeeded in establishing by sufficient legal evidence the subsistence of the leases claimed by them.

The rule of law is that leases for more than one year, being heritable rights, can only be instructed by writing, and the writing ought to be either holograph of the respective parties, or duly tested according to law. But it very often happens, especially with the humbler classes of tenants, that possession of the subject is given and enjoyed, and important *rei interventus* takes place on the faith of the lease without any formal or legally tested written lease, and in these cases the subsistence of the lease is allowed to be proved by writing, although the writing be destitute of or defective in the usual legal solemnities. For example, there may be merely a written offer signed by the landlord, but not holograph of him, and there may be no written acceptance by the tenant, but if, on the faith of the improbative offer, possession has followed, and the lease has been acted upon, both parties will be bound for the whole period of duration expressed in the imperfect writing. And so in many other cases, where what is called a defective lease is validated and rendered binding on both parties *rei interventu*, or where the terms of a lease never formally reduced to writing are instructed by informal writings acted on by both parties, and followed by possession and enjoyment of the subject, and by actings on the faith of the lease.

This rule of law has been established in almost every variety of circumstances by a very long and a very numerous series of cases, which will be found collected in Mr Hunter's work on Leases, vol. i., p. 412, and subsequent pages, and by other writers. It is not necessary that I should refer to these

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cases, because their authority and the rule of law which they establish were admitted by both parties, the dispute being not as to the general rule of law, but as to its application to the circumstances of the present case. I do not understand that it was contested that a defective lease may be validated *rei interventu*, or by possession having followed on it, or that the terms of a lease clothed with possession may be instructed by informal writings. The contest in this case really is, whether the writings founded on by the tenants are in law the writings of the landlord, whether they are sufficient to instruct a concluded lease, and whether the possesion of and acts done by the tenants are referable to the contract of lease alleged by them, and are sufficient to validate it even supposing its terms to be made out from the imperfect writs founded on.

Now, on all these points I have come, though not without hesitation, to form an opinion favourable to the tenants, although certainly the case is one of the narrowest which has yet occurred.

In the circumstances of the present case I think that the writings of Mr John Aiton, engineer, the son of the pursuer, and of Mr Robert Stephen, the factor of the pursuer, must be held as equivalent to the writing of the pursuer himself, at least whenever the son or the factor were acting on the instructions of the pursuer. It has never been doubted that rental-books or rental-rolls made up by a factor duly authorised are held as made up by the landlord himself. In this sense the maxim is applicable *qui facit per alium facit per se*. In the present case, however, there is a great deal of evidence directly under the landlord's own hand.

Now, without going over the evidence in detail—it is long and complicated, and to specify and distinguish the items of evidence would serve no good purpose—I think the following facts are sufficiently instructed by writings which are either directly or constructively the writ of the landlord.

(1) It is proved that the pursuer, Mr Aiton, offered and proposed to give the fishermen in his village of Boddam one of two things,—either, first, a long lease of their houses or cottages for 999 years at the existing rent, £1, 2s. 6d., they paying one-half of the estimated value of the house or its materials; or, second, to give them a shorter lease of their cottages for fifty-seven years at the advanced rent of £2 per annum. Throughout the whole correspondence and communings the first proposal was called a purchase by the fishermen, the second alternative was called a lease to them. No other proposal was made. There was no third alternative.

Originally this offer was made by the landlord verbally at meetings and otherwise, but its terms are all got from the writings of either Mr Aiton himself, or of his son or factor acting under his instructions.

(2) It is proved that Mr Aiton instructed his son, an engineer in Glasgow, to put himself in communication with the fishermen, and "learn what they intend doing about their houses, as I must have their final answers by the 15th of September at latest, so as to have time to warn them away at Martinmas if we cannot agree."

This is proved by the pursuer's own letter of 26th August 1867, which clearly shews that he wanted an answer from the fishermen,—an answer, that is, to his alternative proposal, and an answer which would constitute an agreement; for if "we cannot agree," the fishermen not agreeing were to be warned away.

(3) It is proved that the pursuer's son, following out his father's instruc-

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tions, put himself in communication with the fishermen, through the factor, with the view to get their final answers to the pursuer's proposals. Mr John Aiton had already been in personal communication with many of the fishermen, and we have his note-book, in which he had noted in June 1867 the answers of many of them to the pursuer's offers. But he now sent down final lists to the factor, and instructed the factor to write opposite each fisherman's name whether he will purchase or lease his house, or whether he will do neither. Obviously this was intended to be the "final answer" which the pursuer instructed his son to get.

I may notice in passing that Mr John Aiton's note-book, which, being written in carrying out his father's instructions, I think is really the father's writ, proves 999 years to have been the length of the proposed lease called the "purchase," and fifty-seven years that of the "lease," as well as the rent to be paid in each case. The different cottages are indicated by numbers.

(4) It is proved that the pursuer's factor, acting upon the pursuer's instructions communicated through his son, went through the fishermen, and upon a list prepared for the purpose noted their final answers in writing. This written list the factor transmitted to Mr John Aiton for the pursuer, with full explanations. In his letter the factor states that all the fishermen will either purchase or lease, and it appears from other letters that their ability to purchase depended on the success of the year's fishing.

In the list so transmitted by the factor all the present respondents are marked as "lease," which means that they will take a lease for fifty-seven years of their cottages at a rent of £2 per annum. The cottages had all been built by the tenants themselves.

This written list, made up by the factor under the pursuer's orders and instructions, seems to me to be very like a rent-roll made up by and for the landlord, and a rent-roll where possession has followed has often been held a good and sufficient evidence of a long lease,—see the recent case of the Tobermory fishermen,[1] where the only evidence of the lease was the rent-roll made up by the factor of the fishery company. It is not necessary that the tenant shall hold any writing whatever.

(5) It is proved that the pursuer, on considering "all the information" sent him by his son and factor, agreed, in order to encourage the fishermen rather to purchase than to lease—that is, rather to take the long lease for 999 years than the short lease for fifty-seven years—to delay issuing or making out the leases for fifty-seven years for a year, provided the lessees should pay in the meantime the advanced rent of £2—that is, the rent agreed on for the fifty-seven years' lease. At the same time the pursuer offered, if any of the fishermen wished it, to give them their leases—that is, their shorter leases—for fifty-seven years, at once. This is proved, *inter alia*, by the pursuer's holograph letters of 17th and 19th September 1867. It was simply the proposal of the pursuer which delayed or postponed the making out and the granting of formal written leases of fifty-seven years.

(6) It is proved that the defenders, who had all agreed to take leases of fifty-seven years, and to whom formal leases would have been granted if they had asked them, possessed on the faith of the lease, and paid the advanced rent of

[1] Campbell v. M'Lean, &c., April 4, 1870, 8 Macph. H. L., 40, 42 Scot. Jur. 392.

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£2 for four or five years. There was a change of tenure indicated by the change of rent, and it seems impossible to ascribe the possession subsequent to Martinmas 1867 to anything else than the agreement for leases of fifty-seven years.

I am, therefore, of opinion that there is here sufficient writing, which we must hold in law to be the writing of the landlord, to instruct an agreement to grant a lease of fifty-seven years at the rent of £2, and that this agreement has been followed by sufficient possession and *rei interventus*. There is therefore in law a subsisting lease, and the tenants must be assoilzied from the conclusion of removing. I concur generally with the judgment and opinion expressed by the Sheriff-substitute.

LORD SHAND.—The decision of this case is attended with difficulty, and I am not surprised that it should have given rise to a difference of opinion between the Sheriff and Sheriff-substitute. I concur, however, in thinking that the judgment of the Sheriff-substitute is right, finding that the defenders have instructed their alleged right to leases for fifty-seven years of the houses occupied by them respectively.

The parties are agreed that at Martinmas 1867 a change occurred in the terms of the tenure on which the defenders continued to possess their houses. The question in dispute is as to the nature of the change. Was it merely an arrangement for an increase of rent and for one year's possession in order to give time for deliberation and a permanent arrangement being made for a lease of 999 years on certain conditions, or for a lease of fifty-seven years; or was it an arrangement concluded for a lease of fifty-seven years at the increased rent, with power to the defenders during the first year of that lease, to make their right substantially a right of property by taking a 999 years' lease, subject to the condition of making payment of one-half of the estimated value of their houses? I agree with the Sheriff-substitute in thinking the latter was the agreement between the parties.

It lies of course with the defenders to instruct the existence of the right they allege, as being one for a period of years; and it must, I think, be conceded that the *rei interventus* founded on, which consists entirely in the payment of increased rents, is not of a kind which aids the defenders materially in their contention. A new and informal arrangement for a lease is often followed by expensive operations on the tenant's part, executed with the knowledge of the landlord, in erecting buildings or making drains and fences, or the like, and sometimes by the payment of a grassum. In such cases the acts of *rei interventus* are usefully, and properly founded on, not merely to shew that the agreement of the parties was acted on, but as throwing light reflectively on the agreement itself. In such cases the nature and amount of the expenditure affords a strong presumption that the arrangement was one for a term of years. In the present case, I think, any such element is wanting. The increased rent paid for about four years before the present dispute arose is equally consistent with an agreement for tenancy for a single year, continued by tacit relocation, as with an agreement for a fifty-seven years' lease. The increased rent is not necessarily to be accounted for by an arrangement for a tenancy of years. The *rei interventus* is thus of use only in the way of shewing that the new agreement, whatever it was, was acted on, and indeed acted on by both parties, but not as shewing what the agreement was.

The agreement must thus be found entirely in the writ of the landlord, by

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which the defenders say its existence has been proved. There were no writings which passed between the parties, such as informal missives, or even a draft lease, revised or adjusted, which, when followed by *rei interventus*, might have been held to constitute a lease. The only document directly communicated to the defenders was the schedule made up by Stephen, the factor for the pursuer, on which the verbal answer of each defender to the question of lease or purchase was recorded. This document was not signed, and was not intended to be the writing constituting a lease in favour of the parties whose answers were there recorded. But although there be no writing, which, though informal, can be represented as constituting a lease, when followed by *rei interventus*, I think the agreement, as alleged by the defenders, has been proved by writ, *i.e.* by the writ of the pursuer.

The parole evidence can be competently resorted to in order to prove the relation of agency between the pursuer and his son and factor, both of whom acted for him in the transaction between the parties, and recorded in writings at the time for the pursuer the result of their communications, and may also be legitimately referred to to prove the surrounding circumstances necessary to make the writings intelligible, and to enable the Court to construe the terms there used. To this limited extent only I have proceeded on the evidence of the witnesses. In the writings of the landlord I am of opinion that evidence is to be found that, before Martinmas 1867, he and the defenders had agreed that, on the one hand, the defenders should each pay an increased rent, the difference being £2 in place of the former rent, £1, 2s. 6d., and that, on the other, they should be tenants on leases for fifty-seven years, with an option or privilege, however, open to them during the first year, of taking leases for 999 years, on payment of one-half the value of their houses, and of reverting in that case to their old rent of £1, 2s. 6d. for the longer period.

The documents, which, I think, prove the agreement, are, in the first place, the pursuer's own letters of 26th August and 17th September to his son, and of 19th September to Robert Stephen, with the entries in Mr John Aiton's note-book of the fishermen's answers as to their houses, the letter by Mr Stephen of 11th September to Mr John Aiton, and the list or schedule it contained, and the letter by Stephen of 27th September to the pursuer. Such of these writings as are in the handwriting of Mr John Aiton and Robert Stephen respectively are to be taken in the present question as the writ of the pursuer,—in the same way as the record by a factor in the rental-book of his employer of the terms of a lease is held to be the writ of the landlord. Mr John Aiton and Stephen were employed by the pursuer to act as his factors or agents in communications made for him to the defenders, and the books or writings in which they recorded, on the landlord's behalf, the terms on which the parties had negotiated, and the result of the negotiation, are to be regarded as his writ.

From these writings I think it is proved (1) that prior to 26th August the pursuer and the defenders and other fishermen in the occupation of houses had been negotiating as to their purchasing their houses by taking leases for 999 years, or otherwise taking leases for the shorter period of fifty-seven years; (2) that by the pursuer's desire, communicated through his son to Stephen, the final answers of the defenders and the other fishermen to the pursuer's proposal to allow either purchases or leases were called for and given, and were recorded in writing; and (3) that while all who answered the proposal by agreeing to lease were thereby held bound to do so, yet the pursuer, being anxious that as many as

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possible should yet purchase their houses, agreed to keep the right or chance of purchase open for another year, and thus put them in the position of tenants on long leases, with a power of purchasing the houses which were the subject of lease. I think this arrangement is distinctly recorded in the pursuer's letter of 19th September to Stephen, when he says, "Please to let me know whether they wish the chance of purchase kept open, or wish their leases at once," and I cannot adopt his explanation that the leases there mentioned, as to be sent at once if wished, were leases, not for 57, but for 999 years. It appears to me to be further proved that the leases mentioned in the writings to which I have referred, as distinguished from the purchases, were leases for a period of fifty-seven years. The note in John Aiton's book referring to the defender, Alexander James Stephen, expressly states this to be the term of endurance of his lease. The whole other writings shew that one and the same term of endurance of lease at the increased rent was in the mind of the parties negotiating, so that when the term of fifty-seven years is proved in reference to one it is truly proved as to all.

On the whole I am of opinion that the *rei interventus* which unquestionably took place followed on a verbal agreement with the defenders, proved by the writ of the pursuer to have been not an arrangement for what has been called a year's grace only, with no obligation beyond that time, but an agreement concluded for leases of fifty-seven years, with a power or privilege to the defenders to purchase the subjects of their respective leases, if they desired to do so; and this being so, I think the defenders should be assoilzied from the conclusions of the action of removing at the pursuer's instance.

Lord Neaves.—I concur so entirely with your Lordships that I shall state in very few words the grounds of my opinion.

The case is of considerable importance and delicacy, because a lease for the period of fifty-seven years partakes of the nature of an alienation, and is not to be established or enforced except upon evidence which complies with the cardinal rules of law in regard to the alienation of land.

The essential question is, whether there is writ binding upon the parties. But let us first consider whether, supposing this to have been a consensual contract, where, without requiring solemnities, we had to determine the meaning of the parties, there is any doubt about the agreement to which they came.

The houses in question had been held on a strange sort of customary tenure. They had been built by the fishermen, and it appears that when they removed they were entitled to carry off the woodwork of the houses. This was evidently not a very convenient arrangement, and the proprietor became desirous of putting things on a new footing. Accordingly, he proposed to the fishermen generally an option of a lease of fifty-seven years, or, what is called a purchase, viz. a lease for 999 years. It is of importance to notice that the proposal originated with the landlord. Some declared their willingness to purchase, but the greater number, including the defenders, indicated their willingness to take a lease. This was not so satisfactory to the landlord as he expected. He would have preferred to have had the houses sold. A proposal was then made to them that a year's interval should be allowed to elapse, in order that those who were then willing to lease for fifty-seven years might, if they saw a good opening, choose the longer endurance. The paucity of those willing to buy was attributed to the want of success which had attended that year's fishing, and it was hoped that another

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year would put them in funds. An arrangement was made to this effect, upon the condition that they should pay an increased rent of £2 for their houses for the next year, which was to be the rent under the fifty-seven years' lease. I think that this was agreed upon, not upon the footing that if the option to purchase was not exercised all parties should be free, but that the fishermen were to get the lease at any rate. They were to have the option of an alternative proposal, but if, at the end of that year, they chose to fall back on the original proposal, they were to be entitled to get, and bound to accept, a fifty-seven years' lease.

If that be the nature of the agreement, is it proved in a habile manner by what is equivalent to the writ of the parties, followed by *rei interventus?* It appears to me that the letters founded on are sufficient to prove the offer by the landlord, and the extension of that offer, with the proviso that if the fishermen did not choose to extend the lease to a purchase the parties were to be bound as by a lease. There is sufficient writing to constitute writ by the landlord, such as, if followed by *rei interventus*, will make a contract binding on the parties. It was followed by *rei interventus*, for from that time the new rent of £2 became payable, and has been paid ever since.

The LORD JUSTICE-CLERK and LORD ORMIDALE were absent.

(*In the Suspension.*)

THIS interlocutor was pronounced:—"Find it proved in point of fact that the suspenders are tenants of the houses possessed by them respectively under valid and subsisting leases to them by the respondent for fifty-seven years from Martinmas 1867, and that they have possessed under such leases since Martinmas 1867: Find in point of law that the respondent is not entitled to remove the defenders from their respective possessions: Therefore suspend the decree of removing of date 10th April 1874, pronounced by the Sheriff of Aberdeen in the action raised at the instance of the respondent against the suspenders set forth in the record, and threatened charge thereon, and decern: Find the suspenders entitled to expenses, and remit," &c.

(*In the Appeal.*)

(After findings as in the above interlocutor)—"Therefore and with reference to the judgment of this date in the relative action of suspension at the instance of the respondents, recall the judgment of the Sheriff appealed against, and assoilzie the respondents from the conclusions of the action of removing, and decern: Find the respondents entitled to expenses, both in this Court and in the inferior Court, and remit," &c.

ALEXANDER MORISON, S.S.C.—JOHN AULD, W.S.—Agents.

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THE EDINBURGH LIFE ASSURANCE COMPANY, Appellants.—*D.-F. Clark—Balfour.*

THE SOLICITOR OF INLAND REVENUE, Respondent.—*Sol.-Gen. Watson—Rutherfurd.*

THE SCOTTISH WIDOWS' FUND AND LIFE ASSURANCE SOCIETY, Appellants.—*D.-F. Clark—Balfour.*

THE SOLICITOR OF INLAND REVENUE, Respondent.—*Sol.-Gen. Watson—Rutherfurd.*

Revenue—Inhabited House-Duties—48 *Geo. III. c.* 55—57 *Geo. III. cap.* 25, *sec.* 1—5 *Geo. IV. cap.* 44, *sec.* 4—32 *and* 33 *Vict. cap.* 14, *sec.* 11.

The Act 48 Geo. III. c. 55, imposed a duty upon houses.

The Act 57 Geo. III. c. 25, sec. 1, introduced an exemption in respect of houses occupied "for purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, no person inhabiting, abiding, or dwelling therein, except during the daytime only for the purposes of such trade."

The Act 5 Geo. IV. c. 44, sec. 4, after referring to the exemption introduced by the previous Act "to persons in trade," enacted that the exemption "shall and may be extended" to every person in respect of any house or building "which shall be used by such person or persons as offices or counting-houses for the purposes of exercising or carrying on any profession, vocation, &c., no person inhabiting, abiding, or dwelling therein, except in "the daytime" only, for the purpose of such profession, &c.

The Act 32 and 33 Vict. c. 14, sec. 11, enacted that any house "occupied as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, or being used as a shop or counting-house, shall be exempt from inhabited house-duties, although a servant or other person may dwell in such tenement or part of a tenement for protection thereof."

Held that the last of these enactments applied only to houses used for purposes of "trade" in the sense of the Act 57 Geo. III. c. 25, and therefore did not apply to houses used as insurance offices with resident servants.

Exchequer Cause.
1st DIVISION.
B.

AT a meeting of the commissioners for executing the Acts relating to the inhabited house-duties for the county of Edinburgh on 3d December 1874 the Edinburgh Life Assurance Company, Edinburgh, appealed against the charge of £13, 2s. 6d. made upon them for inhabited house-duty at the rate of 9d. per pound on £350, the annual value of the premises occupied by them for the purpose of carrying on their business of life insurance.

The area flat, consisting of four apartments, having internal communication with the offices above, was occupied as a dwelling-house by a servant of the company, who went messages, superintended the cleaning of the premises, and acted as a clerk to the company to the extent of addressing and booking letters, and with whom resided his wife, and a female servant whose wages were paid by the company.

The appellants claimed relief from the assessment under the Act 14 and 15 Victoria, cap. 36, and under the 11th section of 32 and 33 Vict. cap. 14,* on the ground that they were a proprietary company engaged in trade, that the business carried on for the benefit of, and at the risk of

* "From and after the 5th day of April 1869 any tenement or part of a tenement occupied as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, or being used as a shop or a counting-house, shall be exempt from inhabited house-duties, although a servant or other person may dwell in such tenement or part of a tenement for the protection thereof."

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the shareholders, of insuring lives, buying and selling annuities, reversions, &c., was essentially a trading business, that the part of the tenement occupied by them in 22 George Street was used "for the purpose of trade only," and that the person dwelling in the area flat lived there "for the protection thereof," and to take care of the premises.

The appellants maintained that an insurance office was as little liable as a bank (which the surveyor admitted was not liable unless where it was also used as a dwelling-house), and that an insurance company could be sequestrated as well as a bank, or any other trading company. The appellants further contended that the case of the National Bank of Scotland (1115)* was totally different from theirs, because the upper stories of the bank were inhabited by the cashier and his family.

The surveyor contended that the premises did not fall within the exemption quoted,—1st, Because the business carried on by the appellants was not of the nature of trade in the meaning of the Act, and the premises were not therefore used "for the purposes of trade only." . . . . The Act made a clear distinction between trades and professions. And under it the offices of writers, accountants, &c., were charged, although a considerable part of their business was akin to that of banking, inasmuch as they lent money, purchased shares, &c.; but it was considered that their offices were not solely used for the purposes of trade, and they were therefore taxed. Life insurance was not a trade; there was neither a buyer nor a seller, but for an annual payment the company guaranteed a sum at death. 2d, Because, even if the business carried on was of the nature of trade, the premises did not come under the exemption claimed, inasmuch as the person residing in them did not dwell there solely for the protection thereof, but was otherwise occupied, sometimes in discharging the duties of a messenger, and at other times the more important duties appertaining to the position of a clerk. The surveyor cited the English case (No. 2850), the Atlas Assurance Company, and the Scotch case (No. 1115), the National Bank of Scotland.

The commissioners were of opinion that the business carried on was not of the nature of trade, and that therefore the premises did not come within the exemption granted by the statute, and accordingly refused the appeal and confirmed the assessment. But the appellants being dissatisfied with their decision, craved that a case might be stated for the opinion of the Court under the Customs and Inland Revenue Act, 1874, 37 Vict. cap. 16.

A similar case was stated for the Scottish Widows' Fund and Life Assurance Society, a "mutual" office.

The appellants argued;—These companies, whether proprietary or mutual, were traders, just as a bank was admitted in practice to be. The words "inhabited dwelling-house" were not applicable to their premises, and, besides, they were exempted as being used for purposes of trade only.

The respondent argued;—The companies were not traders, and even bankers and underwriters were not traders.†

At advising,—

LORD PRESIDENT.—In the case of the Edinburgh Life Assurance Company the company claim exemption from the inhabited house-duty upon the ground that they are within the meaning of the 11th section of the statute 32 and 33

* These numbers refer to Assessed Taxes Cases printed for the Office of Inland Revenue.

† The Acts of Parliament founded on by the parties are quoted in the Lord President's opinion.

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Vict. c. 14, and the commissioners have refused to sustain that exemption because they are of opinion that the business carried on by the company is not of the nature of a trade, and therefore the premises do not come within the exemption of the statute.

Now, in order to determine whether the business carried on by this company is of the nature of a trade, it is necessary, of course, to ascertain what is the meaning of the term "trade" as used in this statute. But for that purpose, again, it seems to me to be necessary to attend to the legislative history of this inhabited house-duty,—what it is in itself, and how the exemptions have arisen and been introduced into the statute. The duty itself was imposed originally in the year 1808 by 48 Geo. III. c. 55, along with a great many other taxes, and there cannot be much doubt, I think, in reading that Act, that it was intended to assess all houses or tenements which were occupied, not merely by persons residing in them, but also by persons occupying them during the day for business purposes. In short, although it was called an inhabited house-duty, it really was something more extensive than that, because an inhabited house, in the popular sense of the term, is a house in which persons dwell, reside, and spend the night as well as the day. The tax, in its original conception under the 48th Geo. III., was of a more comprehensive description than that. But after it had been in operation for some time, there was first one exemption introduced by the Act of 57th Geo. III. c. 25, and afterwards another by the 5th Geo. IV. c. 44. The 57th Geo. III. c. 25, sec. 1, introduced this exemption, that on due proof that "any person, or any number of persons, in partnership together respectively occupy a tenement or building . . . . . as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares or merchandise therein, or as a shop or counting-house, no person inhabiting, dwelling, or abiding therein, except in the day time only, for the purpose of such trade, such person or each of such persons in partnership respectively residing in a separate and distinct dwelling-house, or part of a dwelling-house, charged to the duties under the said Act, it shall be lawful for the said commissioners, according to the provisions of this Act, to discharge the assessment made for that year in respect of such tenement or building which shall be so used for purposes of trade, or so employed as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house." Now, this is an exemption applied to trade premises solely, and confined entirely to that, and the words used in this statute are extremely important. It must be a house used for the purposes of trade only, or a warehouse for the sole purpose of lodging goods, wares, and merchandise, or a shop or counting-house, and it must be occupied only during the day for the purposes of such trade, and not occupied during the night as a dwelling-house. Now, *prima facie*, certainly under that statute the word "trade" is used as meaning the trade of a merchant or shopkeeper,—that is to say, of one who buys and sells as a merchant does, on a large scale, or of one who deals in retail like a shopkeeper; and, reading that statute alone, one would be very much disposed to come to the conclusion that the exemption was not intended to extend beyond either a merchant, in the proper sense of the term, or a shopkeeper. But then we have the next statute, 5th Geo. IV. cap. 44, which, by sec. 4, extends the exemption to another class, and it is not immaterial to observe that that section has a special preamble referring back to the 57th of Geo. III. in these terms:—"The provisions in the said Act contained for granting exemptions from the said duties to persons in trade in respect of houses, tenements, and buildings in

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the said Act described." Now, here is the interpretation of the previous statute in this preamble. The exemption extends to persons in trade in respect of houses used solely for the purposes of trade. That is the meaning of the clause in the 57th Geo. III., as construed by the Parliament which passed the Act of 5th Geo. IV., and it extends that provision, and enacts that the exemptions "shall and may be extended and applied by the respective commissioners and officers acting in the execution of the said Act and this Act, on due proof, to all and every person, or any number of persons in partnership together, for or in respect of any house, tenement, or building, or part of a tenement or building in the said Act described which shall be used by such person or persons as offices or counting-houses for the purposes of exercising or carrying on any profession, vocation, business, or calling by which such person or persons shall seek a livelihood or profit, no person inhabiting, abiding, or dwelling therein, except in the day time only, for the purpose of such profession, vocation, business, or calling; such person, or each such persons, in partnership respectively residing in a distinct and separate dwelling-house, or part of a dwelling-house, charged to the said duties."

Now, it seems to me that the question we have to solve in the present case is, whether the Edinburgh Life Assurance Company is within the first statute or the second, whether it is a trader within the meaning of the 57th Geo. III., or is a company carrying on a business or calling within the meaning of the 5th Geo. IV. In these two statutes the two classes of persons are placed exactly in the same position. They are equally exempt, but the necessity of distinguishing between the two in this case arises from the provisions of the 11th section of the recent statute 32d and 33d Vict., which provides—"From and after the fifth day of April one thousand eight hundred and sixty-nine any tenement or part of a tenement occupied as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, or being used as a shop or counting-house, shall be exempt from inhabited house duties, although a servant or other person may dwell in such tenement or part of a tenement for the protection thereof." The persons who are exempted under the 57th Geo. III. have this additional privilege under the statute of the 32d and 33d Vict., that they may enjoy their exemption although they have a servant dwelling in the house for the purpose of protection; and this is not extended to those who enjoy their exemption under the 5th Geo. IV., and thence arises the necessity of determining to which class of exempted persons this insurance company belongs. Now, I am of opinion that the term "trade" is used in the first of these statutes in its strict meaning, and that there are a great many businesses which may be regarded as falling within the description of trading that are not trading within the meaning of that statute. I am satisfied, taking these two statutes conferring the exemptions together, that the distinction intended to be made between the two is, that the one exemption is confined to traders in the proper and legitimate sense of the term—merchants and shopkeepers,—and that the exemption is extended to all other persons who are carrying on any other kind of business for profit, not being traders in that proper sense; and as the 11th section of 32 and 33 Vict. repeats the very words of the 57th Geo. III. in giving the additional privilege, that additional privilege must be confined to the persons within the meaning of the 57th Geo. III.; and I am therefore of opinion with the commissioners that this insurance company is not a trader. That renders it quite unnecessary to enter upon the question whether the servant whom they had in

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charge of their premises is within the meaning of the 11th section of the recent statute, for the purposes of protection, and for no other purpose. That might raise some little difficulty, but it is not a question of the same importance as the other. It is sufficient for our judgment, I think, to adopt the same ground that has been adopted by the commissioners, and in which, I think, they are quite right. With regard to the case of the Scottish Widows' Fund it is not necessary to say much, because if a proprietary company like the Edinburgh Life Assurance Company are not traders, still less are the mutual society called the Scottish Widows' Fund. I think, if we had held that a proprietary office was a trader in the meaning of the statute a very serious question would have arisen whether the same construction of the statute would have applied in the case of a mutual office; but it is not necessary to enter on that question.

I think we can fairly dispose of both cases upon the ground which has been taken by the commissioners.

LORD DEAS.—I am of opinion with your Lordship that neither of these companies are to be held as carrying on a business of the nature of trade, so as to entitle them to come within the exemption in the sense of these statutes. I cannot say I see any substantial difference between them. There may be more difficulty in regard to the Scottish Widows' Fund than in regard to the other, but it is not necessary to go into that, and I cannot see at present that any distinction can be taken between them. It is sufficient to hold that neither of them are carrying on a trade in the sense of the statute.

LORD ARDMILLAN.—When a court of law is called to decide a question affecting the incidence and distribution of taxation the question is necessarily important. We have been told that a taxing statute must be construed liberally and favourably to the subjects. In one sense that is true, and the remark is well founded; but, on the other hand, equality and impartial justice in the incidence of taxation is of greater moment, and the statute should be construed so as to promote that equality and that impartiality of justice. There is no presumption in favour of the exemption of the few from the incidence of the general tax. I think the presumption is for equality, and rather against the partiality which is involved in special exemptions. Therefore, in deciding any case I would consider the question on the statutes according to their true meaning. So viewing the case, I arrive at the conclusion that these insurance companies are not traders within the meaning of the 32d and 33d Vict.—construing that statute by the aid of the preceding statutes imposing and regulating taxation—and that the premises which they occupy are not houses for the purposes of trade only. The question is one of difficulty. I have felt it to be so; but on the whole I am quite satisfied with the construction which your Lordship in the chair has adopted and explained of the series of these Acts, and I have come to the same conclusion that neither of these insurance companies are the occupants of premises used for trade only. There is a distinction between the two, and I do not undervalue it. I think there was a great deal of ingenious argument about it, and if we had come to the conclusion that the proprietary company were engaged in trade there might have been a doubt whether a mutual insurance society, where every man insures himself as well as the others, is a proper trading company. There may be subtle and delicate questions involved in that. I do not know it is trade for a man to insure himself with himself. I

do not know it is sale when a man sells to himself and buys from himself. But it is not necessary to enter upon these questions. Holding—as I concur with your Lordship in doing—that both societies are liable, and not within the exemption, it is not necessary to consider whether one is more liable than the other.

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Lord Mure concurred.

The Court affirmed the judgment of the commissioners without giving expenses.

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James Mylne, W.S.—Party.—Agents.

William M'Kinnon (Hannay and Sons' Trustee), Pursuer.—*Balfour—Mackintosh.*
Armstrong Brothers and Company, Defenders.—*D.-F. Clark—Asher—Lorimer.*

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Hannay and Sons' Trustee v. Armstrong Brothers and Co.

Agreement—Proof—Settlement of contra accounts—Parole.—A, a firm of iron merchants, had an account against B, an iron merchant and broker, for £9562. B, as broker for C, had an account against A for £7536. Both accounts were payable on the same settling day. B's account as broker for C was, at a meeting for settlement, not disputed, but A's was to a certain extent. B paid the balance admitted by him to be due, and the payment was marked as a payment to account on the copy of A's account held by him, and a receipt for the sum so paid was written upon it. A having subsequently become bankrupt, *held*, in a question between A's creditors and B, (1) that the account, with the receipt for the payment to account, though there were pencil markings of figures on the back shewing that the amount of the sum so paid to account had been fixed, after deducting B's account from A's, were insufficient to establish a settlement between A and B by crossing accounts and payment of the balance; and (2) that it was not competent to supplement the proof of settlement by parole evidence.

Compensation—Concursus Debiti et Crediti—Bankruptcy—Bill.—When certain bills were discounted by indorsees for value, and subsequently retired by them at maturity after the bankruptcy of the acceptor, *held* that they were entitled to plead compensation upon them against a debt due by themselves to the bankrupt; and the special objections (1) that they were neither the holders at the date of the sequestration nor the drawers, but only intermediate indorsees, (2) that they held a letter of guarantee from a third party, whose name did not appear on the bills, but for whose behoof they had been drawn, against any loss they might sustain on the bills, and, therefore, were pleading compensation in the interest of the guarantor, who had no debt to compensate, *repelled.*

Observed (*per* Lord Gifford) that prior to the maturity of the bills the indorsees, in respect of their liability to be called on for payment, had a right of retention as against the bankrupt.

2d Division. Ld. Mackenzie.

The pursuer of this action was the trustee on the sequestrated estate of Hannay and Sons, ironmasters, Glasgow, of which sequestration was awarded on 28th March 1874. The defenders, Armstrong Brothers and Company, were iron merchants and iron brokers in Glasgow, the partners of the firm being W. J. Armstrong and his brother T. N. Armstrong.

Previous to 31st December 1873 W. J. Armstrong carried on a similar business in Glasgow as a partner of the firm of Armstrong, Müller, and Company, the other partner being C. Müller. That firm was dissolved on that date, and the firm of Armstrong Brothers and Company was then formed, and thereafter carried on the business of iron merchants and brokers formerly carried on by Armstrong, Müller, and Company.

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W. J. Armstrong, by the contract of dissolution of the copartnery of Armstrong, Müller, and Company, undertook to liquidate the business, and to take over and carry out for his own behoof, and at his own risk, all the existing and unexpired contracts of the firm, paying to his partner, Mr Müller, merely his interest in the firm as it stood at the date of dissolution of the partnership.

The firm of Armstrong, Müller, and Company acted for Thomas Vaughan and Company, ironmasters and merchants in Middlesborough, as their agents in Glasgow, up to July 1873, and from that date to 31st December 1873 as their brokers in Glasgow. After 31st December 1873 the defenders, Armstrong Brothers and Company, acted as the brokers in Glasgow of Thomas Vaughan and Company.

Between June 1872 and the date of the sequestration of Hannay and Sons several contracts for the delivery of pig-iron were entered into, in some one or more of which the several parties, Hannay and Sons, Armstrong, Müller and Company, Armstrong Brothers and Company, and Thomas Vaughan and Company, were each interested.

The pursuer in this action sought to recover payment from Armstrong Brothers and Company of, *inter alia*, a sum of £8501, 7s. 7d., being the amount alleged to be due by them on two contracts entered into between them and Hannay and Sons on 6th and 16th February 1874, after giving credit for a sum of £863, 9s. 11d. paid to account on 11th March 1874, and of £197, 12s. 6d. for fifty-one tons acknowledged to have been short delivered under the contract of 6th February.

Two defences were stated for Armstrong Brothers and Company.

First, That a settlement had taken place between them and Hannay and Sons on 11th March 1874, being the monthly settling day in the Glasgow iron market. That on this occasion, the two firms being duly represented by Mr Moir, cashier to Hannay and Sons, and Mr Picken, book-keeper to Armstrong Brothers, the settlement was effected by crossing accounts, which had been previously rendered by the parties to one another for settlement on that settling day, and by payment by Armstrong Brothers of the balance of £863, 9s. 11d. due by them to Hannay and Sons by cheque for that amount.

Second, That the defenders held bills of Hannay and Sons to the amount of £13,057, 10s. 4d., on which they pleaded compensation or retention.

I. As regarded the first of these defences the defenders averred;—(Stat. 8) "A settlement of accounts was made between the defenders and Hannay and Sons on 11th March 1874. . . . There were placed to the debit of the defenders the prices of the iron sold by Hannay and Sons on 6th and 16th February, viz.:—

"1500 tons, sold on 6th February, at 77s. 6d., .	£5812	10 0
"1000 on 16th February, at 75s., ...	3750	0 0
	£9562	10 0
"From which was deducted the price of the 300 tons short delivered in February of the contract of 6th February, ...	1162	10 0
Leaving due, .	£8400	0 0

"And to the defenders' credit were placed—

(1) The price of the 1000 tons of pig-iron	£4125	0	0		
Carry forward,	£4125	0	0	£8400	0 0

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Brought forward,	£4125	0	0	£8400	0	0
(2) The price of 808 tons 17 cwt.,	3336	10	1			
(3) The commission due to the defenders on the sales, conform to invoice herewith produced, .	75	0	0			
				7536	10	1
" Leaving a balance against the defenders of . .				£863	9	11

" For which sums they gave Messrs Hannay and Sons a cheque upon the Clydesdale Banking Company and this squared accounts as at 11th March 1874."

The two following accounts were produced:—

No. 115/30 of pro. " Glasgow, 28th Feby. 1874.

Messrs Armstrong Brothers & Co., Glasgow,

Bought of Hannay & Sons.

Feb. 4.	No 4 forge G.M.B. pig-iron, 1500	79/6	. .	£5962	10	0*
6.	" " " 1500	77/6	. .	5812	10	0
16.	" " " 1000	75/	. .	3750	0	0
				£15,525	0	0

F.o.b. and f.o.t. makers' wharves and works.

Mar. 11.	By cheque to a/c.	863	9	11
	Balance, . .	£14,661	10	1

HANNAY & SONS,
p. JAS. S. MOIR.
£863 9 11
11/3/74.

£4700 *
HANNAY & SONS,
JAS. MOIR.
12/3/74.

12.	Bills from Vaughan	£4700	0	0*
		£9961	10	1
	Contra a/c. com.	75	0	0
		£9886	10	1

[*Pencil Note on Back.*]

£775 0 0	*£9562 10 0*	*£7461 10 1*
387 10 0	*1162 10 0*	*75 0 0*
£1162 10 0	*£8400 0 0*	*£7536 10 1*
	7536 10 1	
	£863 9 11"	

* It was admitted by both parties that these entries referred to a contract in which Armstrong Brothers and Company were merely brokers for disclosed principals, Thomas Vaughan and Company, and should not have been entered in this account.

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No. 116/29 of pro. " Glasgow, 4th March 1874.

Messrs Hannay & Sons, *Thomas Vaughan & Co.** To ~~Armstrong Brothers & Co.~~

Contract of 28 Aug. /73.

		T.	Cwt.				
Feb. 28.	To	808	: 17	No. 4 forge M'bro' pig-iron	82/6	£3336	10 1
		1000		4 "	82/6	4125	0 0
						£7461	10 1"

It was not disputed that this account fell to be paid to Armstrong Brothers, as brokers for Thomas Vaughan and Company, on 11th March.

The following excerpt was produced from the settlement-book of Hannay and Sons:—

No. 116/30 of pro. " 10 Mar. /74.

Armstrong Bros. & Co.

Feby.	A/	£15,525	By accepts. from Vaughan, ...	£4,700	0 0
Mar.		2,310			
"		825	Mar. 11, cheque, . .	863	9 11
			~~Contra A/ . . . .~~	~~7,461 10 1~~†	
				13,096	*10 1*
		18,660.		*18,660*	*0 0"*

[*Figures in italics are in pencil.*]

The pursuer, on the other hand, denied that any settlement had been come to on 11th March 1874. He contended that as the account 115/30 of pro. was due by Armstrong Brothers and Company as principals to Hannay and Sons as principals, whereas the account 116/29 of pro. was due by Hannay and Sons as principals to Armstrong Brothers as brokers for Thomas Vaughan and Company, compensation could not take place, but a distinct and probative agreement to settle must be proved. He founded on the terms of the account No. 115/30 of pro. as inconsistent with the idea of any such settlement having been made, and explained that the pencil jottings on the back having been made by Mr Picken, the defenders' book-keeper, before his meeting with Mr Moir, as embodying his idea of the settlement which should be come to by the parties, he had accordingly taken with him to the meeting merely a cheque for the balance which he had so brought out, and which he handed to Mr Moir, on the latter refusing to agree to a settlement, as all the payment which he was then in a position to make to account.

It is not necessary to refer to the parole evidence on this branch of the case, as the Court held that the settlement alleged could only be instructed by written evidence.

II. The bills upon which the defenders pleaded compensation were seven in number, amounting in all to £13,057, 10s. 4d. They were granted in relation to different trantsactions from those already mentioned in connection with the first defence.

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* The alteration from Armstrong Brothers and Company to Thomas Vaughan and Company in the heading was made by Mr Moir, Hannay and Son's cashier, after the alleged settlement of 11th March.

† Mr Moir, cashier for Hannay and Sons, deponed:—"My impression is that the deleted entry was made a few days after 10th March, and it may have been deleted the day after it was made; but I cannot speak positively as to that."

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On 26th June 1872, Armstrong, Müller, and Company sold to Hannay and Sons 6000 tons No. 4 Middlesborough forge pig-iron at £4, 12s. per ton, delivery to be at the rate of about 1000 tons a-month, commencing in July 1873, and payment to be made in cash on the last cash day of each month for the monthly quantity delivered, or by acceptance at four months' date.

On the same day Armstrong, Müller, and Company purchased from Thomas Vaughan and Company 6000 tons No. 4 Middlesborough forge pig-iron at £4, 5s. per ton, f.o.b. at their wharf on the Tees, delivery to be at the rate of about 1000 tons per month, commencing in July 1873, and payment to be "nett cash on last cash day of the month for quantity delivered during previous month, or by Messrs Hannay and Sons' acceptance (payable London), at four months' date."

The seven bills in question were accepted by Hannay and Sons in payment of the deliveries to them in November and December 1873 and January 1874, under the contract of 26th June 1872 first above-mentioned.

In terms of this contract they were drawn at four months by Armstrong, Müller, and Company upon and accepted by Hannay and Sons, and were all current at the date of Hannay and Sons' sequestration. In virtue of the contract of dissolution of the firm of Armstrong, Müller, and Company, dated 31st December 1873, they were endorsed by that firm in liquidation to Armstrong Brothers and Company, who discounted them with the Clydesdale Bank. W. J. Armstrong, as liquidator of Armstrong, Müller, and Company, at the same time received from his new firm of Armstrong Brothers and Company an advance of £5000 as against the bills discounted, which he handed to his late partner Mr C. E. Müller, as payment of the first instalment of the assets of the dissolved firm due to him in terms of the contract of dissolution. On the bankruptcy of Hannay and Sons, Armstrong Brothers and Company were obliged to retire the bills as they fell due.

In their contract of 26th June 1872 with Thomas Vaughan and Company second above mentioned (which was avowedly entered into with reference to their contract of same date with Hannay and Sons), Armstrong, Müller, and Company stipulated, as above mentioned, that payment should be "nett cash on last cash day of the month for quantity delivered during previous month, or by Messrs Hannay and Sons' acceptance (payable London) at four months' date." Some difference of opinion existing between Armstrong, Müller, and Company and Thomas Vaughan and Company as to the meaning of this stipulation, and Thomas Vaughan and Company declining to draw upon Hannay and Sons direct, it was agreed that Armstrong, Müller, and Company should draw upon Hannay and Sons, and either hand over the bills endorsed to Thomas Vaughan and Company or discount them and hand over the proceeds, Thomas Vaughan and Company giving them this letter of indemnity:—"Middlesbro', Oct. 23d, 1873.—In consideration of your having to-day agreed to draw upon Messrs Hannay and Sons for all pig-iron delivered and to be delivered under our contract of June 26th, 1872, with you, and hand such drafts over to us when accepted, we hereby agree to indemnify you from any loss in respect of such drafts handed over to us or discounted by you."

Armstrong, Müller, and Company having taken the latter course, and discounted the bills in question accepted by Hannay and Sons, Thomas Vaughan and Company admitted their liability of relief under this letter, they getting the advantage of anything recovered from Hannay and Sons' estate. They also made advances to Armstrong Brothers and Com-

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pany under their obligation of relief, in order to assist them in taking up the bills.

After a proof, the Lord Ordinary, on 29th October 1874, pronounced a judgment in favour of the pursuer, and found the defenders liable in expenses.*

* "NOTE.—. . . . There are two questions raised between the pursuer and defenders in regard to the dealings of Hannay and Sons and the defenders . . .

"The first question is—Whether, on 11th March 1874, being the iron-market account day in Glasgow for the preceding month, no settlement of accounts took place between Hannay and Sons and the defenders, under which, as the defenders maintain, the sum of £7536, 10s. 1d. (consisting of £4125, the price due by Hannay and Sons to Thomas Vaughan and Company for 1000 tons of iron delivered under the contract of 28th August 1873, and of £3336, 10s. 1d., the price of 808 tons 17 cwt. of iron alleged to have been delivered, and to be due by Hannay and Sons to Thomas Vaughan and Company under the same contract, and of £75 due to the defenders for commission on iron sales), was set against £9562, 10s., the amount due by the defenders to Hannay and Sons for the iron contained in the contracts of 6th and 16th February, less £1162, 10s. deducted on account of 300 tons alleged by the defenders to have been short delivered under the contract of 6th February, and the balance of £863, 9s. 11d. was paid by the defenders.

£4125	0	0	
3336	10	1	
£7461	10	1	
75	0	0	
£7536	10	1	
£9562	10	0	
1162	10	0	
£8400	0	0	
7536	10	1	
£863	9	11	

"The second question is—Whether the defenders are entitled to set off against the sum now sued for the sum of £13,057, 10s. 4d., contained in the seven bills mentioned in the defences, drawn by Armstrong, Müller, and Company upon and accepted by Hannay and Sons, and endorsed to the defenders in January and February 1874 by the then dissolved firm of Armstrong, Müller, and Company, for the purposes of the liquidation of that firm.

"1. The Lord Ordinary is of opinion that no settlement of accounts took place on 11th March 1874 such as is averred by the defenders. The statements of the witnesses upon this point are very conflicting. But the Lord Ordinary thinks that the actings with reference to the account No. 115/30 of process, of Hannay and Sons' cashier, and of the defenders' book-keeper (who are averred by the defenders to have made the settlement), support the evidence for the pursuer, and are conclusive against the view that such a settlement of accounts took place.

"Messrs Hannay and Sons sent the account No. 115/30 of process to the defenders on or about 28th February 1874. It then contained three entries, the first being a charge for the 1500 tons of iron sold by the defenders on behalf of Hannay and Sons to Thomas Vaughan and Company on 4th February 1874, and payable by bill at four months from 10th March 1874, and the remaining two entries being the price of the 1500 tons and 1000 tons of iron sold on 6th and 16th February 1874 by Hannay and Sons to or through the defenders for cash on 10th March 1874. These three entries are added together in the account, and amount to £15,525.

"On the 4th March 1874 the defenders sent to Hannay and Sons an account (No. 116/29 of process) containing the sums alleged to be due for the 1000 tons and the 808 tons 17 cwts. of iron delivered under the contract of 28th August, amounting to £7461, 10s. 1d.

"Now, with regard to these two accounts it is important that Hannay and Sons did not admit, as then maintained by the defenders, that 300 tons of the iron sold on 6th February had not been delivered, or that they had received the whole of the above-mentioned 808 tons 17 cwt. of iron. And it is proved that the defenders, who had then got delivery-orders for the whole of the iron sold on 6th February, have received the whole aforesaid 300 tons thereof, with the exception of 51 tons, although it does not appear from the proof when these 249 tons were delivered. It is also admitted in the record by the defenders

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The defenders, Armstrong Brothers and Company, reclaimed.

Argued for them;—(1) The evidence shewed that on 11th March 1874 there had been a crossing of accounts between Mr Moir and Mr Picken, that of the said 808 tons 17 cwt. of iron there have never been delivered to Hannay and Sons 32 tons 13 cwt., the price of which amounts to £134, 13s. 7d.

"When the cashier and book-keeper of the parties met on 11th March the cashier of Hannay and Sons received from the book-keeper of the defenders their cheque for £863, 9s. 11d., which the defenders' book-keeper had taken to the meeting with a view to such a settlement as is now maintained by them. But instead of the two accounts No. 115/30 and No. 116/29 of process being fitted and settled on that footing, the entry which was made by Hannay and Sons' cashier on 11th March on the first of these documents, in acknowledgment of the cheque for £863, 9s. 11d., is entirely inconsistent with any such fitting or settlement.

"That entry is as follows:—'Mar. 11. By cheque to ac/t, £863, 9s. 11d.;' and that sum is deducted by Hannay and Sons' cashier from the sum of £15,525, and there is brought out, and entered on the account by him as still due, the 'balance, £14,661, 10s. 1d.' The account, with that entry, and with that balance brought out, was then taken away and retained by the defenders' book-keeper as their voucher. On the following day (12th March) the defenders' book-keeper delivered to Hannay and Sons' cashier bills drawn by Hannay and Sons on and accepted by Thomas Vaughan and Company for £4700 to account of the 1500 tons of iron sold to Vaughan and Company on 4th February, and first entered in the account No. 115/30 of process. And he again produced that account, and got Hannay and Sons' cashier to make the following entries thereon, under date 12th March, in reduction of the foresaid balance of £14,661 10 1

'Bills from Vaughan, . .	4,700	0	0
	£9,961	10	1
'Contra ac/t comn., . .	75	0	0
	£9,886	10	1'

"The defenders' book-keeper then took away with him that account with these entries thereon, and he has since retained it as the defenders' voucher. There were no entries made on that account by which any deduction was made of £1162, 10s. on account of the 300 tons of the contract of 6th February said to be short delivered. And there were no entries made on that account, or on the defenders' account No. 116/29 of process, by which the price of the 1000 tons and 808 tons 17 cwt. of the iron sold under the August contract by Vaughan and Company to Hannay and Sons were settled or placed against the account No. 115/30 of process.

"Such a settlement of accounts as is contended for by the defenders is quite customary in the iron trade on the settling day, when the parties are agreed as to the sums due. But the Lord Ordinary considers that such a settlement cannot be held to have taken place when it is denied by Hannay and Sons' cashier, and when the voucher taken does not make any mention of the alleged deduction of the £1162, 10s. on account of the 300 tons said to be short delivered, or of the alleged set off of the contra account of £7461, 10s. 1d., and where the entries made on that voucher, so far from shewing a settlement, bring out, after delivery of the cheque of £863, 9s. 11d., a balance as due by the defenders to Hannay and Sons of £14,661, 10s. 1d. on 11th March; and after delivery of the bills for £4700, a balance of £9961, 10s. 1d. on 12th March; and, after crediting the £75 due for commission, a balance of £9886, 10s. 1d., also on that date. . . .

"2. In regard to the defenders' claim to set off the seven bills of Hannay and Sons for £13,057, 10s. 4d., against the sums now sued for, the Lord Ordinary is of opinion that such compensation cannot take effect, because the sums con-

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acting and authorised to act for Hannay and Sons and the defenders respectively. It was true the defenders' account of £7461, 10s. 1d. was for sums properly due to Thomas Vaughan and Company, but they were due tained in these bills are not the property of the defenders, but of Thomas Vaughan and Company.

"The Lord Ordinary is satisfied that there were two separate and distinct contracts entered into under date 26th June 1872; the one being entered into on that date by the firm of Armstrong, Müller, and Company on their own account, for the sale to Hannay and Sons of 6000 tons of iron, and the other being entered into shortly after that date for the purchase on their own account, by Armstrong, Müller, and Company, from Thomas Vaughan and Company, of 6000 tons of the same kind of iron. No doubt Armstrong, Müller, and Company were then the agents in Glasgow of Thomas Vaughan and Company, but it is established by the proof that in selling the 6000 tons of iron to Hannay and Sons, Armstrong, Müller, and Company acted on their own account, and not as agents for Vaughan and Company. Although this is the case it was stipulated in the contract between Armstrong, Müller, and Company and Vaughan and Company that payment was to be made either in cash 'or by Messrs Hannay and Sons' acceptance.' When payment fell to be made under this contract Armstrong, Müller, and Company required Vaughan and Company to draw direct upon Messrs Hannay and Sons. This Vaughan and Company refused to do, and required Armstrong, Müller, and Company to become drawers of the bills upon Hannay and Sons. This dispute was ultimately settled by Vaughan and Company granting the following letter to Armstrong, Müller, and Company, on 23d October 1873:—'In consideration of your having to-day agreed to draw upon Messrs Hannay and Sons for all pig-iron delivered and to be delivered under our contract of June 26/72 with you, and hand such drafts over to us when accepted, we hereby agree to indemnify you from any loss in respect of such drafts handed over to us or discounted by you.' On the faith of this letter Armstrong, Müller, and Company drew the seven bills now founded on by the defenders upon Hannay and Sons, and paid Vaughan and Company in cash the price of the 6000 tons of iron. After the dissolution of Armstrong, Müller, and Company these bills were endorsed by that firm to the defenders, as liquidators of Armstrong, Müller, and Company, who discounted them, and applied £5000 of the proceeds in payment of that amount due to Mr Müller, under the contract of dissolution of Armstrong, Müller, and Company, and retained the balance. Before the seven bills became due Hannay and Sons were sequestrated; and these bills were, when due, retired from the bank by the defenders, who received from Vaughan and Company £4207, 10s. on 3d April, and £4207, 10s. on 3d June 1874, to enable them to do so. It is proved that Vaughan and Company admit that they must pay the defenders any balance of these bills which may remain unsatisfied after deduction of the said two sums of £4207, 10s., and of any dividend recovered from Hannay and Sons' sequestrated estate. In short, Vaughan and Company admit that they are the parties truly interested in these bills, and in the plea of compensation now insisted in by the defenders.

"Such being the case, the Lord Ordinary considers that the defenders have no interest, in respect of which they now plead compensation, and that they plead compensation in the interest and for the benefit, not of themselves, but of Vaughan and Company. The letter of indemnity of Vaughan and Company was granted in respect of their obligation to take, in terms of their contract with Armstrong, Müller, and Company, of 26th June, Hannay and Sons' acceptances in payment of the prices of iron delivered under that contract to Armstrong, Müller, and Company—that is, to draw upon Hannay and Sons for these prices. Armstrong, Müller, and Company maintained that they were bound to do so; and they must have admitted that this was the true construction of the contract, because the consideration for granting the indemnity is as set forth in the letter,—that Armstrong, Müller, and Company have 'to-day agreed to draw upon

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under a contract whereby payment was to be nett cash and not by bill, and under such a contract it was the custom of the market to make payment to the seller's broker.* It was therefore natural that the parties should cross accounts on the settling day, and such was their understanding at the time. It was only afterwards and on their bankruptcy that Messrs Hannay and Sons and their trustee found it convenient to repudiate the settlement and fall back upon Messrs Vaughan and Company with a view of enlarging their assets.

(2) Armstrong, Müller, and Company were the drawers of certain bills upon Messrs Hannay and Sons. They endorsed them to the defenders for value. The defenders discounted them with the bank, and they were in the hands of the bank at the date of Hannay and Sons' sequestration. The defenders were obliged to retire them at maturity, and were now entitled to plead compensation upon them. The contention of the pursuer that no one could plead compensation in bankruptcy on a bill who was not either the holder at the date of the sequestration or the person ultimately liable, *i.e.*, the drawer, was not sound. Scotch law acknowledged concourse in bankruptcy of future or contingent debts. The English case of Hale,[1] founded on, went too far. Besides, it rested upon the statute of 5 Geo. II. c. 30, which was afterwards amended.[2] Neither was it true that the defenders were really only the hands of Armstrong, Müller, and Company in recovering the sums in the bills, and therefore not entitled to set off these sums against their own private debt. No doubt the defenders were only indorsees and not drawers of the bills, but they had made advances against them, they had assumed the whole responsibility for them. They could not recover against Armstrong, Müller, and Company, the drawers, in the event of their being unsuccessful in this defence. They were stating this plea of compensation on their own behalf, and it should therefore be sustained.

Argued for the pursuer;—1. Inasmuch as the account which the defenders contended was on 11th March 1874 crossed with Hannay and Sons' account consisted of sums not due to the defenders themselves directly, but only as brokers for Thomas Vaughan and Company, there could be no compensation by law, but only by special agreement. Such agreement could only be proved by writ. Now, the writ produced and

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Messrs Hannay and Sons' for all iron delivered by Vaughan and Company to Armstrong, Müller, and Company under their June contract.

"Further, the defenders acted in endorsing and discounting these bills as the liquidators of Armstrong, Müller, and Company, and for behoof of that firm. They were therefore merely the agents or mandatories of that firm in the liquidation. And in that capacity they paid Mr Müller £5000 of the proceeds of the bills, and retained the balance. Armstrong, Müller, and Company, for whom they acted, are bound to relieve them, and have a good claim under the letter of indemnity against Vaughan and Company, for whom Armstrong, Müller, and Company acted on the faith of that letter in drawing the bills."

* J. S. Moir's evidence—"When a purchase of iron is made through an iron broker it is the practice to make payments for it through the broker. When a sale is made, the money, if it is a cash payment, is received through the broker in the same way. If the settlement is by bill the practice varies. The broker might draw for the iron on the purchaser, and endorse the bill to the seller. If the purchaser was disclosed it would be left to his discretion; it might be done one way or the other,—by the seller drawing on the buyer, or the seller's broker drawing on the buyer and endorsing the bill."

[1] 3 Vesey jun., 304.

[2] 6 Geo. IV. c. 16, sec. 50; Bell's Com. 5th ed. ii. 129-30; Collins v. Jones, 1830, 10 Barn. and Cres. 777.

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founded on as proving a settlement, viz., the account No. 115/30 of process, by its very terms contradicted the idea of a settlement. The pencil markings on it could not be looked at, for they were not Hannay and Sons' writ. Even if they could be looked at as explanatory of the account itself, they proved nothing except that the defenders' cashier proposed a settlement on the 11th March, while what was subsequently entered on that day and on the 12th, without objection from the defenders, shewed conclusively that no settlement was agreed to.

2. On the plea of compensation.—(1) An intermediate indorsee who was not the holder at the date of sequestration could not plead compensation on a bill on retiring it after sequestration. Compensation could only be pleaded on debts mutually due at the date when the question arose. The date of sequestration was the date at which the rights of parties were fixed. In the present case, at the date of sequestration there was no concourse except between Hannay and Sons and the bank, who then were holders of the bills. No subsequent acquisition of the bills could give a right to plead compensation.[1] (2) There was indeed a limitation to the common law rule of compensation introduced by the law of balancing accounts in bankruptcy in favour of the parties to a bill. But this only covered the parties ultimately liable. Professor Bell's doctrine went no further than that.[2] The acceptor being bankrupt the concourse of ultimate liability was between the bankrupt and the drawer. The law allowed the latter to make an equitable set off, but no one else. The defenders were not in this position, and therefore could not plead compensation. (3) In the present case the bills were really taken up by the defenders as the hands of Armstrong, Müller, and Company, and therefore, in no view of the law could they set them against their own private debt. (4) Besides, the real interest in these bills was not either in the defenders or in Armstrong, Müller, and Company, but in Thomas Vaughan and Company. It was solely in their interest that the plea was stated, and it was therefore clearly untenable. Had the letter of indemnity of 23d October 1873 stood alone this might not have been the case. But if the original contracts of 26th June 1872 were referred to it would be seen in what position Vaughan and Company really stood. The fact truly was that Vaughan and Company were originally bound to draw on Hannay and Sons, though to avoid dispute the defenders afterwards consented to draw and discount the bills for Vaughan's behoof on receiving the letter of indemnification. The bills were therefore, in a question like the present, to be considered as truly Vaughan and Company's bills, though their names did not appear upon them.

At advising,—

Lord Justice-Clerk.—In this case the defences stated for Messrs Armstrong Brothers and Company raise some important questions.

The first point decided by the Lord Ordinary is how far, on 11th March 1874, there was a settlement of accounts between the parties in which a debt due by Hannay and Sons to Armstrong Brothers was deducted from that due by the latter to the former, and the balance paid by cheque. I do not mean to go into the circumstances connected with this alleged settlement, because I have come to a clear opinion in concurrence with the Lord Ordinary.

I have no doubt that both Mr Moir and Mr Picken, as representing the firms of Hannay and Sons and Armstrong Brothers, were in a position to make such settlement as is alleged. Neither have I any doubt that on 11th March

[1] Hale, 3 Vesey jun. 304.

[2] Com. 5th ed. ii. 130.

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1874 both these gentlemen believed that they had crossed accounts and set off the sum of £7461, 10s. 1d. due by the one firm, *pro tanto* against the larger debt due by the other. All questions as to the position occupied by Armstrong Brothers in relation to these iron contracts, and as to the character of their agency for Vaughan and Company and its bearing upon their power to agree to such a settlement, or as to whether the receipt of the cheque was to account or as settlement of a balance, are afterthoughts, and have no bearing on what was done at the time.

The true account of the transaction is given in Mr Moir's evidence:—"Q.) Did you intimate to Messrs Armstrong that you had deleted the entry in your book with reference to the £7461? (A.) No. (Q.) When you deleted the entry was your opinion different in regard to the nature of the transaction of 11th March from what it was when you made it? (A.) Yes, my opinion was altered. (Q.) What was the change in your opinion? (A.) On referring to the contract I found that it was a direct contract with Vaughan and not with Armstrong Brothers, who were simply agents in the transaction, and that we could in this particular case look upon the debt as due to them instead of to Armstrong Brothers. It suited our convenience better to look at it in that light at that particular time. (Q.) Did you know that Armstrong's idea of that transaction with reference to the contra account on 11th March was the same as yours on 11th March? (A.) I think our opinions were both the same at that date. . . ." So that, in point of fact, there was not at the meeting on 11th March 1874 any dispute as to whether or not the £7461 should be deducted. Any dispute was as to the sum which remained over after that deduction was made. I concur, therefore, with reluctance, in the Lord Ordinary's judgment, because I think it is giving effect to a most valuable principle of our law in circumstances where it unfortunately leads to an inequitable result. But as the law requires written evidence of such an agreement, and as the only document founded on does not amount to such evidence, Armstrong Brothers and Company must fail.

The debt claimed must therefore be held to be still due, but the debtors have raised a plea of compensation on certain bills of which they are holders and endorsers, and in which the bankrupts stand as acceptors. The questions raised under this plea are important, and it is necessary to keep the precise facts in mind. These bills were granted as the price of iron furnished by the drawers, Armstrong, Müller, and Company, to the bankrupts under a contract dated 26th June 1872. The partners of the firm of Armstrong, Müller, and Company were W. J. Armstrong and C. E. Müller, W. J. Armstrong being also a partner of Armstrong Brothers and Company. Armstrong, Müller, and Company dissolved partnership in December 1873, and by the terms of the agreement of dissolution all current contracts were taken over by W. J. Armstrong for his own behoof, he undertaking to pay £5000 to his partner as in part of his share of capital, and to account for any further right he might have. The bills in question were either current at or were drawn and accepted after the dissolution of the copartnery, and in the course of winding up W. J. Armstrong used his new firm of Armstrong Brothers and Company practically for the purpose of obtaining advances for current purposes. And with that view he endorsed to Armstrong Brothers and Company the bills in question, who discounted them on their own credit with the Clydesdale Bank and advanced the proceeds to W. J. Armstrong. The bills were at four months, but before they fell due Hannay and Sons became bank-

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rupt on the 28th of March 1874. The bills were retired at maturity by the last endorsers, Armstrong Brothers, who now plead compensation upon them.

There is no doubt that on the face of these documents Armstrong Brothers are the creditors. They are the holders, with the legal presumption that they became so for value. Unless, therefore, the acceptors and the trustee on their sequestrated estate can overcome that presumption they are good documents of debt. But several legal propositions have been maintained in defence against this plea.

Before considering the question of compensation I propose to inquire into the effect of these propositions as defences against an action or charge on the bills.

The legal propositions which are maintained against the plea of compensation, as I gather them not from the record but from the argument at the bar, seem to be these:—

1. That Armstrong, Müller, and Company held a guarantee or obligation of indemnity from Vaughan and Company to keep them free of loss on these bills, and that therefore the plea is truly stated in the interest of the latter.

2. That the defenders were not holders of the bills at the date of the sequestration, that they were then in the hands of the bank, and that the defenders were only prior endorsers, to whom the plea of compensation is not competent.

3. That the defenders gave no value for the bills, but were only the agents or hands of Armstrong, Müller, and Company in liquidation.

On these grounds it is maintained that compensation is not pleadable by them in respect of these bills against their company debt due to the acceptors' estate.

In considering these pleas it must be kept in mind that Armstrong Brothers are, *ex facie* of the documents, holders of and creditors in the bills, and that the law presumes onerosity unless the contrary be proved by the writ or oath of the holder; and secondly, that these pleas are raised on the part of the primary debtor in the bills, who does not dispute that he received value for his obligations.

In regard to the first plea, founded on the letter of indemnity, I am of opinion that it is entirely irrelevant. The bankrupts' obligation was undertaken to Armstrong, Müller, and Company, not to Vaughan, and that is the obligation he is asked to fulfil. It is nothing to him that others with whom he has no contract have given collateral and subsidiary obligations, to take effect solely in the event of his not fulfilling his engagements. The loss which Vaughan undertakes to indemnify could not possibly occur unless Armstrong, Müller, and Company were creditors of Hannay.

It is said, however, that the real interest in these contracts was in Vaughan, and that Armstrong, Müller, and Company were only his agents. But this is also irrelevant, as pleaded against Armstrong Brothers, the endorsees of these bills. It is enough that the obligations were granted to Armstrong, Müller, and Company in their own name, and the debtor, having so granted them, must fulfil them in their terms. If they are in the hands of a third party for value, no such allegation is of any avail against him.

But I am further of opinion that the plea would have been quite inefficacious, even if the question had arisen with the drawers themselves. The contracts are here, and they are solely in the names of Armstrong, Müller, and Company. They dealt in their own name. They were liable to fulfil the contracts, and they were entitled to demand the price. Whether they were agents or not they did not deal as such, and they could have set off these obligations against any

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debt due by themselves to Hannay. This is well settled. But further, it seems quite clear that Vaughan had no contract with and incurred no liability to Hannay. His contract was with Armstrong, Müller, and Company solely, and he was quite entitled, if he chose, to deal on that footing.

2. But it is said, secondly, that at the date of the sequestration the Clydesdale Bank was the holder of these bills, and that the defenders, who were only the last endorsees, are not entitled in that character to plead compensation. It was argued that this right was competent only to the actual holder or to the primary creditor, meaning, I presume, the original creditor. But the argument proceeds on misapprehension of the legal principles applicable to this subject, which, although for some time in dispute, are now fully recognised. They will be found well summarised and the authorities quoted in the last edition of Mr Thomson's work on Bills of Exchange at p. 570, &c. The rule is this: There can be no double ranking for the same debt, nor can a prior endorser plead compensation when his endorsee is in possession of the document of debt. But in respect of his contingent right of relief against the holder's demand, he is entitled to retain what he owes to the debtor in the bill until he is relieved of that demand. "The holder of such a security," says Mr Thomson,[1] "if he has endorsed it to a third party, seems entitled to retain any debts due by him to the other party till he is relieved from his liability," and he would in like manner, apart from retention, be entitled to rank and have a dividend set aside to meet his contingent claim. But we have no case of double ranking here. It is the ordinary case where the holder of a bill who has discounted it retires it from the bank on the acceptor's failure to pay. The debt is precisely the same in the person of the endorsee as it was before the bill was discounted. He remains the acceptor's direct creditor, and is entitled not to retain but to set off the debt he owes against the obligation which he holds.

It is pleaded, in the third place, that the defenders gave no value for this bill, and were only the hands or agents of Armstrong, Müller, and Company in liquidation. This again is irrelevant. It is no concern of the primary debtor in this bill on what terms the holder acquired it. It is enough that he has the right to receive and the power to discharge the debt, and the acceptor has not the right, nor has he any interest to inquire farther, seeing that he got full value for his obligation. It is, however, quite obvious from the facts of this case that the plea of want of value is without any foundation. Armstrong Brothers discounted these bills on their own credit, and advanced the proceeds to their own partner for behoof of the drawer. The former became directly liable to the bank, and whatever claims or liabilities in account they may have with the drawers the transaction was clearly onerous. They acted, in truth, as the bankers of the liquidator of Armstrong, Müller, and Company, and furnished him with funds in the first instance to carry out the agreement between the partners.

Neither is it relevant to allege that on the failure of the acceptor other parties subsidiarily liable have aided in retiring these bills. A payment to account from a co-obligant after the date of the sequestration, it has been decided, does not deprive the holder of his right to rank on the estate of the bankrupt acceptor for his full debt. I could understand the plea, and give some weight to it, if it were alleged that the endorsation was a device to enable Armstrong Brothers to evade payment of this debt. It could not be so, seeing it took place long before

[1] Ed. 1865, p. 583.

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the bankruptcy. But the allegation here truly amounts to no more than asserting that, by subsequent transactions, the holder had come to be the debtor of the prior endorser, an assertion of no value or significance whatever in the mouth of the primary debtor as against this liquid document of debt.

I am, therefore, of opinion that this plea of compensation is well founded.

Lord Neaves.—In this action at the instance of Hannay and Sons' trustee against Armstrong Brothers for the price due on certain iron contracts, two main pleas in defence have been stated,—the one that the debt sued for had been set off, while Hannay and Sons were still solvent, against a counter claim of the defenders against them, the parties having met and fitted accounts bringing out a balance due to Hannay and Sons, which was paid by cheque.

The second defence was that at the time when the debt now sued for became due by the defenders to Hannay and Sons, and anterior to the bankruptcy of the latter, Hannay and Sons were the acceptors and debtors in certain bills now held by Armstrong Brothers, and that that fact founded a plea of compensation or retention on their part.

On the first of these questions it is unnecessary for me to pronounce a definite opinion, because, whichever way it were decided, I am prepared to assoilzie the defenders on their second plea. I may say, however, that I see no good reason for differing from the views of the Lord Ordinary. Whatever may have been the intention of the parties, and certainly the evidence of Moir on the one side and Picken on the other is anything but satisfactory, there is no doubt that a payment of £863 having been made by cheque by Picken on account of Armstrong Brothers to Moir on behalf of Hannay and Sons, yet no proper docquet of adjustment was appended to the account, nor any other document taken to extinguish the larger sum alleged to have been settled by set off. On the face of the account produced matters remained as they were with regard to this larger sum, and the result in that view would be that, whatever was the intention of the parties as to that matter, it was not carried out.

On the other hand, I do not agree with the Lord Ordinary on the second point, and there I am prepared to reverse his judgment and decide in favour of the defenders. I think we have here a sufficient set off to afford a good answer to the claim of Hannay and Sons. No doubt the claim of Hannay and Sons against Armstrong Brothers is for the price of iron supplied on contract. To that claim Armstrong Brothers say, Here are your bills held by us as endorsees, endorsed by us indeed to the bank, but now on your bankruptcy retired and held by us,—here is your proper debt met by us, which we are entitled to compensate by our debt to you.

I think, technically speaking, this is more properly retention than compensation. But I see no objection to the soundness of the plea stated for Armstrong Brothers, unless it can be said either that they have no real interest in these bills, as holding them merely as the hand of another, or that they obtained them after the bankruptcy for the purpose of putting themselves artificially in a position in which they could plead compensation or retention on them. But neither of these things is proved against the defenders. The bills are in Armstrong Brothers' hands by the natural sequence of events which was in progress before the bankruptcy, and the course of which was merely altered by the fact of the bankruptcy. Had Hannay and Sons remained solvent the defenders would never have had to relieve the bank. But they were under a contingent liability

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to do so in the event of Hannay and Sons' failure to pay. And that contingent liability has become an actual one, and has been met by them by payment. It cannot be doubted that in common justice the party who is subsidiarily and contingently liable for the true debtor in a bill is entitled to retain any funds of that debtor that may come into his hands, because his obligation may be enforced on the bankruptcy of the true debtor. I cannot say I see any difficulty in this. The operation of the principle of retention in the case of bills of exchange is familiar to our law. The person who is an endorser is a kind of cautioner, and if he is in bankruptcy liable and certain to be distressed he cannot be prevented from working out his own relief by retention, if he is fortunate enough to be debtor to the bankrupt in a similar sum. Accordingly, Mr Bell, both in his Commentaries and Principles, carries out this doctrine most clearly. He distinguishes most properly retention from compensation. Thus, he says (Prin. sec. 1410), "Compensation is payment and extinction of mutual debts; whereas retention of a debt is nothing more than an implied security for performance, a power of suspension or right to withhold payment or performance till satisfied of some counter demand. Compensation, therefore, can be pleaded only where the debt in extinction of which it is meant to be applied is due and liquid; whereas retention may be pleaded in security of debts, future, contingent, or illiquid." The same doctrine will be found laid down by Erskine (iii. 4, 11). I cannot therefore see any answer to this plea of the defenders, and I am of opinion that on this point the Lord Ordinary's interlocutor must be recalled.

With regard to the objection that Armstrong Brothers were only the liquidators of Armstrong, Müller, and Company, I think it necessary to add this merely, that whatever may have been their apparent outward relation to Armstrong, Müller, and Company, they were personally concerned in the winding up of that concern. They gave value for their assets and undertook their liabilities. They were, therefore, onerous holders of these bills, so far as Armstrong, Müller, and Company were concerned, and are entitled to indemnify themselves in the way proposed.

LORD ORMIDALE.—I am of the same opinion. Two questions have been raised and submitted to the Court for decision in this case. The first is, whether or not a settlement of accounts such as that founded on by the defenders took place on the 11th of March 1874; and the second is, whether, at any rate, the pursuer's claim in this action has not been more than met and extinguished by counter claims or debts due to them by Hannay and Sons.

In regard to the first of these questions, I think the Lord Ordinary is right in holding that there is no evidence sufficient to shew that there was any such settlement of accounts on the 11th March 1874 as that relied on by the defenders. The account (No. 115/30 of pro.), which the defenders say is the fitted account on which the settlement was made, in place of shewing the result contended for by them, instructs that a large balance, —much larger than the claim now sued for,—was, on the 11th of March resting owing by the defenders to Hannay and Sons. Nor do I see that there is any reliable evidence, or, indeed, any competent evidence at all, to entitle the Court to alter and transpose the figures in the account referred to, so as to shew the result contended for by the defenders, as on the 11th or 12th of March 1874. It is unnecessary for me, however, to enter into detail in support of this view, seeing that, independently altogether of it, I am of opinion, with your Lordships,

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that a determination of the second question is sufficient of itself to entitle the defenders to absolvitor.

The second question raises undoubtedly considerations of great importance and of some nicety in the law of compensation or set off in bankruptcy. In the present case it relates to the seven bills referred to in articles 12 and 13 of the defenders' statement of facts. All these bills bear to be drawn by Armstrong, Müller, and Company upon and accepted by the bankrupts, Hannay and Sons, and if they had remained in that state till the bankruptcy the present defenders could not have had any ground for their plea of compensation or set off in respect of them. But the fact is undoubted and has not been disputed that the defenders had, previous to the bankruptcy or known insolvency of Hannay and Sons, acquired right to the bills by endorsation from Armstrong, Müller, and Company. When, therefore, after the bankruptcy, the pursuer, as trustee on Hannay and Sons' sequestrated estates, insisted against the defenders for payment, as he does in the present action, of the debt owing by them to that bankrupt firm, they answer and defend themselves on the ground that the debt sued for is more than met and extinguished on the principle of compensation or set off by the seven bills referred to. The question thus arises for the determination of the Court whether, in the circumstances which here occur, that is a good and available defence to the defenders. The pursuer maintains that it is not, on various grounds:—

(1) He has maintained, first, that although the defenders are apparently the holders of the seven bills, they, in truth and reality, hold them not in their own right, but for and in the right of Vaughan and Company, and this appears to be the pursuer's sole plea on the subject for which any foundation is laid in the record. In regard to the pursuer's plea as so maintained, I have no difficulty or hesitation in disregarding it. Vaughan and Company are not parties to the bills at all. Armstrong, Müller, and Company are the drawers, and Hannay and Sons are the acceptors of them. No doubt Vaughan and Company, although not parties to the bills, undertook by letter No. 115/43 of process to indemnify Armstrong, Müller, and Company for any loss they might sustain in respect of them. But I am not aware, and can neither find authority or see any good reason in equity for holding that the circumstance of a party having a cautioner or collateral security for his debt is destructive of his right of compensation or set off, supposing it to be otherwise well founded. I did not, indeed, understand that any such contention was ultimately maintained by the pursuer, although it seems to be the ground upon which the Lord Ordinary has proceeded in deciding this branch of the case in his favour.

(2) It was, however, strenuously urged, in the second place, for the pursuer, that although his plea to the effect that the defenders were in right of Vaughan and Company is to be taken as ill founded, still it could not be held that they are vested in the bills for and in their own right, but merely for and in the right of Armstrong, Müller, and Company, who had and have the sole and exclusive interest in them. But this view,—irrespective of the circumstance that it is not only not in accordance but inconsistent with the case of the pursuer as presented by him in the record,—cannot, I think, be sustained. The defenders are, in point of fact, the holders of all the bills in question, and are therefore alone *in titulo* to insist in payment of them, and they alone can deliver them up on payment of their contents. Nor do I see that any competent evidence has been produced or referred to for the purpose of shewing that the defenders are not onerous and *bona fide* holders of the bills. They must, therefore, according to

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the facts as they have been presented to the Court, be held to be the true creditors on the bills, and, if so, it follows that they are entitled in respect of them to the benefit of the plea of compensation or set off in answer to the demand now made for the debt due by them to Hannay and Sons.

(3) But it was further maintained, in the third place, on the part of the pursuer, that in point of law no such plea was available to the defenders, in respect the bills were not due at the date of the bankruptcy, and in place of being at that date actually held by the defenders they were held by the bank at which they had been discounted. But it neither was nor could be denied that it was the defenders who, as endorsees and holders of the bills, had endorsed them to and discounted them with the bank before the bankruptcy, and so had, beyond all question, become liable for their contents to the bank. Nor was it disputed that the defenders when the bills fell due, after the date of the bankruptcy, retired them, as they were bound to do, and so had again become the holders of them, and were the holders of them when the pursuer's claim was made. And it is clear,—at least the contrary is neither shewn nor alleged,—that all this took place in good faith and in ordinary course of business. Why, therefore, should the defenders' plea of compensation or set off not be available to them as against the pursuer, the trustee of Hannay and Sons, the primary and proper debtors in the bills, merely because they had not actually been retired and in the hands of the defenders till after the bankruptcy? No precedent or other authority was cited by the pursuer in support of his contention, and it was acknowledged by him that he was aware of none. On the other hand, the defenders, besides Mr Thomson, have the high authority of Mr Bell, who, while he states (2 Bell's Com., 5th ed. p. 128) the ordinary rule that "in compensation the debts must both be due at the same time," goes on to explain that, on the principle of the balancing of accounts in bankruptcy, "if one of the parties become bankrupt the other may defend himself against a present demand by setting off a debt that is future or contingent, although the term of payment be after the bankruptcy." Mr Bell (pp. 129 and 130) enforces the equity of this doctrine, which, indeed, is obvious, by various illustrations. And I must own for myself that to allow the pursuer in the present case to insist for payment of the debt he sues for, irrespective of the bills held by the defenders, would be tantamount, as it appears to me, to allowing Hannay and Sons' creditors to be paid with the defenders' money, while they, the defenders, are only to receive a dividend on the large debt due to themselves.

I am, therefore, for the reasons now stated, of opinion that the defenders are entitled to set off against the pursuer's claim of debt the counter debt due to themselves by Hannay and Sons, the consequence of which will be to entitle the defenders to have the interlocutor of the Lord Ordinary recalled and absolvitor pronounced in their favour.

LORD GIFFORD.—I concur. And although the case is somewhat intricate I have come at last, without much difficulty, to be of opinion that upon the second branch of the case the defenders are entitled to prevail.

There is now no dispute as to the amount of the debt sued for as due to the sequestrated estate of Hannay and Sons. If all defences fail, then a sum of £9562 is due by the defenders to Hannay and Sons' trustee. The defence, however, is twofold. Firstly, Armstrong Brothers and Company say that part of their debt to Hannay and Sons was settled on 11th March 1874, a sum of £7536,

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10s. 1d. due by Hannay and Sons to them having been deducted from their debt to Hannay and Sons and the balance paid by cheque. On the question raised by this defence I entirely agree with the Lord Ordinary. The settlement is not proved in the only way in which it competently could be proved. The debts so crossed were not due in the same character, and therefore compensation did not take place *ipso facto*. An agreement to set off, or rather an actual settlement and discharge, was necessary, and that agreement can now only be proved by writing. So far from there being a written settlement, or any written evidence of settlement produced, the only document founded on proves clearly that there was no settlement. The parties may have intended one, but if so, what they intended they did not carry out, because they did not reduce it to a writing which imported a settlement and was legal evidence thereof. On the first question, therefore, I agree entirely with the Lord Ordinary that the defence has failed.

But, secondly, the defenders raise another defence much more formidable. Hannay and Sons' trustee sues for the amount due for iron delivered on certain contracts. In defence the defenders produce certain bills of which they are endorsers which are now in their hands, and in which Hannay and Sons are acceptors, and they plead that against the debt due by them to Hannay they are entitled to set off in bankruptcy the bills accepted by Hannay, and of which the defenders are onerous holders. They say the amount in these bills in which Hannay and Sons are liable to them exceeds their debt to Hannay and Sons, and therefore the debt sued for is extinguished.

Now, suppose, in the first place, that the defence had been stated without any question of bankruptcy arising: It was conceded, I think, that there could have been no answer to it. There would not even have been room to inquire how Armstrong Brothers got the bills. It would have been no objection that they had got them gratuitously, provided Hannay and Sons were debtors for value. Apparently, therefore, if there had been no sequestration, and assuming that there had been no question as to proper *concursus debiti et crediti*, Armstrong Brothers, on getting right to the bills, would have been entitled to plead on them as they now do.

Let us see, then, whether bankruptcy makes any difference. When Hannay and Sons became bankrupt the bills were in the hands of the Clydesdale Bank, being still current. Now, compensation, in the strict sense of the term, can only be sustained between debts simultaneously liquid. But when Hannay and Sons became bankrupt certain rights instantly arose to every person interested in the bills. Hannay and Sons' acceptances were discounted in the ordinary course of business with the bank, therefore the bank had recourse against all the previous endorsers up to the drawer. That would not have prevented the bank pleading compensation had they been debtors to Hannay and Sons in any obligation,—for instance, had they owed Hannay and Sons a balance on current account. But at the same moment there arose a right to every one of the endorsers in the sequence of liability to the bank. Each was entitled to pay the bank and take up the bills. Armstrong Brothers were the last endorsers. They were entitled to pay the bank and retire the bills and operate their own relief in any way that was open to them. They do so by pleading retention in bankruptcy. It is no answer to that plea that at the date of the bankruptcy their claim against Hannay and Sons was not liquid, or not mature, for their plea was not compensation strictly so called, but retention in bankruptcy, that is, retention until the final

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liabilities and rights of parties shall be ascertained, and until the bills current shall be paid and taken up. But now that the bills have been taken up by Messrs Armstrong and the currency of the bills has expired there is nothing to prevent a final settlement, and it is not now mere retention, but set off, compensation, or settlement in bankruptcy, which is to determine the balance due to or by the defenders.

I am of opinion that in these circumstances Messrs Armstrong, the holders of these bills, are entitled to set them off against their debt to the bankrupts. It is equally incompetent after bankruptcy, as it would be before it, to inquire whether there are prior indorsers liable to Armstrong Brothers or not. In short, I think the law may be stated with correctness as broadly as this: that compensation or retention to the effect of ultimate compensation may be pleaded after bankruptcy in the same way as before it, provided the debt pleaded on has not been acquired after bankruptcy for the purpose of producing compensation. The defenders do not come under this exception. Their contingent liability on the bills was incurred before the bankruptcy, and their again becoming the holders was a direct consequence thereof, and not a mere device for producing compensation. On Hannay and Sons' bankruptcy, and the bills becoming due, they might have been at once compelled to pay to the bank, and therefore were entitled to retain while the bills were current and not met by the acceptors, and on paying the bank and getting up the bills to compensate their own debt to the bankrupts so far as the amount of the bills went.

Upon this simple ground, therefore, that we have here a concurrence of debtor and creditor, I think we are entitled to sustain the defenders' plea of compensation, seeing that there is nothing to put them *in mala fide* or to shew that they acquired the debt for the purpose of founding the plea.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor, and assoilzie the defenders from the conclusions of the action: Find the defenders entitled to expenses, subject to modification to the extent of one-half of the expense of the proof, including the printing thereof, and remit," &c.

J. & R. D. ROSS, W.S.—WEBSTER & WILL, S.S.C.—Agents.

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Robb v. Logiealmond School Board.

ALEXANDER ROBB, Pursuer.—*Scott—A. J. Young.*
THE SCHOOL BOARD OF LOGIEALMOND, Defenders.—*D.-F. Clark—Keir.*

School—Schoolmaster—Retiring Allowance—Education (Scotland) Act, 1872 (35 *and* 36 *Vict. cap.* 62) *sec.* 60—*Parochial and Burgh Schools (Scotland) Act*, 1861 (24 *and* 25 *Vict. cap.* 107) *sec.* 19.—The Parochial and Burgh Schools Act, 1861, sec. 19, provides that when it shall be found that "the schoolmaster of any parish is disqualified because of infirmity or old age for the due performance of the duties of his office, or that from negligence or inattention he has failed efficiently to discharge such duties, it shall be lawful to the heritors and minister . . . . to permit or require such schoolmaster to resign his said office, ... and in every case of such resignation the heritors and minister may grant to such schoolmaster a retiring allowance . . . . provided that where such resignation shall not be occasioned by any fault on the part of the schoolmaster the heritors shall grant a retiring allowance."

The Education Act, 1872, sec. 60, empowers school boards to remove teachers if they are "incompetent, unfit, or inefficient," and provides that teachers, appointed previous to the passing of the Act, who may be so removed, shall have the same rights to retiring allowances as were vested in parish schoolmasters by the Act of 1861.

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Held that, assuming that a teacher could only have claimed a retiring allowance under the Act of 1861, if removed in consequence of old age or infirmity, inasmuch as these were the only causes for which he could be removed without fault, he might, under the Act of 1872, be removed for other causes without fault, and might therefore be entitled to a retiring allowance although not removed for old age or infirmity.

1st Division. Lord Young. B.

THIS was an action by Alexander Robb, formerly teacher of the side school of Logiealmond, against the school board of the parish of Logiealmond, claiming a retiring allowance.

Mr Robb had been teacher of the school since 1858.

In July 1873 the school board intimated to the pursuer that, in pursuance of the powers conferred on them by section 60 of the Education Act, 1872,* a special report regarding the school, and the pursuer as teacher, had been required from Her Majesty's inspector for the district.†

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* 35 and 36 Vict. cap. 67, sec. 60.—"Any teacher of a public school appointed prior to this Act may be removed from his office in manner following, that is to say, . . . (2) If the school board of any parish or burgh shall consider that any such teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school and the teacher from Her Majesty's inspector charged with the duty of inspecting such school; and on receiving such report the school board may, if they see cause, remove such teacher from office, provided that before proceeding to give judgment on the matter they shall furnish to the teacher a copy of such report, and that a judgment removing the teacher shall not have effect until confirmed by the Board of Education: Provided also that in the case of teachers of parish schools appointed previously to the passing of this Act who may be so removed, school boards shall have the same powers of granting retiring allowances, and the teachers shall have the same rights to retiring allowances, as were vested in heritors and ministers and in parish schoolmasters respectively by secs. 19 and 20 of the Parochial and Burgh Schoolmasters (Scotland) Act, 1861, in the case of parish schoolmasters permitted or required to resign, or dismissed or removed from office, as therein provided."

† The inspector reported,—"There are no pupils in attendance; only 6 have been enrolled during the school year, 3 in December and 3 in January, and no scholar since March. According to lists of names on loose copy leaves, kept mostly in pencil—the only school registers for the last seven years—the number enrolled in 1871-1872, was 9; in 1870-1871, 9; in 1869-1870, 27; in 1868-1869, 14; in 1867-1868, 25; in 1866-1867, 32. In these loose leaves no record of attendance has been kept; but so far as the fact can be ascertained from jottings of fees the attendance has always been small compared with the number on the roll. According to last census there are in the district 8[illegible] children receiving instruction; with the exception of 10 or 12 in outlying parts they go to school either at Heriotfield, about a mile west of Logiealmond school or to Millhaugh, about a mile east of it. The former school is kept in premises much inferior to those of Logiealmond, and has had nine teachers within the last eight years. It has at times had as many as 90 scholars, while Mr Robb had none; and on 4th August, when I looked in, it had 33 present. The support of it has, according to the statement of the U.P. minister, been always felt to be a heavy burden upon the managers, and it would have been discontinued long before this but for the state of the side parish school. The other school at Millhaugh is an adventure school kept in a room in a cottage unsuited for the purpose, by a mistress who has had no special training. It was in vacation at the time of my visit; but had had during the year an attendance reaching a maximum of 23.

"Mr Robb's explanation that the absence of pupils from his school is due to party feeling, clerical squabbles, and sectarian differences in the district is to a certain extent corroborated by the fact that of 34 names adhibited to a petition against him (of which I send a copy herewith) presented to the school board on

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On 26th August 1873 the clerk of the school board wrote to the pursuer as follows:—"The school board for the parish of Logiealmond, at their meeting held yesterday, directed me to intimate to you that, in consequence of Mr Walker's, H. M. inspector's report, they have now resolved to remove you from the office of teacher." The resolution of the school board was confirmed by the Board of Education. The pursuer applied for a retiring allowance, but the school board refused the application.

The pursuer then brought this action. He averred that after receiving the inspector's report, the defenders, "without inquiring whether *culpa* existed on the part of the pursuer," removed him from his office. (Cond. 5) "The report so returned does not set forth any fault on the part of the pursuer, and his removal by the school board from his office of teacher of the said side school was not occasioned by any fault on his part, but was due to other causes, for which he was not responsible."

He contended that his removal not having been occasioned by his own fault he was entitled to a retiring allowance under sec. 60 of the Education Act, 1872,* taken in connection with sec. 19 of the previous Parochial and Burgh Schools (Scotland) Act, 1861, 24 and 25 Vict. c. 107.†

The grounds of defence were (1) That the statements were not relevant. (2) That the pursuer was not a parochial schoolmaster, and therefore not entitled to a retiring allowance. (3) That the pursuer having been removed from his position as teacher in respect of inefficiency, caused by his fault, the defenders were not, in the circumstances, liable in a retiring allowance.

On 18th November 1874 the Lord Ordinary assoilzied the defenders.‡

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the day of my visit, only two are those of adherents to the Church of Scotland, to which Mr Robb belongs.

"However this may be, the state of the school gives evidence that it has not been efficiently conducted, and that Mr Alexander Robb, however he might succeed elsewhere, is unfit for the post of schoolmaster of Logiealmond."

* *Supra*, p. 418.

† Sec. 19.—"In case it shall be found, on a report by one of Her Majesty's inspectors of schools, made on the application of the heritors of the parish, and concurred in by the presbytery of the bounds, that the schoolmaster of any parish is disqualified because of infirmity or old age, for the due performance of the duties of his office, or that from negligence or inattention he has failed efficiently to discharge such duties, it shall be lawful to the heritors and minister, at any meeting called and held as aforesaid, to permit or require such schoolmaster to resign his said office, and in case of his refusal to do so, to dismiss or suspend such schoolmaster, and, when necessary, to declare the school vacant; and in every case of such resignation the heritors and minister may grant to such schoolmaster a retiring allowance, payable during the remainder of his life; provided that, where such resignation shall not be occasioned by any fault on the part of the schoolmaster, the heritors shall grant a retiring allowance, the amount whereof shall not be less than two-third parts of the amount of the salary pertaining to said office at the date of said resignation thereof, and shall not exceed the gross amount of such salary, which retiring allowance shall be payable in all respects in like manner with the salary of the schoolmaster . . .

‡ OPINION.—"The validity of the removal of the pursuer from his office under clause 60 (2) of the Education Act, 1872, is not questioned, and must be assumed. The questions in the case are—1st, Whether he was teacher of a parish school within the meaning of the Act? and 2d, whether the cause of his removal was such that he might, under section 19 of the Schoolmasters Act, 1861, have been required to resign or been dismissed therefor, 'as therein provided;' but with right to a retiring allowance by the provisions of that Act, applicable to resignation or dismissal for such cause.

"On the first question my opinion is with the pursuer, and I should accord-

No. 79. The pursuer reclaimed.

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LORD PRESIDENT.—The pursuer is the schoolmaster of the parish school of Logiealmond. He was removed from his office by the School Board in August

ingly be prepared to repel the 2d, 3d, and 4th pleas for the defenders, were it possible thereby to reach a result favourable to the pursuer. It is unnecessary to express the grounds of this opinion, because the pursuer has no case unless the second question also shall be answered in his favour, and upon this question my opinion is against him, for the reasons which I proceed to explain.

"The provisions of section 60 (2) of the Act of 1872, with respect to the grounds on which a teacher may be removed, are in marked contrast to those of section 19 of the Act of 1861. In the former, the grounds are that the teacher is 'incompetent, unfit, or inefficient,' no matter from what cause. In the latter the grounds are—1st, that the teacher 'is disqualified because of infirmity or old age for the due performance of the duties of his office;' and 2d, 'that from negligence or inattention he has failed efficiently to discharge such duties.' The former statute (1872) permits the removal of a teacher who is in fact incompetent, unfit, or inefficient, taking no account (so far as concerns the removal) of the cause of the incompetency or inefficiency. The latter (1861), on the contrary, takes such account of the cause that removal is thereby permitted only with reference to the cause, which must be either disqualification 'because of infirmity or old age,' or failure in duty 'from negligence or inattention.' The law, as it stood on the Act of 1861, was defective (at least the Legislature of 1872 thought so), inasmuch as it made no provision for the removal of an incompetent, unfit, or inefficient schoolmaster, unless his incompetency, unfitness, or inefficiency was attributable to the natural disqualification of 'infirmity or old age,' or to 'negligence or inattention.' Hence the more comprehensive provision of the Act 1872.

"But the latter Act, while providing absolutely, as the interests of the community seemed to require, for the removal of incompetent, unfit, or inefficient teachers, preserved the rights to retiring allowances conferred by the Act of 1861 upon teachers removed 'as therein provided,' and it is to these accordingly that the pursuer appeals in support of his demand. The question is whether they apply to his case. Now, although the provision (sec. 19 of Act 1861) is, in the passage principally relied on, expressed in general terms thus,—'that when such resignation shall not be occasioned by any fault on the part of the schoolmaster, the heritors shall grant a retiring allowance,'—the expression 'any fault,' must, I think, be read and construed with reference to the premises, or preceding part of the clause, which specifies the cases in which alone resignation can be required or permitted under the Act. These are, as I have observed, exactly these two, viz., 1st, disqualification, 'because of infirmity or old age;' and, 2d, failure in duty 'from negligence or inattention.' I must therefore limit and confine the words 'shall not be occasioned by any fault on the part of the schoolmaster' to cases of disqualification because of infirmity (not occasioned by the man's own fault) or old age, for in no other case is removal or forced resignation without fault on the teacher's part permitted by the Act.

"Now, it is not pretended that the pursuer was removed by the school board because of infirmity, or old age, or unfitness, or inefficiency thence arising, and his counsel declined to put an averment to this effect on record. The only averment on the subject is (Art. 5) that his removal was not occasioned by any fault on his part, but was due to other causes for which he was not responsible. But, in my opinion, such generality of averment cannot be taken as sufficient to support a case laid upon the provisions of the Act of 1861 as imported into the Act of 1872. For this purpose it is, I think, clearly necessary to aver a cause of removal which might have led to removal or resignation under the Act of 1861, and removal for which, 'as therein provided,' would have entitled the teacher to a pension by the provisions of that Act.

"It was not intended to give pensions to teachers who should be removed under the Act of 1872 for any cause which would not have warranted removal

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1873, under the 60th section of the Education Act, 1872, his removal proceeding, as required by the Act, on a report of one of her Majesty's inspectors, to the effect that he is unfit for the post of schoolmaster of Logiealmond.

He now brings this action, claiming a retiring allowance as a matter of right. The grounds of defence are that he is not entitled to a retiring allowance,—1, Because he is not within the class to whom it is provided by statute; 2, Because he was removed in respect of inefficiency caused by his own fault. The first defence the Lord Ordinary has repelled. The second he has not disposed of. But he has decided against the pursuer on a particular construction of the 60th

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under the older law, but only to teachers removed for a cause which would have warranted removal or resignation with a pension under the Act of 1861; and this is, in my opinion, clear on the language of the Act. Thus (to put a conceivable case) such singular natural stupidity or inaptitude for teaching that the school was totally deserted for years, on account of the incompetency of the teacher, was no case for removal prior to the Act of 1872, certainly not under section 19 of the Act 1861. The law with respect to such a clamant case was amended by the Act 1872, but without giving right to a pension, unless indeed it can be held to be given by reference to section 19 of the Act 1861, which does not contemplate or provide for such case at all. It is true that all cases to which section 19 of the Act 1861 was formerly applicable now pass under section 60 (2) of the Act 1872, with the rights of pension, as therein provided, preserved. But these rights are not extended to cases to which the statutory provisions on which they stand were inapplicable. In short, the result, as I read the provisions of the Act of 1872, is, that a teacher appointed prior to the Act, who is subsequently removed for incompetency, &c., arising from disqualification because of infirmity (without fault) or old age, is entitled to a retiring allowance exactly as if he had been removed under section 19 of the said Act 1861, 'as therein provided,' but that such right does not attach to any other case of removal under section 60 of the later Act, there being no other possible case of removal, without fault, under the former. I ought perhaps to notice, though it is apparent on the face of the Act, that section 55, which reserves the rights of teachers in office prior to the passing of the Act (1872), does so subject to the provisions of section 60 regarding their removal from office.

"I may observe, in conclusion, that were I able to adopt the view on which the pursuer relies—viz., that a teacher removed for incompetency not occasioned by his own fault, but 'due to other causes for which he was not (I presume morally) responsible,' is entitled to a pension—I should still think that the case here presented is defective in substance. Not one child has been attracted to the school for a very considerable period of time, although there are plenty of children of school age in the district for which it exists. The school board have signified their opinion that the pursuer's removal, confirmed by the Board of Education, is due to his own fault. He rests his action on a simple averment of the negative, without condescending on any tangible fact capable of being sent to proof, to account for the deplorable state of matters, which the proper authorities have by deliberate statutory judgment attributed to his incompetency and unfitness. The validity and propriety of the removal must be assumed, and also, *prima facie*, the refusal of a pension. The pursuer, who by action appeals to this Court to correct the judgment and resolution of the proper public authority in the matter, is in my opinion required, as a condition of having his case entertained, to state distinctly, and in such form as to admit of investigation (if thought relevant), to what his incompetency, unfitness, or inefficiency (which led to the total desertion of his school) was attributable. But he only says that it was due to 'causes for which he was not responsible,' pointing, as was explained, to unpopularity arising from ecclesiastical jealousies and discord. I do not think such a case can be entertained.

"I have said nothing about expenses, meaning to give none in the circumstances of the case."

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section of the Act of 1872, taken in connection with the 19th section of the previous Act of 1861, according to which he holds that no schoolmaster can claim a retiring allowance as matter of right, unless his inefficiency is caused by infirmity or old age. This ground of defence is not stated in any of the pleas, and before we could sustain it, it would be necessary that it should be put upon record. But that is not necessary under existing circumstances.

The question is important and of extensive application, and in order that my view of it may be fully understood I shall mention what the history of the legislation on the subject has been.

Under the Act of 1803 no schoolmaster could be removed except by sentence of the presbytery of the bounds, proceeding on a libel charging him with neglect of duty, or immoral conduct, or cruelty. By the Act of 1861 the jurisdiction of the presbytery was abolished, and the trial of schoolmasters for immorality or cruelty was transferred to the Sheriff, and in place of a libel for neglect of duty before the presbytery there was substituted the procedure under section 19—(*supra*, p. 419). Now, there are two grounds on which procedure may be taken under this section,—first, old age and infirmity; secondly, inefficiency by reason of negligence or inattention, which appears to be just another term for "neglect of duty" under the older statute; and the heritors are bound to grant a retiring allowance where the resignation has not been occasioned by any fault.

Now, it may well be, as the Lord Ordinary holds, that the absolute right to a retiring allowance under this section is confined to cases of disqualification by old age or infirmity, because that is the only case mentioned in the clause where the removal can be without fault, the other case, inefficiency by negligence or inattention, being one in which there always must be fault. It is not necessary to determine whether that is so or not. Possibly there may be some kind of inattention which does not infer fault, and yet does not come up to infirmity. But I am willing to assume with the Lord Ordinary that section 19 provides for two cases only, old age and infirmity, and inefficiency inferring fault, and therefore that while the heritors were always entitled to give a retiring allowance, the schoolmaster could demand one only in the former case.

But now we come to section 60 of the Act of 1872—(*supra*, p. 418). The Lord Ordinary's construction of this clause is, that no one can demand of right a retiring allowance who has not been removed on account of old age or infirmity, because these are the only cases under the Act of 1861 which give the right, and he holds that the right is not by the new enactment extended to any cases not within the letter of the previous Act.

My Lords, I cannot help thinking that his Lordship has forgotten that he was construing a remedial statute. A remedial statute is not to be strictly construed, and I think this is one of the strictest constructions that I ever saw applied to an Act of Parliament. A remedial statute ought to receive a benign and favourable construction, and is often applied *ad consimiles casus*. But it is not necessary to rely on that principle in order to arrive at an opposite conclusion from the Lord Ordinary, for the natural meaning of the words is, in my opinion, entirely against his reading. The clause extends the category of causes for which a schoolmaster may be removed. Under the previous Act nothing justified removal except old age and infirmity, or inefficiency by reason of negligence and inattention. But here the school board is empowered, on the report of an inspector, to dismiss a teacher as incompetent, unfit, or inefficient. These words appear all to mean substantially the same thing. Now, there may unquestion

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ably be cases in which a teacher is, in the judgment of the school board, unfit for his post, when his unfitness arises neither from old age or infirmity, nor from fault of his own. The qualifications required by the statute are such that a schoolmaster may not be able to meet them, though he may have been fit for the post when he was appointed many years ago. He may even have improved during his tenure of office, and yet not be up to the mark of the present day. Here there would be no fault, but the reverse, and yet the Lord Ordinary holds that such a teacher would not be entitled to a retiring allowance.

Such a construction appears to me contrary to the clear meaning of the statute The application of the one statute to the other is this. The principle that a retiring allowance is to be granted as a matter of right where there has been no fault is contained in the older statute. That principle is imported into the new Act, and applied in terms to all the cases under it. The teacher may be dismissed if inefficient, whether from his own fault or not. If there is a fault he is entitled to no retiring allowance. If there is no fault he is entitled to one. The causes of and liability to removal being extended by the new enactment, it is plain that the right to a retiring allowance must be extended in a corresponding *ratio*.

But the Lord Ordinary proceeds farther to say that, even if his construction of the statute be wrong, the pursuer has not presented a relevant case. This is a more difficult point. I am not prepared to differ from the Lord Ordinary, but I think it will be fair to allow the pursuer an opportunity of amending his statement. The inspector has reported that the schoolmaster is unfit for his post. His report does not state what the causes of that unfitness are. But the schoolmaster's right to a retiring allowance depends on what these causes are, and till we know what they are I do not see how we can dispose of the case. The pursuer gives us no information beyond stating in vague terms that his dismissal was due to causes other than personal fault on his part. I am unwilling to say more as to how far there is a presumption against the pursuer till we know whether he desires to amend his record.

Lord Deas.—I entirely agree with your Lordship as to the construction of the statute. There are just two classes of cases,—one where the schoolmaster has been dismissed for fault, in which case he has no right to a retiring allowance; the other, where he has been removed for causes which cannot be attributed to fault, in which case the statute gives him a legal right to a retiring allowance.

The only difficulty I have about the present case arises from this: I do not see that it is clear, on the face of the proceedings, that the school board dismissed the pursuer for fault. They do not say that they did. It appears to me that when the school board intend that a teacher should not have a retiring allowance they ought to frame their deliverance so as to shew that he was dismissed for fault. At all events, when a schoolmaster asserts his right to a retiring allowance the school board ought to pronounce a distinct deliverance, affirming fault if they disallow his claim. But I do not find any such deliverance in these proceedings. There is, indeed, an allegation of fault in the record. But I cannot take that as equivalent to a deliverance by the school board, pronounced in their official character and on their official responsibility.

The only objection that I have to calling on the schoolmaster to amend his record is, that it seems to proceed on the footing that it lies on him to shew that

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he was not removed for fault. Now, I am not disposed to hold that in such a case, more than any other, it is incumbent on a man to prove his innocence. I would rather have been disposed to remit to the school board to explain the grounds on which they dismissed the pursuer. If the explanation was satisfactory, with or without further investigation, I should have been disposed to give all due weight to the deliverance of the board. But I cannot hold that the burden of proof, in the first instance, lies on the pursuer, and if that be implied in the suggestion of an amendment I could not concur in the course proposed.

LORD ARDMILLAN.—The pursuer, Mr Robb, was appointed schoolmaster in 1858 of the parochial school of Logiealmond. Some years ago the pupils attending his school were numerous, and he states that besides teaching the school—I presume satisfactorily—he discharged the duties of inspector of poor, registrar, and session-clerk. In August 1873 Mr Robb was removed from the office of parochial teacher in consequence of a report by the inspector of schools, dated 7th August 1873, in which the inspector states that there were no pupils in attendance, that only six had been enrolled during the year, and not one between March and August, and yet that in one school, a mile to the west, there were thirty-three pupils on the day of inspection, and there had been frequently a much larger number; and that in another school, a mile to the east, there had been during the year twenty-five pupils, though taught by a mistress only. The inspector concludes the report by stating that the school has "not been efficiently conducted, and that Mr Alexander Robb, however he might do elsewhere, is unfit for the post of schoolmaster at Logiealmond." Accordingly Mr Robb was removed by the school board. His removal was confirmed by the Board of Education in Edinburgh on 24th September 1873, and intimated to him, and on 31st October 1873 the school board intimated to him that they declined giving him any annuity. So standing the facts, Mr Robb has brought an action concluding for decree, ordaining the school board to pay him a retiring allowance of not less than two-thirds of his salary.

It is important to observe that no question is here raised in regard to the propriety, the legality, or the finality of the removal of the pursuer from the office of schoolmaster. He stands removed,—regularly removed,—and, as we must assume, rightly removed. The question is, being thus removed, is he entitled, as the case stands, and without inquiry, for he is not demanding inquiry, to enforce a retiring allowance? The pursuer, accepting his removal as lawful and effectual, demands the retiring allowance as matter of right, and without further inquiry. The school board, who removed him, and whose act of removing was approved by the Board of Education, had the power, on removing him, to give a retiring allowance if they thought fit. They, knowing all the facts and circumstances of the case, have declined to do so. This action is raised concluding for judicial decree, ordaining them to give the allowance. The pursuer craves decree on the case as it now stands.

But for the provision at the close of the 60th section of the Education Act of 1872 it is plain that the pursuer, being rightly removed, could not have any statutory claim to a retiring allowance. Of this there is, in my opinion, no doubt. The claim rests, and has in argument been urged, entirely on the provision in clause 60 of the Act of 1872, to the effect that "the teachers shall have the same rights to retiring allowances as were vested in parish schoolmasters by sections 19 and 20 of the Schoolmasters Act of 1861, in the case of parish

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schoolmasters permitted or required to resign, or dismissed or removed from office as therein provided." In order to ascertain the nature and measure of the right reserved by this 60th section of the Act of 1872, and now claimed by the pursuer, we must go back to the 19th and 20th sections of the Act of 1861.

I have carefully considered the construction and application of these sections of the Act of 1861 in order to see whether they support this claim of the pursuer; and in the construction of the Act of 1861, an Act repealed by the Act of 1872, except in so far as the 19th and 20th sections are introduced by the provision in section 60, I have arrived at the same conclusion as Lord Young, and on that part of the case I have really very little to add to the explanations given in his Lordship's note. By the 19th section of that Act of 1861 the heritors and minister, whose powers are now transferred to the school board, are empowered to "permit or require" a schoolmaster to resign when "disqualified because of infirmity or old age," or when failing efficiently to discharge his duties "from negligence or inattention." In every case of such resignation the heritors and minister have power to grant a retiring allowance; and where the resignation, permitted or required, and therefore including removal, has not been occasioned "by any fault on the part of the schoolmaster," they were bound to grant a retiring allowance. Reading this Act of 1861, and construing it as it stands alone, I concur with Lord Young in opinion that in the case of removal for inefficiency caused by "negligence or inattention," and not caused by "infirmity or old age," the teacher being lawfully removed, could not have enforced a retiring allowance under that statute. The grounds of removal under the 19th section of that Act are inefficiency from negligence or inattention, implying, as I think, fault, or disqualification because of infirmity or old age, not implying fault. As I read the 19th section of this statute of 1861 the teacher could not be removed without some degree of fault unless he was removed as disqualified because of infirmity or old age.

The statute of 1872 did, however, extend the power of removal and multiply the causes or grounds of removal, so as to bring within the scope and reach of that power a number of cases where removal could not have been enforced under the Act of 1861, and perhaps among these cases there may be some where there is no fault on the part of the teacher.

The school board—popularly elected, and viewed as representing to a large extent the parentage of the district—have now power to remove a teacher in respect of ascertained actual incompetency, unfitness, or inefficiency, from whatever cause that may have proceeded. It is quite possible to conceive cases where such inefficiency, though not arising from infirmity or old age, may not have arisen from actual fault on the part of the teacher. Such cases are no doubt exceptional. But there may be such. For that inefficiency without fault the teacher could not have been removed under the Act of 1861. It is only because of the extended scope and reach of the power of removal under the Act of 1872 that it takes effect in a case beyond the scope and reach of the Act of 1861. Now, it does appear to me that one of the objects of the Act was to secure efficiency without doing injustice, and that the protection given to the teacher against removal without fault under the limited scope of the Act of 1861 must in fairness be held to be extended under the Act of 1872, so as to be commensurate with the more extended and comprehensive scope of that Act.

Therefore, while I agree with Lord Young in his construction of the 19th section of the Act of 1861, I am disposed to think that the teacher's right to retir-

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ing allowance must be read with reference to the nature and measure of the power of removal, and that when, by the Act of 1872, other grounds of removal are introduced, not implying fault on the part of the teacher, then the teacher's right to retiring allowance cannot justly be left under the limitation created with reference to the limited power of removal. Justice demands, in my opinion, that the teacher's right to retiring allowance shall, under the new Act, as it was under the former Act, be commensurate with the power to remove without fault on his part. On this point I concur with your Lordship in the chair. If in this case it did appear that the teacher's inefficiency and unfitness was not occasioned by any fault on his part, but was explained on grounds not implying fault, that would be an exceptional case, and, in that case, I think that he would have a good claim to a retiring allowance, even though his inefficiency did not arise from "infirmity or old age."

But, while I am of this opinion, I have been compelled, in the actual circumstances of this case, so far as ascertained, to arrive at a conclusion unfavourable to the pursuer's claim.

I have no doubt that the pursuer was rightly removed. His continuance in the office of teacher, under the circumstances, would have been an abuse. He was pronounced inefficient and unfit by the inspector. He had no work and no pupils. That he is infirm or old is not alleged. He has failed as a teacher. The school is vacant. He has no pupils, though there are plenty of children requiring education. He has had experience and practice in teaching and in other departments, and want of mental capability is not suggested. No cause whatever to explain the entire failure of the school has been stated by him on record, and he has not alleged or offered to instruct any facts tending to explain a result so unfavourable to him. The inspector has reported him inefficient and unfit, and has reported the failure of the school, and the pursuer, who has been removed on that ground, has not suggested any reason in respect of which the fact can be explained apart from his own fault. Nothing like an exceptional case has been alleged. It is said that the inspector has not alleged fault. But it was not the province of the inspector to charge him with fault. The report of the inspector raises, in my opinion, a presumption that the failure of the school, and the unfitness and inefficiency of the teacher, has been occasioned by some fault on his part. Notwithstanding the report,—accepting it as accurate,—and not disputing the lawfulness of his removal, and not craving any inquiry, the pursuer demands his retiring allowance, founding only on the inspector's report, and on the absence from that report of reference to any fault. I think he is not entitled to do so. In the position in which he stands in relation to this report, and to the deliverance by the school board, confirmed by the Board of Education, I think that the pursuer must be considered as *in petitorio* bound to allege and instruct some explanation of the facts reported by the inspector, an explanation consistent with the absence of fault on his part. In the present state of the case, as presented to us by the pursuer, and on which, as it stands, the pursuer has called on us to pronounce judgment, I am of opinion that he is not entitled to the retiring allowance which he demands.

I do not say what might be the effect of distinct and relevant averment by the pursuer of special and exceptional facts tending to explain the failure of the school and his own unfitness on grounds inferring no fault of his. We have no such averments at present. Lord Gifford in the Whitburn case[1] appears to have

[1] Not reported, but see Morison v. School Board of Glenshiel, May 28, 1875; *ante*

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been of opinion that an inquiry by proof in this Court might be permitted if relevant averment were made and proof demanded. I am not disposed to differ from his Lordship's view. In such a case there should be some remedy. But in the meantime no such averments have been made, no proof has been craved by the pursuer, and no inquiry into his conduct and character has been demanded by him.

LORD MURE.—On the construction of this statute I have come to the same conclusion as your Lordships. I am ready to assume that under the Act of 1861 a schoolmaster could only claim a retiring allowance, as matter of right, if his removal was occasioned by infirmity or old age, and not by fault on his part. But then, by the Act of 1872, greater powers were given to school boards relative to the removal of teachers for causes other than old age or infirmity, and not necessarily attributable to actual fault or neglect on the part of the schoolmasters; and when these additional powers were given, it is not unreasonable to suppose that the Legislature would make provision for some retiring allowance to teachers so removed. Now, this has, in my opinion, been done by the 60th section of the Act of 1872, by which the right of teachers, appointed prior to the date of the Act, to retiring allowances has, I think, been made co-extensive with and correlative to the additional powers of removal conferred on boards for causes other than fault on the part of the teachers.

The other question raised as to relevancy and *onus* is one of considerable nicety, and it is with some hesitation that I have come to the same conclusion as your Lordship. I agree with Lord Deas that the report of the inspector does not specify actual fault. We can only therefore gather from it by implication that there may have been fault. It does, however, bear that the pursuer was not incapacitated by any apparent physical defect; and after referring to certain statements which appear to have been made by the pursuer in explanation of the bad attendance at his school, for which the master ought not to be held responsible, the report proceeds:—"However this may be, the state of the school gives evidence that it has not been efficiently conducted, and that Mr Alexander Robb, however he might succeed elsewhere, is unfit for the post of schoolmaster of Logiealmond." Now, "unfitness" is one of the additional grounds of removal specified in the Act of 1872, and the school board, by adopting the report, seem to say that they removed the pursuer on that ground. Upon that being done the pursuer seems to have written to the Board of Education, and made some observations on the report. What these explanations were we are not informed, but after receiving them that board confirmed the school board's decision.

In this state of matters I agree with Lord Ardmillan that the pursuer may be considered to have been removed for some inefficiency or unfitness, and when he in such circumstances comes here *in petitorio*, he ought, I think, to have set forth something more specific on record than that he was removed for no fault, in order to found a relevant claim for a retiring allowance under the statute. I therefore concur in the course which your Lordship has suggested.

THE pursuer was allowed to amend his record.[1]

G. BEGG, S.S.C.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

[1] See sequel of case, *infra*, under date May 21, 1875.

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Feb. 6, 1875.
Clark v. Henderson.

ANDREW CLARK, Pursuer.—*Campbell Smith.*
JAMES HENDERSON, Defender.—*Thorburn.*

Husband and Wife—Expenses—Agent.—A law-agent raised an action against a husband for his wife's expenses in an action of separation and aliment, in which the pursuer had been employed by her, stating that, before any inquiry into the facts, the parties had been reconciled, and decree of absolvitor pronounced, and that a motion by him for his expenses had, at the same time, been refused, on the ground that his claim could not properly be investigated except in a separate action. *Held* (after consultation with the Judges of the Second Division, *rev.* judgment of Lord Young), that the action was competent, and a proof allowed.

Observed (*per cur.*) that the agent's claim for his expenses in such cases may be competently made, either in the original process or in a separate action, but that the Court will in general not entertain it in the original process if the case is settled before there has been any investigation into the facts.

Observations on Smith v. Smith, Feb. 21, 1871, 9 Macph. 538.

1ST DIVISION. Lord Young. B.

THIS was an action by Andrew Clark, S.S.C., against James Henderson, stevedore, Leith, for payment of an account of £42 incurred to the pursuer by the defender's wife, for whom he acted as agent in an action of separation and aliment against her husband. The pursuer averred that in that action, after defences had been lodged, and about a month after the action had been raised, the parties were reconciled. (Cond. 5.) "The pursuer, at the calling of the cause, upon the motion of the defender for absolvitor, moved for decree for his expenses, which was opposed by the defender, and not granted by the Lord Ordinary (Gifford), in respect that the pursuer's claim could not be properly investigated except in a separate action. The defender having since refused payment, the present action has therefore become necessary."

The pursuer pleaded;—(1) The pursuer having performed the business charged for in the account founded on, upon the employment of the defender's wife, he is entitled to decree therefor. (2) The defender is liable to the pursuer for said account incurred upon the employment of his wife, in respect that the action raised on her behalf was well founded on its merits, or at all events was an action which the pursuer had every reason to believe to be well founded in fact and law.

The Lord Ordinary pronounced this interlocutor:—"Finds that, in the circumstances averred by the pursuer, the action is not maintainable: Therefore assoilzies the defender from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses."*

* "NOTE.—It is well settled, and was not disputed by the defender, that, in conjugal actions, as, indeed, in all actions, the Court before whom they depend has very ample jurisdiction in the matter of expenses, and may, and habitually does, exercise it in favour of the agents-disbursers, as well as the parties themselves. It may also be stated, as a general rule, that a wife pursuing an action of divorce or separation against her husband, or defending such an action at his instance, is entitled by herself or her agent to have decree against him for the expenses properly incurred by her, even when unsuccessful. There are exceptions to the rule, and whether a case falls under the rule or an exception is judged of and determined by the Court in the case itself.

"In the present case the pursuer, having been employed by the defender's wife to raise an action of separation and aliment against him, which was dismissed at an early stage without expenses in the circumstances stated in the record, sues the defender for his account of expenses, either as being his own proper debt, or that of his wife, for which, as her husband, he is liable.

"The pursuer cited no authority for such an action, and relied on the principle

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The pursuer reclaimed, and argued;—In the original action the Lord Ordinary, in refusing the agent's motion for his expenses, had proceeded on the footing that it was decided by the case of Smith[1] that the claim was incompetent in the original process, and must therefore be made in a separate action. But the Lord Ordinary in the present case held that a separate action was incompetent, so that the pursuer was deprived of any remedy.

The defender argued;—The wife was not entitled, as matter of right, to her expenses in an action against her husband, and the short time that elapsed before the action was settled shewed that it had been precipitately raised.

At advising,—

LORD PRESIDENT.—This is an action by a practitioner in this Court for recovery of an account of expenses incurred to him by the defender's wife, by whom he was employed as agent in an action of separation and aliment against her husband, the defender. The action was not prosecuted to a conclusion. When the record was in a position to be adjusted, and it became the duty of the pursuer's agent to have it printed and to send the process to the Lord Ordinary, he received intimation that the husband and wife were reconciled, and that the action was to be stopped. The defender then moved for absolvitor, and decree of absolvitor was pronounced. At that stage the present pursuer moved for decree for his expenses. But the Lord Ordinary did not think fit to entertain his claim, being of opinion, in consequence of a judgment of the Second Division, that the proper form of making his demand was by a separate action. He has accordingly raised this action, but he is met by the objection that that is not a competent mode of enforcing his claim, so that he finds himself in this

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of liability involved in the practice of the Court, to which I have referred in dealing with the matter of expenses in conjugal actions, undertaking to establish by evidence that he had reasonable grounds for accepting of the wife's employment to take proceedings against her husband.

"I am of opinion that the action is not maintainable.

"1st, It may be assumed, although it is not necessary to decide, that the claim is good against the wife, and that it may be enforced against any separate estate, which she has, or may come to have. But it does not follow that the husband is liable, and, having regard to the nature of the debt, I think he is not. 2d, It may be that the pursuer might have made his claim good against the defender by invoking the jurisdiction of the Court on the matter of expenses in the action of separation itself; but this is a peculiar jurisdiction, and is exercised in each case according to the Court's opinion of its merits, and the just claims of parties when the case itself is before the Court. 3d, The consideration which the pursuer urged,—that if the husband be not subject to such a claim as this an ill-used wife may have to go without a remedy from inability to find an agent willing to incur the risk of taking up her case, is worthy of attention, but is, in my opinion, greatly overbalanced by considerations on the other side. As I have already noticed, the wife's agent may always appeal to the Court in the action which he raises for her. But to allow him to make an independent claim by action at his own instance would involve an investigation, at his instance and for his purposes, into family differences after the spouses had, as in the present case, made them up and resumed their cohabitation,—a course which is, in my opinion, to be deprecated as inimical to family peace. 4th, I do not think it is desirable, on general considerations, to encourage agents to take up such cases by declaring any other liability on the part of the husband than that which the Court may, as hitherto, give effect to and enforce according to their judgment, in the wife's own action against him."

[1] Smith v. Smith, Feb. 21, 1871, 9 Macph. 538, 43 Scot. Jur. 265.

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dilemma, that his claim was not competent in the original process, and is held to be equally incompetent in a second action.

I am not able to assent to so startling a proposition. There may be a question on the merits whether the account was reasonably and properly incurred. But if it was, these are services of a necessary kind rendered to a wife, and the claim for remuneration for these services became the debt of her husband. It is a civil debt, and I cannot see why it should not be recovered in an ordinary civil action.

In consequence of the reference to the judgment of the Second Division we have thought it right to consult with the Judges of that Division, and the judgment which we now pronounce will be understood to have the assent of all the Judges of the Inner-House.

The case of Smith is reported in a way rather calculated to mislead. The rubric sets out "An action of separation and aliment at the instance of a wife against her husband, having been stopped, before decree, by the reconciliation of the parties, *held* that the wife's agent was not entitled to be sisted as a party to the action for the purpose of enabling him to get a decree against the husband for expenses." The only opinion reported is that of Lord Benholme, which does not affirm the proposition in the rubric. But we are informed that the Court did intend to decide, and did express an opinion, that in the circumstances of that case, and at the stage which it had reached, it was not a proper course for the party to be sisted and to recover in the original action. There was very good reason for so holding. The case was very similar to the present. A reconciliation took place before the case had gone very far, and a motion was made similar to the motion made by the present pursuer. The Judges were all of opinion that it was not expedient,—they did not decide whether it was competent,—to dispose of the matter at that stage. Nothing had been done in the case beyond lodging defences. The Lord Ordinary knew nothing of the facts. There had been no investigation. Where there has been proof, and the Lord Ordinary is acquainted with the facts, it may be very expedient that he should dispose of the claim in the original action, because he has it in his power to see whether the action has been properly raised, and whether the charges are reasonable. But wherever there has been no such investigation, I think, with the Judges of the Second Division, that as a general rule it is not desirable that that course should be followed.

There is no question of competency, whether the claim is disposed of in the one action or the other. It is a question very much for the discretion of the Court in the original process whether the claim of the wife's agent should be disposed of there or separately. Lord Gifford exercised that discretion here. He granted immediate absolvitor, I think rightly. It was the absolute right of the husband to demand immediate absolvitor. It would not be expedient that decree should be delayed. It was accordingly pronounced immediately, and, once pronounced, the process would seem to have come to an end. No doubt in the ordinary case it is in the power of the Lord Ordinary, in pronouncing judgment on the merits, to reserve the question of expenses, but that is the expenses of the process between the parties. But the agent is not a party, and I should doubt the competency of granting absolvitor, and then sisting the agent as a party to an extinct process.

But I cannot hold with the Lord Ordinary that the necessary consequence is

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that the claim is extinct. There would be great injustice in such a result, and it rests on no ground of law that I can understand.

I therefore think we must recall this interlocutor, and allow the pursuer a proof.

LORD DEAS.—There is no incompetency in an agent enforcing a husband's liability for expenses incurred in acting for the wife, either by decree in the process itself, or by a separate action, or what may be cheaper than an action, by proceeding under the Act of Sederunt of 6th February 1806. The question of mode is merely one of expediency. I think the Second Division exercised a sound discretion in the case of Smith, considering the short way the action had gone, in not sisting the agent; and that for two reasons, first, because this would have hung up the case, whereas it is expedient, when a quarrel between husband and wife is to be made up, that the reconciliation should forthwith take effect; and, secondly, because the Judge in that action could not have had any better knowledge of the grounds of the agent's claim against the husband than anybody else. Both these reasons apply here, equally as they did in the case of Smith, and I am therefore of opinion that the action should be sanctioned.

LORD ARDMILLAN and LORD MURE concurred.

THIS interlocutor was pronounced:—"Recall the Lord Ordinary's interlocutor: Sustain the competency of the action; and in respect of the minute now lodged for the defender, No. 11 of process, decern in terms of the conclusions of the summons for £24, 1s., being the taxed amount of the account sued for: Find the defender liable in the expenses of process, and remit," &c.

PARTY, and WALLACE & FOSTER, Agents.

No. 81.

Feb. 16, 1875.
Addie v. Solicitor of Inland Revenue.

ROBERT ADDIE AND SONS, Appellants.—*D.-F. Clark—Balfour.*
THE SOLICITOR OF INLAND REVENUE, Respondent.—*Sol.-Gen. Watson—Rutherfurd.*

Income-Tax—5 and 6 Vict. c. 35, sec. 100, rule 3, and sec. 159.—Held that in computing profits for assessment of income-tax a tenant of minerals is not entitled to make deductions from the gross receipts of sums necessary to replace capital expended in sinking pits, or lost by depreciation of buildings and machinery, in respect that the Act expressly provides that "in estimating the balance of profits and gains chargeable under schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from . . . such profits or gains on account of any sum employed or intended to be employed as capital in such trade."

Exchequer Cause.
1ST DIVISION.
B.

THIS was a case for the opinion of the Court presented under 37 Vict. cap. 16, sec. 9, by Messrs Robert Addie and Son, coal and iron masters, Langloan, who were dissatisfied with the determination of the commissioners under the Property and Income-Tax Acts for the Middle Ward of Lanarkshire.

Messrs Addie had appealed to the commissioners "against the assessment made on them under schedule D of the Act 5 and 6 Vict. chapter 35, entituled, 'An Act for granting her Majesty duties on profits arising from Property, Professions, Trades, and Offices,' and subsequent Income-Tax Acts referring thereto, in respect of the profits arising from their business for the year preceding, in so far as the said assessment includes two sums of £5525, 19s. 9d. and £4435, being a percentage which they

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claimed to deduct for pit sinking and for depreciation of buildings and machinery respectively, and for which they maintained they were not assessable."

The appellants stated that they were tenants in several mineral fields on leases of thirty-one years, which were in various periods of currency. 1. Pits were sunk nearly every year and were only wrought for a short time, and the appellants were not recouped for the cost of them, except out of the gross annual returns. 2. When pits were wrought out the price obtainable for the machinery and buildings was only breaking-up value, and they were not recouped for the difference between that and the original cost except out of the gross annual returns.

The surveyor maintained that the deductions claimed were not allowed by the Act.*

The commissioners dismissed the appeal.

LORD PRESIDENT.—The appellants, Messrs Addie and Sons, have been assessed under schedule D of the Income-Tax Act in respect of profits arising from their business as ironmasters, and they say there ought to have been deducted from the amount of profits upon which they were so assessed two sums of £5525 and £4435, being a percentage for pit sinking and for depreciation of buildings and machinery, and this they maintain upon the ground that the sinking of new pits, although it be only an occasional thing, is still part of what may fairly be called the annual expenditure which they necessarily incur in realising the profits from their trade. I think there is only one point to be determined here, and not two as represented, because the machinery and buildings connected with a pit appear to me to be just part of the pit itself. It is one compound structure necessary for the working of the mine, and the question comes to be whether, under the special rules of the Income-Tax Act, they are entitled to deduct something on account of the amount expended in making a new pit. Now, I am quite clear that the making of a new pit in a trade of this kind is, in every sense of the term, just an expenditure of capital. It is an investment of money, of capital, and must be placed to capital account in any properly kept books applicable to such a concern. Now, if that be so, it seems to me that the provision of the third rule under the 1st head of section 100 of the Property-Tax Act is conclusive upon the question before us, because it is there provided that "in estimating the balance of profits and gains chargeable under schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or be allowed to be set against or deducted from, such profits or gains on account of any sum employed or intended to be employed as capital in such trade." It seems to me that it is quite unnecessary to go beyond that one part of the statute. No doubt some support may be had also from the 159th section, but I think this rule is in itself perfectly conclusive. As soon as you ascertain that this is an expenditure of additional capital, there is an end to any

* 5 and 6 Vict. c. 35, sec. 100, rule 3, quoted in the Lord President's opinion. Sec. 159. . . . "In the computation of duty to be made under this Act in any of the cases before mentioned . . . it shall not be lawful to make any other deductions than such as are expressly enumerated in this Act, . . . nor to make any deduction from the profits or gains arising from any property herein described, or from any office or employment of profit, on account of diminution of capital employed or of loss sustained in any trade, manufacture, adventure, or concern."

proposal to deduct anything in respect of it, and on that simple ground I think the judgment of the commissioners right. No. 81.

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LORD DEAS.—I am of the same opinion, and I think it is better not to run the risk of making any confusion in the grounds of judgment by adding anything to what your Lordship has said.

LORD ARDMILLAN.—I am of the same opinion. I think the two sections, taken together, are quite conclusive.

LORD MURE.—I think the third rule of section 100 is quite conclusive on the point.

THE COURT pronounced this interlocutor:—"Affirm the judgment of the commissioners: Find the appellants, Messrs Robert Addie and Sons, liable in costs," &c.

GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—PARTY.—Agents.

P. AND P. CAMPBELL, Pursuers and Appellants.—*Scott.*
THE NORTH BRITISH RAILWAY COMPANY, Defenders and Respondents.—*D.-F. Clark—Balfour.*

No. 82.

Feb. 18, 1875. Campbells v. North British Railway Co.

Proof—Onus—Carriers Act (11 *Geo. IV. and* 1 *Will. IV. c.* 68, *secs.* 1 *and* 8).—The first section of the Carriers Act provides that carriers are not to be responsible for the loss of certain descriptions of goods carried by them unless the senders declare the nature of the goods and pay an extra charge. The eighth section provides that nothing in the Act is to be held as protecting the carriers from liability for loss of goods through any felonious act of their servants.

In an action against a railway company for the value of goods of the description specified, stolen while in the custody of the company as carriers, *held* that it was not sufficient for the pursuers to prove that there was a greater probability of the theft having been committed by servants of the company than by strangers.

1ST DIVISION. Sheriff of Perthshire. M.

THIS was an action in the Sheriff-court of Perthshire by Messrs P. and P. Campbell, dyers, Perth, against the North British Railway Company, concluding for payment of various sums as the value of goods sent by the pursuers from Perth to Leeds by the defenders' railway and stolen on the journey. The defenders admitted their liability for all the sums except a sum of £23, 15s. 6d., being the value of silk dresses contained in a box belonging to the pursuers, numbered 196, which was delivered to the defenders on 14th July 1873 for conveyance to Leeds. The defenders maintained that they were protected by section 1 of the Carriers Act, 11 Geo. IV. and 1 Will. IV. c. 68,* and the pursuers, while admitting that the articles in the box fell under the description of that section, and that no extra charge was paid, maintained that the goods had been abstracted by the servants of the defenders, and that, under section 8 of the Act,† the railway company were responsible.

* "Sec. 1. . . No mail contractor . . or other common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the description following, viz. . . silks in a manufactured or unmanufactured state . . when the value of such article or articles shall exceed the sum of ten pounds, unless at the time of the delivery thereof . . the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

† "Sec. 8. . . Nothing in this Act shall be deemed to protect any mail

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A proof was led, in which the following were the leading facts proved: —The box was duly despatched from Perth at 6·20 P.M. on the 14th of July, securely packed and roped, containing silk dresses. It arrived at Portobello at 11·30 P.M. and left next morning at 1·30 A.M. The waggon in which the box was carried arrived at Carlisle at 6·30 A.M. and left at 7.25 A.M. There was no further evidence as to stoppages, but the box was proved to have arrived at Leeds at 7 P.M. on the 15th July. It was then apparent that the box had been tampered with, as the lid was partly off the box, and the rope had been taken off and tied again in a different way. The box was delivered on the 16th, and it was found that silk dresses to the value of £23, 15s. 6d. were amissing.

The Sheriff-substitute (Barclay) pronounced an interlocutor which, after detailed findings in fact, "finds that under the common law, and the provision contained in the 8th section of the said cited statute, the defenders, as carriers, are liable in payment to the pursuers of the value of said stolen articles: Therefore . . . decerns in terms of the conclusions of the action: Finds the defenders liable in expenses: Allows an account," &c.*

The Sheriff (Adam) recalled this interlocutor, and found "that it is not proved that the loss of the said articles arose from the felonious acts of any servant in the employment of the defenders: Finds therefore in point of law that under and in virtue of the Act 11 Geo. IV. and 1 Will. IV. c. 68, sec. 1, the defenders are not liable for the loss of the said articles, and assoilzies them from the third conclusion of the summons: . . Finds the pursuers entitled to expenses to the 18th of December 1873 inclusive: Finds the defenders entitled to expenses subsequent to that date: Allows accounts thereof to be lodged, and remits," &c.

The pursuers appealed, and argued that the proof disclosed a greater probability of the theft having been committed by the defenders' servants than any of the public, and that fulfilled the requirement of section 8 of the Carriers Act.[1]

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contractor, stage-coach proprietor, or common carrier for hire, for liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman . . or other servant in his or their employ."

* "The Sheriff-substitute is not of opinion that it is necessary to fix the theft on any individual servant, or even on any collective number. It is not necessary to require such proof as would convict of felony any servant. But it is sufficient to establish that the theft must have been the act of the company's servants —(See the recent case in English Exchequer, Vaughton v. London and North-Western Railway Company, 43 L. J. 75.) The Sheriff-substitute feels satisfied that in this case there is such proof. There is more than a *prima facie* case of the theft by the company's servants, which, at all events, shifted the onus on the defenders to fix the theft on some persons not their servants, which they have not attempted. Of course if it were the act of discharged servants no longer in the company's employment this would be the same as any of the outside public. The mode in which the boxes were packed, roped, and screwed, and the selection from amongst many articles of such as were most valuable, all indicate considerable length of time and cool deliberation to accomplish. This therefore excludes the hasty act of a stranger with the risk of instant discovery, and fixes the act on persons who had access to the box, and considerable time to complete their act of transfer. The detective officer, Blagg, swears that the great majority of cases (of theft) were traced to servants of the company (defr's. proof, p. 5), and he swears that he has had only ten cases of theft by discharged servants in ten years (p. 6). Anderson, inspector for the company, swears that he has within five or six years 'sometimes detected the railway servants as the offenders, who were either punished or discharged.'"

[1] Boyce v. Chapman and Brown, Nov. 5, 1835, 2 Bingham's New Cases, p.

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LORD PRESIDENT.—The claim which has been disposed of by the Sheriff-substitute and the Sheriff is for £23, 15s. 6d., being the value of certain silk dresses contained in a box belonging to the pursuers, which box is No. 196. The pursuers allege that they delivered this box to the defenders at Perth on 14th July 1873, and it cannot be disputed that when the box was delivered it contained the articles in question. When the box arrived in Leeds it had been tampered with. The rope had been taken off, and upon examination it was found that the articles in question had been taken out of the box. It is quite clear that there must have been a thief interfering with the box between the time it left Perth and the time it arrived at Leeds. The defenders found on section 1 of the Carriers Act, because silk dresses are within the category of articles which require to be declared under that section in order to render the carrier liable. But the answer made by the pursuers is, that section 8 of the statute takes off the effect of section 1, and they maintain that they have established that the loss arose from the felonious act of the company's servants. Now, it would be out of the question to force the pursuers to prove a felony against one particular individual servant of the company. It is certainly enough if the pursuers of such an action can shew that the theft must have been committed by one of the defenders' servants. It might even be enough to shew that in all probability the theft was committed by one of the defenders' servants. But it will not do to infer this from the fact, common to all cases, that the railway company's servants have the best opportunity of committing a theft. But although this should not be enough, taken alone, to prove the case, it may yet be taken into account with the other circumstances of the case. What, then, are the circumstances which lead to the conclusion that the servants committed the theft beyond the fact that the company's servants had the best opportunity? I have the greatest difficulty in finding any such circumstances. The reasoning of the Sheriff-substitute is not made out on the evidence. He says,—"There is more than a *prima facie* case of the theft by the company's servants, which, at all events, shifted the onus on the defenders to fix the theft on some persons not their servants, which they have not attempted. Of course, if it were the act of discharged servants no longer in the company's employment this would be the same as any of the outside public. The mode in which the boxes were packed, roped, and screwed, and the selection from amongst many articles of such as were most valuable, all indicate considerable length of time and cool deliberation to accomplish. This, therefore, excludes the hasty act of a stranger, with the risk of instant discovery, and fixes the act on persons who had access to the box, and considerable time to complete their act of transfer." Now, I do not find any reason to suppose that the articles taken were of greater value than those left, and therefore these observations of the Sheriff-substitute can have no influence on my judgment. But he seems further to have thought that the theft must have occupied some time, and that therefore it was more likely to have been committed by a railway servant than by any one else. Any one who knows anything of the transit of a train from Perth to Leeds must know how many opportunities for a theft occur. This goods train was stopped for two hours at Portobello during the middle of the night, and again for nearly an hour at Carlisle. During these stoppages any

222; Metcalfe v. London, Brighton, and South-Coast Railway Company, April 28, 1858, 4 Scott's C. B. Rep., N. S. 307; Great Northern Railway Company v. Rimmell, June 10, 1856, 18 Scott's C. B. Rep. 575; Vaughton v. London and North-Western Railway Company Co., Jan. 28, 1874, L. R. 9 Ex. 93.

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person might have committed the theft,—not, indeed, without some risk, but we know that thieves are very adventurous. Certainly two hours' stoppage gave ample opportunity for the theft. But apart altogether from the stoppages, a theft from a train in motion is by no means improbable. An active man getting up on the back of one of the trucks would be quite out of the view of the guard and the driver, especially if the trucks were loaded high.

The condition of the case is this, that it is a very narrow one, and I am left in this position, that I cannot choose between the one suggestion and the other. I cannot see any circumstance, beyond the one circumstance that railway servants generally have greater opportunities of stealing goods during their transit. There might have been an obligation on the railway company to examine any one of their servants who could have been shewn to have been connected with the box. But as nothing has been proved by the pursuers to connect any one with the box in its transit they cannot found on the absence of witnesses.

LORD DEAS concurred.

LORD ARDMILLAN.—As carriers only, and apart from any charge of theft by a servant of the railway company, the defenders are not liable, because they are protected by the 1st section of the statute 11 Geo. IV. and 1 Wm. IV., c. 68. The pursuers, if they had chosen, might have made themselves safe by paying a small additional charge, but they did not do so. They preferred to take their own risk.

Now, I agree with your Lordships that under the 8th section of the Act, which declares the carrier to be still liable for loss or injury arising from the felonious act of any servant in his employ, it would not be necessary to bring the felonious act home to the particular offender,—not necessary to prove theft by an individual servant. You do not require to prove the act of theft as you would in a criminal charge against a particular man; but something must be proved as the foundation of a *prima facie* case against the servants of the railway company. Mere opportunity on the part of the servants of the company is not enough, for that occurs in every instance of the loss of articles during transit by the railway company, since the servants always have at such a time the opportunity of stealing. The pursuer is bound to shew that there is a greater probability of the articles having been stolen by the servants of the company than by a stranger. Of course, in judging of the probability, the fact of opportunity cannot be left out of view. But, unless there is some special ground of liability, the first section of the Act takes effect, and the company are not liable. They are protected. In the ordinary case of such a loss as this there is no liability. A distinction must be proved. That which is common to both cases cannot be the distinction between them. Opportunity is common to all cases of carriage, and, taken by itself, it cannot be the distinguishing feature. If the pursuers had proved that any particular servant, or any particular class of servants of the company, were in a position of suspicion, so as to be likely to have committed the theft, then the railway company would have been bound to call that particular servant, or to call the whole of that particular class of servants. But we have no such proof here.

I think that the theft may possibly, and even probably, have been committed by a stranger during the two hours' detention at Portobello, or during the detention for above fifty minutes at Carlisle. And, further, I agree with

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your Lordship in the chair in thinking that it is by no means beyond possibility, or even beyond probability, that a dexterous thief might have got upon the waggon, or between the waggons, during transit, and have committed the theft while the train was in motion. Such a thing has been done, and one case, at least, I remember.

On the whole, I am of opinion that nothing beyond opportunity has been proved, and that mere opportunity is not sufficient to sustain this action.

LORD MURE.—I agree with your Lordships that upon the evidence this is a narrow case, and that in questions of this description it is not necessary, in order to bring a case within the provisions of the 8th section of the statute, for the pursuers to prove that any particular servant of the railway company committed the felonious act. It is, in my opinion, enough to subject the company in liability if it can be shewn that the facts and circumstances connected with the transit and abstraction of the goods are such as are calculated to raise a very strong *prima facie* case, leading to the conclusion, in the absence of all counter evidence or explanation on the part of the company, that some servant of the company committed the theft. That, I think, is the fair import of the English decisions which have been referred to, and the fair and reasonable construction of the statute.

In dealing with the evidence I was at first much struck with the observation of the Sheriff-substitute that in the present case a considerable length of time would be required to make the selection of the articles which were abstracted; and that this indicated such an amount of deliberation on the part of the thief as was sufficient to exclude the act of a stranger, and to fix the theft upon some one or more of the company's servants who had time and opportunity to make the selection. But upon examining the evidence and comparing the list of articles stolen with that of the articles which remained in the box, I find nothing to shew that the one set of articles was more valuable than the other. The articles abstracted were no doubt all silk; but it appears from the evidence of the pursuers' manager that "many other articles in the box were also silk, and came safe to Leeds;" and this is, I think, sufficient to obviate the weight which I should otherwise have attached to the Sheriff-substitute's observation. There is nothing, therefore, as I apprehend, in the character of this theft which can be held to lead to the inference that it must have been committed by a servant of the company, and as it is in evidence that there was a stoppage of at least two hours' duration at Portobello, during the darkest period of the night, there was then ample opportunity for thieves of ordinary expertness to commit the theft. I am therefore satisfied that the pursuers have not made out such a case against the servants of the railway company as to throw the onus upon the defenders of leading evidence to meet the case made by the pursuers, and that the judgment of the Sheriff should be adhered to.

THE COURT pronounced this interlocutor:—"Find that it is not proved that the loss of the said articles arose from the felonious act of any servant in the employment of the respondents: Find therefore, in point of law, that under and in virtue of the Act 11 Geo. IV. and 1 Will. IV. c. 68, sec. 1, the respondents are not liable for the loss of said articles: Therefore refuse the appeal, and decern: Find the appellants liable in expense, and allow an account," &c.

JOHN GALLETLY, S.S.C.—DALMAHOY & COWAN, W.S.—Agents.

No. 83.

Feb. 18, 1875.
Graham v. Lamont.

THOMAS GRAHAM, Petitioner and Respondent.—*M'Laren.*
JAMES LAMONT, Respondent and Appellant.—*Sol.-Gen. Watson—Hunter.*

Heritable and Moveable—Fixtures—Sale—Personal Objection.—In a question between a purchaser of lands and a person who was entitled to the income of a trust-estate, of which the lands formed part, and who had taken an active part in the sale,—*held* that the latter was not entitled to remove wire fencing which he had put up at his own expense, when in occupation of the mansion-house by permission of the trustees, no notice having been given to the purchaser before the sale was completed that the fencing was not to go with the estate.

2D DIVISION.
Sheriff of Stirlingshire, &c.
I.

IN April 1874 Thomas Graham presented a petition to the Sheriff of Stirlingshire against James Lamont of Knockdhu.

The petitioner set forth that for a number of years prior to Whitsunday 1873 he was tenant from year to year under the trustees of his father, the late Dr John Graham, of the house and grounds of Balfunning. In 1867, during his tenancy of the house and grounds, being desirous of acquiring some additional ground for grazing cows, he entered into an arrangement with the tenant of the adjoining farm of Clachanry, also belonging to his father's trustees, whereby the tenant sublet to him part of a field, and the petitioner, at his own expense, enclosed the portion of the farm of Clachanry so taken in with a moveable continuous iron fence about four feet in height. He had previously, also at his own expense, fenced off portions of the shrubbery from another portion of the grounds used for grazing cattle, with a similar fence. The whole of the fencing so erected extended to not less than 450 yards in length. In 1873 the estate of Balfunning was sold by the proprietors to the respondent, with entry at Whitsunday 1873, and the petitioner removed from the house and grounds at the said term.

Upon the further narrative that the respondent refused to allow him to remove the fencing, which he maintained belonged to himself, he prayed for an order upon the respondent to deliver up the fencing, failing which, to pay £120 as its value.

The defence was that the fencing passed with the estate, and that the pursuer by his actings in connection with the sale had barred himself from making the present claim.

A proof was allowed, from which the following facts appeared;—The petitioner's father, the Rev. Dr Graham, died in 1865, leaving a *mortis causa* settlement, by which he conveyed his whole estate, heritable and moveable, including the lands of Balfunning, to trustees, who were directed, after the other purposes of the trust were fulfilled, to hold the residue of his means and estate in trust for behoof of his only son, the petitioner, in liferent, for his liferent use allenarly, and to pay him annually the whole free annual produce of the said residue; and further, to hold the fee of the residue in trust for behoof of the petitioner's children. Full power was given to the trustees at any time to sell all or any part of the trust-estate, if they should deem it necessary.

Shortly after Dr Graham's death the petitioner was allowed by his father's trustees to occupy the house and grounds of Balfunning, and to draw the rents of the estate for his own benefit.

The fencing in question was erected by the petitioner at his own expense. Part of it stood upon the site of an old wooden paling, which he removed. It was fixed in the ground by prongs, but it was specially adapted for the purpose of being easily moved without injury to the soil or to the fencing itself.

In 1872 the petitioner began to treat with Mr Lamont as to a purchase

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of the estate. In his letters he always referred to the property as "my property," and generally held himself out as the proprietor and the party entitled to sell and arrange as to the price. The petitioner and Mr Lamont not being able to come to terms the estate was exposed for sale by public roup on 3d July 1872. The articles of roup were signed by the trustees, and by the petitioner "for all right and interest whatsoever which he had or could have in the said lands and others in any manner of way." The estate was not sold on that occasion, and it was exposed by the trustees alone at a reduced price on 5th March 1873, when Mr Lamont purchased it. By the articles of roup the purchaser was taken "bound to relieve the exposers of all claims anywise competent to tenants in virtue of their respective tacks for meliorations, or on any other account."

No intimation was given to Mr Lamont or his agent at or before the sale of any claim at the instance of the petitioner to the fencing in question.

The Sheriff-substitute (Sconce), on 16th October 1874, pronounced this interlocutor:—(After findings in fact)—"Finds in law that the disposition in favour of the defender gives him right to the whole fences on the estate, with a title to hold the same, but subject to such rights as might exist by paction, custom, or law in the tenants or others having preferable claims thereto: 12. Finds in law that the wire fencing in question in both its portions was, in the state of the facts foresaid, heritable, and passed to the defender as part and pertinent of the estate, and cannot be claimed by the pursuer, and specially in respect that he did not occupy the house, policy, and grounds as tenant, but under his liferent right, and that by his destination it was a pertinent of the estate, as well as a necessity for the common and beneficial use of the house, grounds, and policy as existing at the time of the sale to the defender: 13. Finds in law, *separatim*, that the pursuer, (1) by generally holding himself out as proprietor of the estate, and (2) specially to the defender, and (3) separately, by his signing the articles of roup, is barred, *personali exceptione*, from claiming the said wire fencing; and therefore sustains the defences, and assoilzies the defender from the conclusions of the petition, and decerns: Finds the defender entitled to expenses."

The petitioner appealed to the Sheriff (Blackburn), who, on 24th November 1874 pronounced this interlocutor:— . . . "Finds that the said fencing is not of so fixed a character as to pass necessarily with the property of the land: Finds that there are no special circumstances to shew that the petitioner intended the fences to be permanently attached to the soil, or to shew that they were sold to the respondent as part of the lands of Balfunning purchased by him: Therefore sustains the appeal; recalls the interlocutor appealed against; repels the whole defences; ordains and decerns conform to the prayer of the petition: Finds the petitioner entitled to expenses."

Mr Lamont appealed to the Court of Session.

Argued for the appellant;—The fences were of a heritable character.[1] But whether they were so or not, the appellant was in the circumstances entitled to take the estate as it stood. The petitioner took the principal part in the negotiations prior to the sale of the estate, and he never hinted that the fences were not to go with it. The purchaser gave a larger price on account of the existence of the fences, and of this enhanced price the

[1] Tod's Trustees v. Finlay, Jan. 30, 1872, 10 Macph. 422; *Ex parte* Belcher, 1835, 2 Montagu and Ayrton's Bankruptcy Cases, p. 169 (Sir John Cross' judgment); Bell's Prin. sec. 743.

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petitioner got the benefit. He could not call upon the purchaser to give them up or pay twice over for them.

Argued for the petitioner;—At the time when the fences were placed in the ground by the petitioner they were fences which in a question of landlord and tenant could be removed by the latter.[1] This being so, the next question was, whether, in consequence of the sale or of any incidents of the sale, the fences were transferred along with the estate to the purchaser. The petitioner's right was not strictly one of tenancy, but he held by a tenure which for the purposes of the present question must be held as equivalent to tenancy. He held on a precarious possession which did not induce him to make permanent improvements on the estate at his own expense. The trustees had power to sell the estate without his consent. He was not a proper liferenter. The only right which he had was strictly moveable, viz., a right to receive the income of the trust-estate. He must be presumed to have put up the fences, not with the view of permanently benefiting the estate, but for the convenience of his own occupation. If the trustees had simply sold the estate without the petitioner's consent the fences would not have been transferred to the purchaser. And the petitioner's consent did not really affect the question. He consented to the sale of what the trustees had power to sell, viz., the heritable estate, and not his own moveable property. The titles were ready for exhibition to intending purchasers. It was not even alleged that the estate was purchased as from the petitioner. It was said that the purchaser might assume from the appearance of the fences that they belonged to the estate, but the same might be said in the case of a tenant, who would certainly have had a right to remove them. Even in a question with a proprietor selling his own ground fencing like the present would not pass to a purchaser without a special contract, much less would it pass when it had been put up by a temporary occupant.

Lord Neaves.—The question here raised approaches a delicate province of law, but in the circumstances I see no difficulty. It is unnecessary to consider what would have been the result if Mr Graham's position had been outside altogether of the right of administration of this property,—if, for instance, he had been a mere legatee under the settlement of his father or of some one else. We must look at the contract of sale, and the position in which Mr Graham put himself with regard to the sale. He was *de facto* the occupant and liferenter of this property, and the fee was in his children. In the negotiations with Mr Lamont he comes out as the *dominus* of the subject, and manager of the transaction. His letters are those of a man who puts himself forward, as he might naturally do, for the interest of himself during his life, and of his children after his death, and therefore as the proper person to look after the sale. Not only does he take this position in the correspondence, but he becomes a formal party to the articles of roup. This is not a case in which the sale is effected behind Mr Graham's back. It is not a question in regard to agricultural fixtures, in which a tenant may be interested who has nothing to do with the sale. It is a question with a contracting party as to what is the fair meaning of the contract. This property was unquestionably sold as it stood, with everything necessary for its use or essential to its amenity. During

[1] Duke of Buccleuch v. Tod's Trustees, July 18, 1871, 9 Macph. 1014, 43 Scot. Jur. 552; see also Syme v. Harvey, December 14, 1861, 24 D. 202, 34 Scot. Jur. 98; Dowall v. Miln, July 11, 1874, *ante*, vol. i. p. 1180; Brand's Trustees v. Brand, Dec. 19, 1874, *supra*, p. 258.

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the whole of the negotiations with Mr Lamont not a word is said about these fences not going with the estate. By his silence or his conduct the petitioner allowed the purchaser to believe that he was getting everything as it stood, and he cannot now turn round and say that he was a mere outsider, like one of "the puir people that labouris the ground," and had nothing to do with the contract of sale.

In a sale of a heritable estate everything which is not unequivocally moveable, and whose character speaks for itself, passes with the estate in a question between seller and purchaser. Things of a debateable character the purchaser will generally be entitled to take, if he has not received notice to the contrary. Mr Lamont can say that for the estate in its existing state, including these fences, he has paid to the trustees, *i.e.*, to the petitioner and his children, all that they demanded. On these grounds I think that there was an implied obligation on the petitioner to let things remain in their *status quo*. I am of opinion, therefore, that we should recall the interlocutor of the Sheriff, and revert in effect to that of the Sheriff-substitute.

LORD ORMIDALE.—I am of the same opinion. It is important to keep in view that we are not here in a question between landlord and tenant. The principle of trade fixtures, which is all-important there, does not enter the present case. Neither is this a question between heir and executor, or between liferenter and fiar. The case is one which does not usually occur, but it is substantially one between seller and purchaser. It was said, no doubt, that Mr Graham was not to be held as the seller, because, looking to the feudal title, he was not absolute proprietor of the estate. But for the purposes of the present case he was substantially the seller. He was the liferenter, and therefore a limited proprietor, and his children were the fiars. He also took a very active part in the negotiations with Mr Lamont prior to the sale, and was a consenter to the articles of roup. If he was not strictly the proprietor, he stood in the place of the trustees, who were the feudal proprietors, and held himself out in the transaction of sale as if he had the control of the matter.

The real question is, therefore, as it appears to me, what must be held to have been the understood or implied contract between seller and purchaser as regards the fences. This leads us, in the first place, to consider the nature of the fences in themselves, and the object or purpose they served. It is true that they were moveable in themselves,—that is to say, they could be easily detached from the ground. But it does not follow that they are to be dealt with as moveable in the present dispute. Many things are moveable, in the sense that they could be removed from the subject to which they are attached without injury to that subject or to themselves,—as, for example, gates in permanent fences, or window frames and doors in a dwelling-house; but these are articles which certainly could not be dealt with as moveable in such a dispute as the present. It would undoubtedly be unwarrantable in the ordinary case of the sale of a dwelling-house on the part of the seller to remove after the sale the doors and window frames, on the pretence that they were moveable. Now, would not the removal by the seller of the fences in question be an act of the same kind? The purchaser, Mr Lamont, in this instance, examines the estate, or sends persons to examine it for him, and very likely he is attracted by the policy and the fencing round it. He is not told or warned in any way, although he sees the estate has an enclosed policy, that the wire fences which form the enclosure are to be removed and not

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to go along with the estate. But without some statement or warning to that effect, I think he was entitled to rely on his getting the fences as accessories of the property. The policy would, indeed, be no longer such if it were not enclosed and protected.

Having regard, then, to the fact that Mr Graham was substantially the seller of the estate, or held himself out as such,—that the fences had been put up for its permanent benefit,—and to all the circumstances as disclosed in evidence, I am very clearly of opinion that Mr Lamont was entitled to rely upon these fences being allowed to remain as parts and pertinents, or accessories of the lands which he purchased. I therefore concur with Lord Neaves that we must revert in substance to the interlocutor of the Sheriff-substitute, recalling that of the Sheriff.

Lord Gifford.—I am of the same opinion. The question is, what was the fair meaning of the contract of sale? and what subjects were fairly included therein?—keeping in view that the petitioner was a party to the sale—a party to the contract of sale although he did not sign the formal disposition.

I think that the fence now claimed may fairly be taken as a proper part and pertinent of the estate. It appears that the larger part of it came in place of a stob and rail fence put up by Dr Graham. If the petitioner had simply renewed this stob and rail fence the present question could never have been raised. But with a view to amenity, and as more ornamental, he erected a new fence, being the wire fence now in question. It is important to see that the fence now claimed by the petitioner was a fence which existed in a place where an old fence formerly was, and where a fence should naturally be.

If the petitioner had not been a party to the sale he might have been in a more favourable position. But when he saw parties looking at the estate with a view to purchase, a duty was imposed upon him to warn intending purchasers that what appeared to be a pertinent of the estate really was a moveable subject belonging not to the sellers but to the petitioner himself. And the petitioner felt this, for he states on record that Mr Blair, the person who was advertised to shew the boundaries, had instructions to inform parties looking at the estate that the fences now in dispute belonged to the petitioner himself. What he thought necessary to tell Mr Blair to say, it was his duty himself to tell to inquirers who did not go to Mr Blair, but communicated directly with the petitioner himself.

I do not attach much importance to the fact that the fence was moveable in itself. We must look not only to the possibility of lifting it but to the purpose which it serves. A paling is physically moveable, but it may be heritable legally. Nor do I draw any distinction between the two parts of the fencing. I think they are really in the same legal position, and as to both I think the purchaser was entitled to take the whole as an accessory of the estate.

I do not think it necessary to advert to the nice distinctions in the law of heritable and moveable, according as the question may occur between landlord and tenant, heir and executor, and liferenter and fiar. This is a case of seller and purchaser, and for such a case we must look to the nature of the transaction, the meaning of the parties, and the nature, position, and use of the subjects which are claimed, on the one hand, as parts of the heritable estate, and, on the other hand, as separate moveable subjects. I think, on the whole, the fences in question must be held to have been really parts of the lands, and to have been sold therewith.

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LORD JUSTICE-CLERK.—I entirely agree with your Lordships. As questions of this kind have come up rather frequently of late I shall express shortly the grounds of my concurrence.

Fences are *prima facie* held to be heritable accessories of the lands. When a man buys an estate he buys it, in general, with the ordinary demarcations as they stand. It may be otherwise, for heritable and moveable are not qualities of things but of rights. If Graham had been a tenant, and had put up these fences for his own convenience, the present question might have been different from what it is; though, even in that case, the purchaser might have had a great deal to say against the tenant claiming the fences, after having allowed them to remain in the ground till after the sale. But erection for a temporary purpose, by a temporary occupant, is essential to bring in the element of trade fixtures. The petition in this case is based on the allegation of tenancy, which is now disclaimed. Mr Graham was not a tenant. He was in possession of land the revenue of which went into his own pocket during his life. It is not even proved that he erected the fences for a temporary purpose; and it is quite as likely that he erected them to improve the estate, in which he had a liferent interest, and of which his children were the fiars. He negotiates the sale with Mr Lamont, and does not give him the slightest warning that the fences belong to himself. After the sale is completed and the price paid he claims that he is entitled to carry off the fences. I think this is against conscience.

THIS interlocutor was pronounced:—"Find that the appellant purchased the estate of Balfunning, in the year 1873, without any specific stipulation being made in regard to any of the fences on the property: Find that the respondent erected these fences while occupying the mansion-house and grounds of the estate by arrangement with his father's trustees, and that he had the life interest in the annual produce of the trust-estate: Find it not proved that the respondent was tenant of these subjects: Find that the respondent acted as a principal in transacting the sale to the appellant: Find that the fences in question are included in the said sale: Therefore sustain the appeal, recall the interlocutor complained of, assoilzie the defender (appellant), and decern: Find him entitled to expenses in both Courts, and remit to the Auditor of this Court to tax the expenses now found due, and to report."

WEBSTER & WILL, S.S.C.—W. & J COOK, W.S.—Agents.

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PETER ANDERSON, Pursuer.—*Guthrie Smith—J. A. Reid.*
NORTH BRITISH RAILWAY COMPANY, Defenders.—*D.-F. Clark—Moncreiff.*

Nautæ Caupones—Public Carrier—Railway—Contract—Negligence.—Where a railway company, which had been in the practice for twelve years of running a fast goods train, by which dealers could send meat and live-stock to N in time for market without paying any special or extra rates, failed on one occasion, as they alleged from excess of other traffic, to carry some trucks containing pigs from a station on their line to N by that train, and the pigs consequently arrived too late for the market, *held* (*aff.* judgment of Lord Young) that no sufficient cause of delay having been proved, they were liable to the owner of the pigs for damage incurred by loss of market.

Nautæ Caupones—Public Carrier—Railway.—Where, owing to an accident to a train, the cause of which could not be ascertained, a number of pigs arrived about five hours too late for a market to which they had been forwarded, *held*

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(*rev.* judgment of Lord Young) that the railway company were not liable to the owner of the pigs for damage incurred by loss of market.

THIS was an action of damages for loss of market at the instance of Peter Anderson, cattle salesman, Granton, against the North British Railway Company.

There were two separate claims, arising at different times and from different causes,—

I. The first claim was for the sum of £28, being the loss Anderson alleged he had suffered from the decreased price of seventy-one pigs delivered by him to the railway company for transmission from Granton to Newcastle on 7th October 1872. This claim was based on the following circumstances:—Anderson had been in the habit for a period of eleven or twelve years of forwarding pigs from Granton on Monday afternoons to Newcastle so as to arrive in time for the market there, which took place every Tuesday, and opened about 6 A.M. The pigs were usually trucked at Granton in time for a goods train leaving that station at 6·45 P.M., and timed to arrive at Portobello at 7·10 P.M., where the trucks going south were taken to the Joppa siding at the south-east end of the station, and left there till a train, called the "meat train," which was timed to leave Edinburgh at 8·2 P.M., arrived and took them up at 8·15 P.M. The "meat train" had the following note appended to it in the working time-tables of the company (from which the above times are taken):—"Train must keep strict time." This train was timed to reach Berwick at 11·10 P.M., and Newcastle at 4·5 A.M., and cattle and pigs forwarded by it were thus in good time for the Tuesday morning market there. The goods trains from Granton to Portobello were drawn by a pilot engine, which also had shunting and piloting to do. The working time-tables of the company are private, and are not published, being intended for the use of the company's servants. No special or extra rate was in use to be charged for cattle or pigs forwarded by the "meat train."

On Monday, 7th October 1872, Anderson himself assisted at the trucking of seventy-one pigs at Granton for Newcastle, the operation being concluded about 5 P.M. The 6·45 P.M. train, by which they were to be forwarded, however, did not leave Granton till 8·15 P.M.,—the engine not having come from Portobello till 7·25 P.M.,—and it did not arrive at the north-west end of Portobello station till 8·30 P.M., at which time the "meat train" was just leaving the south-east or Joppa end of that station. The pigs were accordingly kept at Portobello till the next through goods train from Edinburgh to the south arrived, and did not reach Newcastle till mid-day on Tuesday, 8th October, by which time Anderson's consignee considered the market over, and did not sell them. They were afterwards disposed of in various ways at a loss, as stated by Anderson, of £25.

Anderson immediately intimated to the railway company that he held them liable for the loss he had sustained, but no notice was taken of his demand, and he took no further steps until he raised this action in September 1874. He maintained that the company was liable for the loss he had suffered, because from the regular course of business, extending over a long period of years, he was entitled to assume that the pigs would arrive in time for the market, and that the railway company, by holding out that this train was a market train for meat and cattle, entered into a special contract with customers to deliver what was forwarded by the train in time for the market.

The railway company defended the action, and by way of explanation of the delay which had occurred in connection with these pigs averred that the Granton train had been late on the occasion in question owing

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to the extra and excessive traffic caused by the Falkirk Tryst which was being held at the time. They denied that they were under any special contract with Anderson to forward his pigs in time for the Newcastle market, and pointed out that only the usual rates were charged for the transmission of the pigs by the train in question. The delay in forwarding the pigs from Granton to Portobello they stated to be owing to the pilot engine, which was used for the traffic between these places, having got shut up in a siding at Portobello, through the unusual pressure of business. They further contended that no unreasonable delay had taken place in forwarding the pigs from Granton, the engine which brought them up having only remained fifty minutes at Granton after its arrival there, instead of two hours, which was its usual time. The time so spent was attempted to be accounted for as having been spent in marshalling the train. The company also complained that, owing to the space of time which Anderson had allowed to pass before pressing his claim they had lost the opportunity of procuring evidence which would more satisfactorily account for the delay.

II. The second claim was for £18, 8s. 6d. as damage incurred by the loss of market for sixty-seven pigs sent on 4th August 1874. These pigs were trucked at Granton and forwarded to Edinburgh in time for a train leaving Edinburgh at 5 P.M. (also a "meat train.") The trucks were duly attached to that train and reached Berwick in safety, but at a station called Windmillhill, about six miles south of Berwick, five of the waggons went off the rails and blocked the whole line, and damaged the points at a crossing, in consequence of which the train was delayed for 5 hours and 40 minutes, and did not reach Newcastle till 8·40 A.M., instead of 3 A.M., and the market was again lost. Anderson contended that the accident was owing to the insufficiency of the waggons composing the train, for which the company was liable, and claimed repayment of his loss accordingly.

The railway company denied all liability, and in the course of the proof which was led in the action proved that all the waggons in the train had been duly inspected at Berwick almost immediately before the accident. The wheels of the waggon which caused the block, and the rails, were in good order and uninjured, but the body of the waggon was so smashed that it was impossible to discover the true cause of the breakdown.

After a proof had been led, the substance of which has been given in the foregoing narrative, the Lord Ordinary pronounced this interlocutor:—"Repels the defences, and decerns against the defenders in terms of the conclusions of the summons: Finds the defenders liable in expenses," &c.*

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* "OPINION.—The two claims presented for consideration, although of the same general character, differ in their details, and each of them is, in some respects, more, and in others less, favourable to the pursuer than the other. I have not found either free from difficulty, but on the whole, after the best consideration I have been able to give to the evidence and to the law applicable to the facts which I think established, I have arrived at the conclusion that the pursuer is entitled to succeed in both.

"The general rule of law applicable to the case, and on which the pursuer relies, is not doubtful. It is that a common carrier is bound to receive goods tendered to him for carriage, and to forward them to (or towards, as the case may be) their destination, according to the means of conveyance which he professes to maintain, and according to the ordinary course of such conveyance, without any unreasonable delay in their despatch, or detention by the way. In this case there is no question of the receipt of the goods by the carrier at Granton, on a common contract to carry them to Newcastle, and there is, I think, no question that the duty to despatch them without unreasonable delay, and to

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The railway company reclaimed, and argued;—1. The working time-tables of the company being private and not published for the purpose of carry them without any undue detention by the way, thereby attached as matter of contract. This, indeed, as a general proposition, was not contested by the defenders. They only disputed the pursuer's contention that, on the facts of this case it so operated as to subject them in liability. And indeed, when a rule of law cannot be stated with more certainty and precision than is compatible with the use of such expressions as 'reasonable despatch,' or 'undue detention,' it is to be expected that disputes under it will turn on its application or operation with reference to the facts of individual cases. These expressions, which the poverty of language or the nature of the subject renders unavoidable, or suggests as the best that can be employed, are themselves incapable of useful definition, and involve an appeal to the good sense and judgment of the jury or other tribunal which is called upon to determine particular cases.

"The pursuer's first claim regards a lot of swine which he delivered to the defenders at Granton on 7th October 1872, in good time to be forwarded to Newcastle by the 6.45 P.M. train of that day. The pursuer had frequently sent pigs in the same way before during a period of several years, and the ordinary course of conveyance admittedly was, that the trucks containing the animals were despatched by the train which left Granton at 6.45 P.M., joined the 8 P.M. train from Edinburgh at Portobello, and were thence conveyed by that train to Newcastle, arriving there next morning between 5 and 6 o'clock, in time for the morning market, which opens between 6 and 7 o'clock. On the particular occasion (7th October 1872), the train (with the pursuer's swine), which ought to have started from Granton at 6.45, was not despatched till 8.15. It was accordingly too late to join the ordinary train at Portobello (the 8 P.M. train from Edinburgh), and the trucks with the swine being forwarded by a train later by several hours did not reach Newcastle till mid-day the following day, whereby the market was lost. The explanation of the unusual delay at Granton is, that there was no engine available to start the train at the proper time. It appears that a pilot engine was in use to be sent to Granton in time to leave again with the train at 6.45, but that on this occasion it did not arrive till about 8 o'clock. The reason suggested is, that it was the time of Falkirk Tryst, when the traffic on the line is always heavier than usual, and that thus it was, or might have been, impossible, with reference to the other traffic, to spare an engine sooner. The reason does not seem a good one in itself, and the evidence on the subject is of the most general description. I cannot hold that the extra traffic usual during a Falkirk Tryst is an admissible excuse for not sending an engine at the proper time to start a stated and ordinary train from Granton, by which the railway company had contracted to forward goods in the ordinary course of their business and with reference to which the contract immediately in question was undoubtedly made. The defenders, however, urged, that had the action been brought so as to enable the trial to take place nearer the time, they might have been able to assign a better or more precise reason, and to support it by better evidence, and claimed some indulgence by reason of the delay in bringing the action. I admit the validity of the topic, but am nevertheless unable to allow it such effect in the circumstances as to overcome the pursuer's case, which I regard as a strong one. I think it was according to the defenders' contract, and duty thence arising, to despatch the pursuer's swine from Granton at 6.45, or at least in time to be forwarded from Portobello to Newcastle by the 8 P.M. train from Edinburgh. This was according to the regular course of their conveyance, of which the pursuer had much previous experience, and with reference to which the contract was made. Not having done so, or assigned any admissible excuse, and the pursuer having sustained actual damage in consequence, I am of opinion that he is entitled to compensation.

"The pursuer's second claim is for alleged undue detention by the way of another lot of swine which he delivered to the defenders at Granton on 3d August last for carriage to Newcastle. The detention occurred on the line of the North-Eastern Railway Company, about six miles south of Berwick. It lasted

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inducing traders to forward their goods, &c., in order to catch certain markets, or to get them earlier delivered, no special contract could be founded about five hours and forty minutes, and the consequence was that the train (with the swine) arrived at Newcastle about six hours behind the proper time, and that the pursuer in consequence again lost the market. The cause was a breakdown, occasioned by the front part of the train breaking away from the hind part, the couplings having given way. Four of the waggons immediately behind the point of breakage were thrown off the line, that nearest to it (the property of the defenders) being thrown over the fence into an adjoining field, and so broken that it was impossible to tell by examination whether the breakdown had been caused by any defect in it. The line was found to be in good order and unobstructed, and it was not suggested that any of the other waggons, or any of the equipments or arrangements of the train, were defective. Some defect in the defenders' waggon, which was so much broken as to preclude examination, or in its attachment to the preceding waggon, which was carried forward safely, is a probable cause of the accident, and the tendency of the evidence is to exclude any other. The question, on these facts, is, whether the defenders are liable to the pursuer for the damage occasioned to him by the detention.

"The liability of a carrier for delay in the delivery of goods, occasioned by an accident on the journey, stands on a different footing from his liability for damage thereby done to the goods, the element of insurance, which the contract of carriage implies, extending only to the safety of the goods, which the carrier is thereby, as an insurer, bound to deliver in the like good condition as he received them, the acts of God or a public enemy only excepted. Therefore, although the defenders would have been, I think, clearly liable for the destruction of the pursuer's pigs by the accident in question, or any inferior damage to them, it does not follow that they are liable for the mere delay of delivery thereby occasioned.

The case of passengers is more analogous; for with respect to them, even in the case of bodily injury, the liability of the carrier rests, not on implied insurance, but on his common law duty, arising from the contract, to carry safely, in so far as that can be done by the employment of proper carriages, and the exercise of due care and foresight. Had a passenger, booked by the defenders from Granton to Newcastle, been killed or injured by a similar accident befalling the train in which he travelled, I think it not probable that the defenders would have escaped liability on the ground that the accident was not such as might have been avoided by ordinary care and foresight. But not to dwell on this analogy, and assuming that a case of personal injuries may involve, upon the question of liability, other considerations than apply to the detention of goods, however long, I think it is the law that a carrier is responsible for excessive delay in the delivery of goods, though occasioned by such an accident in the course of the transit as occurred here, unless it shall appear that it could not have been avoided by due and ordinary care on his part, or that of those for whom he is responsible on his contract. I say 'excessive delay,' meaning thereby to throw out of account such ordinary delays as, having regard to the length of the journey and character of the conveyance, it shall appear to be reasonable, and according to the practice of life to allow for. Here, again, it is necessary to employ general language, and such as involves an appeal to the sense and judgment of the tribunals called on to consider the circumstances of individual cases.

"Now, it does not appear to me to be running the matter fine, or encroaching on the time-margin which a railway company may reasonably claim in the running of their trains or conduct of their traffic, to characterise a detention of about six hours beyond the ordinary time on a journey between Granton and Newcastle as *prima facie* undue or excessive, and therefore such as *prima facie* to infer liability for any actual damage thereby occasioned to a sender of goods. I should certainly not hold that a railway company, in the absence of express contract, were liable as on a guarantee of advertised or ordinary time for the disappointment (however injurious) of passengers or senders of goods, whenever their trains were late. People who, from necessity or choice, run the matter so

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upon them. The pursuer did not pay any extra or special rate to get his goods sent by this particular train, and when there was nothing unusual of that description there was certainly no presumption of special contract.[1] Where there was no special contract a carrier was not bound to deliver goods within a specified time, and he was not liable for delay unless he was in fault.[2] The action, as regards this claim, must therefore be laid on fault, and not on guarantee. The pursuer had failed to make out any case of negligence or fault. All that he had proved was that there was delay. The company had accounted for the delay as well as could be expected after the lapse of time. They had proved great pressure of traffic owing to Falkirk Tryst, and that was sufficient to relieve them of liability, after the delay which had occurred in bringing the action. The onus was shifted from the company by the pursuer's delay.

2. The mere fact of an accident having occurred did not of itself establish a *prima facie* case of fault against the railway company.[3] The company had also proved in this case that all the usual precautions had been taken, and the waggons had been carefully tapped and inspected only a few minutes before the accident.

Argued for Anderson;—1. The sort of traffic and the nature of the articles conveyed by this train was so peculiar as to take it out of the rules which applied to ordinary goods trains. The mere fact of the note in the company's time-tables that it was to be punctual shewed that the purpose of the train was special, and the pursuer was entitled to expect it to fulfil its purpose. If this had been a question as to a passenger train there would be no doubt as to the liability of the company.[4] A course of dealing such as had existed in this case might lay a foundation for a special contract.[5] The attempted excuse about excess of traffic owing to Falkirk Tryst was not sufficient. There was no block at Granton, and yet it was there that the delay had occurred. A carrier was not bound

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close that such delays as experience shews ought, in common prudence, to be allowed for, must bear the consequences of their disappointment unless the delay shall be excessive. But there must be a limit, whatever difficulty may attend the fixing of it, or in determining whether it has been transgressed in individual cases. In my opinion, the delay of which the pursuer here complains transgressed due limit, and was excessive. I therefore think that it is incumbent on the railway company to account for it, and to shew that it was owing to a cause which was unavoidable by ordinary care and foresight, or otherwise to be liable for the consequences. On the evidence I am unable to hold that the defenders have so accounted for the delay complained of, and I am therefore of opinion that the pursuer is entitled to compensation for the damage which he sustained.

"With respect to the amount of damages, I need only say that I think the sums claimed are reasonable, and fairly supported by the evidence."

[1] Finlay v. North British Railway Company, July 8, 1870, 8 Macph. 959, 42 Scot. Jur. 552.

[2] Briddon v. Great-Northern Railway Company, Nov. 9, 1858, 28 L. J. (Exch.) 51; Lord v. Midland Railway Company, Jan. 25, 1867, L. R. 2 C. P. 339; Taylor v. Great-Northern Railway Company, April 24, 1866, L. R. 1 C. P. 385.

[3] Bird v. Great-Northern Railway Company, Nov. 4, 1858, 28 L. J. (Exch.) 3; Kearney v. London, Brighton, and South-Coast Railway Company, June 15, 1870, L. R. 5 Q. B. 411; Lyon v. Lamb, June 22, 1838, 16 S. 1188; Readhead v. Midland Railway Company, May 10, 1869, L. R. 4 Q. B. 379.

[4] Denton v. Great-Northern Railway Company, Jan. 19, 1856, 25 L. J. Q. B. 129; Great-Northern Railway Company v. Hawcroft, Feb. 11, 1852, 21 L. J. Q. B. 178.

[5] Pickford v. Grand Junction Railway Company, April 27, 1844, 12 Mees. and Welsby, 766.

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to take an extra amount of goods, but when he did so it would not protect him that owing to an insufficient supply of conveyances he could not forward them.[1] In this case the company had undertaken to send these pigs by that particular train, and they were bound to forward them, or pay any loss incurred through their failure to do so. Time was of the essence of the contract here, when it was considered that this was a market train. The company were under an obligation to forward the goods, not to a place, but to a market, and they had failed to do so. The cause of their failure was something personal to themselves, and not a *damnum fatale*.

2. The railway company was bound to prove that they were not responsible for the accident which caused the delay complained of.[2] The pursuer had been able to establish this much, that the wheels and the rails had not caused the accident, therefore it must have arisen from malconstruction, over-loading, or insufficient coupling of the waggons, and the company was bound to prove it was none of these. It was settled law in such cases that all a pursuer had to do was to prove the accident, and then the defender was bound to prove that he was not to blame.[3] All the examination proved was that the wheels had been tapped at Berwick, but the wheels were all right. There was no evidence of how the waggon had been loaded, constructed, or coupled. If the company failed to shew that the cause of the accident was not owing to their fault, the presumption was against them.[4] The company was bound to deliver these pigs in reasonable time, but they had not done so, and were liable for the damage which had been suffered.[5]

At advising,—

LORD JUSTICE-CLERK.—There are two claims made by the pursuer in this action, both founded on the alleged detention by the defenders of separate consignments of pigs for the Newcastle market, despatched by the pursuer from Granton. The first of these transactions dates as far back as the 7th of October 1872. The second took place in August 1874. The question which is raised under both of these claims is whether the railway company is liable for the animals not having been delivered in due course, so as to be in time for the market to which they were sent. The cases must be considered separately.

In regard to the first the Lord Ordinary has very clearly stated the facts on which it rests, and I need not recapitulate them. There is no doubt that the railway company were aware, both from the course of dealing and from the circumstances of the consignment itself, that the animals were intended to be delivered in time for the early market next day. I adopt also the general views expressed by the Lord Ordinary as to the nature of the obligation undertaken by the railway company in regard to this contract of carriage. They did not undertake to deliver the animals at any specific time, but they did undertake to

[1] Cohen v. Gaudet, 1863, 3 Foster and Finlason, 455, L. C. J. Cockburn, and note by the Reporter, 463.

[2] M'Glashan v. Dundee and Perth Railway Company, June 24, 1848, 10 D. 1397, 20 Scot. Jur. 508. Form of issue.

[3] Anderson v. Pyper and Company, March 18, 1820, 2 Murray, 261; Lyon v. Lamb, *supra*, p. 448.

[4] Dawson v. Manchester, Sheffield, and Lincoln Railway Company, Jan. 15, 1862, 5 Law Times, 682, Chief B. Pollock.

[5] Hodges on Railways, 564; Deas on Railways, 435, and cases there; Macdonald and Company v. Highland Railway Company, May 20, 1873, 11 Macph. 614, 45 Scot. Jur. 391.

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deliver them in reasonable time, looking to the nature of the goods and the circumstances in which the contract was made. I should say farther, that although the consignment was not, in the strict sense, one of perishable articles, yet, from consisting of live-stock, the undertaking to carry implied a greater obligation of despatch than would be inferred in the case of ordinary goods. But what is reasonable despatch is a question to be determined on the circumstances of each case, and is substantially a jury question.

In the present case it is not disputed that the train by which the consignment was despatched did not arrive until many hours after its ordinary time. The train was not timed by published time-tables, but the company must be held to undertake to deliver at or about their ordinary time, unless they can shew reasonable cause to the contrary. The cause alleged is the detention of the train during the whole of the day in question, owing to unusual pressure of traffic arising from the occurrence of the Falkirk Tryst, and this fact the company have satisfactorily established. To this extent I think the plea is relevant. The mere amount of time by which the train was delayed in arriving at Newcastle is not, in my opinion, the material test by which the question is to be solved. I think an unusual pressure on the resources of the line, arising from such an occurrence, is one of those contingencies the risk of which is taken by a trader who employs that mode of conveyance for the carriage of his goods. The railway company in such circumstances cannot be expected to extemporise either rails or plant. As their carriages can only run on one set of rails, their means of conveying the traffic are necessarily limited; and I should be sorry to give any countenance to the notion that an action like this will lie for the detention of goods on every occasion on which the line may be blocked. It would certainly not tend to the safety of this mode of conveyance, sufficiently hazardous as it is, if railway companies were impelled by such liabilities to forward their goods trains to the detention or risk of their passenger traffic. These are contingencies incident to a mode of transit, but for which the pursuer would have been obliged to carry his pigs to another market.

If, therefore, it had been established in this case, not merely that the line at Portobello was blocked on the day in question by the accumulation of trains, but that the delay in forwarding the pursuer's goods was directly owing to that cause, I could not have found the defenders liable. But I am of opinion that this has not been proved, and that it lay with the defenders to prove it. It seems that this traffic from Granton was worked by a pilot engine, which conveyed the goods trains up to Portobello, waited at that station until the train could be shunted to the main line, and then returned to Granton to be ready for the next train. On the occasion in question the pilot engine was two hours beyond its usual time in reaching Granton for the trip on which it ought to have left Granton at 6.55. In point of fact it arrived at Granton at 7.25, and did not leave for Portobello until 8.15. I think it is sufficiently proved that the delay in reaching Granton was caused by the pressure of traffic, but of the cause of the delay in starting from Granton we have no evidence whatever. This seems to me fatal to the defence. It was known that the train from Edinburgh, leaving at 8.2, by which the consignment was to be sent, would keep its time at Portobello. The train with the pursuer's pigs, which left at 8.15, arrived at Portobello at the part farthest from the Joppa siding at 8.30, almost simultaneously with the departure from that siding of the Edinburgh train, which they accordingly missed. The very fact that the trains had been detained all day put on

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the defenders the obligation of greater alacrity in despatching their train from Granton, and as they have entirely failed to prove any reasonable cause for the delay in starting from Granton I think they have been rightly found liable in this first demand.

I think it unnecessary to refer to the numerous authorities which were quoted to us, as I think the views I have expressed are entirely consistent with the principles which have been established both in this Court and in England.

Two considerations were pressed upon us as sufficient to exonerate the company. The first,—the delay which has taken place in enforcing this claim; the second,—the fact that the pursuer might have sent his goods by an earlier train. As regards the delay, the consideration is not without weight; but it seemed hardly disputed that the claim was intimated immediately after the occurrence, and it has not been shewn that the defenders have suffered in the way of loss of evidence by the time which has elapsed. As regards the second, I think the pursuer was entitled to expect, when he put his goods on the train at five o'clock that afternoon, that they would arrive in time to join the 8.2 train from Edinburgh.

The second claim stands in a different position. It relates to a consignment of pigs despatched by the pursuer from Granton on the 4th of August 1874. The train by which they were sent, from some cause which has not been explained, ran off the line at Windmillhill Station, six miles south of Berwick,—one of the carriages which ran off was smashed to pieces, the line was blocked, and the pigs were consequently detained for several hours. The pursuer alleges a loss of market in this case also. The question is, whether the accident was owing to the fault of the defenders. On that question I am of opinion that the fact of the occurrence of the accident does not of itself prove that the defenders were in fault. I think, both in law and in reason, it only throws upon the company the burden of shewing that they acted with reasonable care. The cause of the accident has not been ascertained, and the pursuer has entirely failed, in my opinion, to reduce the possible causes to such as the company were bound to have prevented. It is well known that such occurrences do take place from causes which remain entirely occult. It is proved that the company's servants examined the carriages at Berwick according to their usual custom, and found nothing which appeared to be wrong. In these circumstances I cannot find that the detention arose from any cause for which the defenders were responsible, or against which reasonable care ought to have provided. It was suggested that the company should have made the history of these broken waggons more complete, and I concur in thinking that this would have been desirable. But on the evidence I am of opinion that the pursuer has failed to establish that fault which was essential to support his demand.

LORD NEAVES concurred.

LORD ORMIDALE.—When it is borne in mind, on the one hand, how dependent the public are on railways for the transport throughout the kingdom of goods as well as passengers, and, on the other hand, the unavoidable accidents and impediments to which railway transport is exposed, however well and carefully conducted, the importance, as well as the delicacy of the questions involved in this case can be readily understood.

The case consists of two branches, each of which depends, to some extent,

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upon different considerations. There is, first, the liability of the defenders for the pursuer's claim of damages arising in October 1872; and there is, secondly, his claim of damages arising in August 1874. No dispute was ultimately maintained on the part of the defenders as to the amount of the damages sued for under either of these claims, supposing their liability to be otherwise established. But the defenders deny and dispute, on various grounds, that they are liable at all.

1. The material facts to be kept in view in reference to the pursuer's first claim of damages, and about which there is little if any dispute, are these:—For about twelve years immediately preceding the 7th of October 1872 the pursuer had been in the practice of sending weekly on Monday afternoon by the defenders' line of railway live pigs from Granton to Newcastle for the Tuesday morning market there, and for all that time the pursuer's pigs were trucked by the defenders on the afternoon of the Mondays at Granton, and forwarded to their destination by a train which regularly left that place at 6.45 for Portobello, in time to join the eight o'clock evening meat train from Edinburgh to Newcastle, where it arrived early on the Tuesday mornings, some time before the opening of the market. On the evening of the 7th of October 1872 the pursuer, in accordance with his usual practice, sent to the station at Granton seventy-one pigs for transmission, in the usual way and by the usual train, to Newcastle for the market of the following morning. They were received by the defenders, and trucked in good time for such transmission; but they were not forwarded from Granton in due and ordinary course so as to join at Portobello the eight o'clock meat train from Edinburgh, and the consequence was they did not reach Newcastle till about noon the following day, after the morning market, or the better part of it, was over, the result being that the pursuer sustained the damage which constitutes his first claim.

The pursuer maintains that the unprecedented delay which thus occurred in the transmission of his pigs to Newcastle amounted to a failure of duty on the part of the defenders as common carriers, and a breach of the contract, implied, if not expressed, under which they were to him, or, in other words, that the delay arose from negligence or other fault on the part of the defenders, for the consequences of which they are liable. The defenders deny and dispute that any such liability can in the circumstances be held to attach to them.

In regard to the law applicable to such cases as the present there did not appear at the discussion to be any difference between the parties. The defenders acknowledged that it has been correctly stated, so far at least as the pursuer's first claim of damages is concerned, by the Lord Ordinary, its application merely, in the circumstances, being disputed.

Now, there can be no doubt that a great—so far as appears, an unprecedented—delay occurred,—a delay, in my opinion, sufficient to raise such a *prima facie* case of liability against the defenders as to make it necessary for them to shew that it was not caused by negligence or other fault of theirs. And as they were under no warranty, and had undertaken no absolute obligation that the pursuer's pigs should arrive at Newcastle at or before any particular time, it is quite open for them to do so; and if they can shew that they did all they could in the circumstances to forward the pursuer's pigs with due and reasonable expedition, they must stand exculpated. It cannot, however, be assumed that the defenders were under no duty or obligation at all to the pursuer to carry his pigs from Granton to Portobello in time to be forwarded from there to Newcastle by the

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meat train referred to; for, although it may be true that they had entered into no express or special contract to this effect, it must, I think, be held that they were, in the circumstances, bound to use all due and ordinary diligence to have that done. The case comes in this way to be reduced to the question, whether the defenders did or did not use such diligence, and have shewn that they did so; or, to put it in different words, whether the delay arose, not from any negligence or fault of theirs, but from circumstances beyond their control, or, at any rate, circumstances which afford them a reasonable and justifiable excuse. The law, as so stated, is exemplified by many of the cases cited at the discussion, and I have in particular to refer to the cases of Briddon v. the Great Northern Railway Company (28 Law Journal, Exch., p. 51), where the dispute related to delay, owing to a fall of snow, in the transmission of cattle; the case of Taylor v. the Great Northern Railway Company (Law Reports, 1 Common Pleas, p. 385), which related to the transmission of hampers of poultry for the London market; and the recent case in this Court of Macdonald and Company v. the Highland Railway Company (11 Macph. 614), which related to the transmission of perishable goods (confections) from Inverness to Strome Ferry. Although here the goods were not perishable like confections, they were live animals, which could not be allowed to starve, and were, in the knowledge of the defenders, intended for a particular market, which, if they missed through delay in their transmission, the necessary consequence would be loss and damage to the pursuer.

The question, therefore, is whether, in the circumstances of the present case, the defenders did or did not use reasonable expedition in the transmission from Granton to Newcastle of the pursuer's pigs; and this being entirely a jury question, depending upon the impression that may be taken of the evidence, I cannot, for one, help regretting that it had not been tried by a jury.

In now, however, coming to a determination on the subject, it appears to me, as I have already said, that it lies on the defenders to shew that the unusual delay which occurred in the present instance was not caused by the negligence or fault of themselves, but was the unavoidable result of the state of their line, they doing all that, under the circumstances, they were bound to do to forward the pursuer's pigs with due and reasonable expedition. This, indeed, must necessarily be so, for they and they alone can account for the delay, it being obvious that the owner of goods, like the pursuer, who does not travel along with them, could have no means or opportunity of knowing what was the cause of the delay. He has done all that was incumbent on him by proving the usage which had existed for twelve years, and that he had, in conformity with that usage, delivered his pigs at Granton, where they were received and trucked by the defenders in ample time for transmission, in ordinary course, for next morning's market at Newcastle.

It only remains, therefore, to consider whether the defenders have shewn that they did all that was reasonably incumbent on them to forward the pursuer's pigs. I am of opinion with the Lord Ordinary that they have failed to do so. They have not, indeed, established by sufficient evidence the cause of the delay at all. Their case amounts, in regard to this point, to little more than a statement to the effect that, owing to the Falkirk Tryst, which took place about the same time, their traffic was so great as to create such impediments on their line, especially at Portobello, as to render it impracticable by due and reasonable exertions to forward the pursuer's pigs as usual. But it does not appear to me that there is anything like sufficient evidence to support this statement. And, especially,

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as the defenders have altogether failed, I think, to account for the great and unusual delay which occurred in taking the pursuer's pigs from Granton to Portobello, which appears to have been the real cause of the delay complained of, I am of opinion that the Lord Ordinary is right in holding them liable in the first of the pursuer's claims of damages.

In forming this opinion I have not overlooked the defenders' argument, founded on the time which the pursuer allowed to elapse after his claim arose and the raising of his action, in consequence of which they, the defenders, say they are unable to account for the delay which occurred in the transmission of the pigs on the 7th of October 1872 so satisfactorily as they might otherwise have done. But, on the other hand, I cannot overlook what was stated for the pursuer, and not denied, that in point of fact he immediately, or soon after the 7th of October, intimated his claim, and called on the defenders to make reparation for his loss, and that he never afterwards departed from it. Keeping this in mind, and that the defenders must, independently of the pursuer's demand for reparation, have known at the time that his pigs were delayed in their transmission to Newcastle so as to lose the market there, contrary to the usage which had uninterruptedly and undeviatingly existed for twelve years, I have been unable to find anything sufficient in the circumstance of the pursuer's delay in bringing his action to meet or displace the view which I have otherwise taken of this branch of the case.

2. The pursuer's other claim, while it may be held to be governed by the same general principles of law, arises in circumstances so entirely different from his first, that the determination of the one can have little material effect on the determination of the other. The second claim relates to the transmission of pigs from Granton to Newcastle in August 1874. It is not, on the part of the pursuer, said that there was any delay in the departure, in this instance, of the train with the pursuer's pigs from Granton or Portobello, or any undue delay anywhere else except at or near the Windmillhill Station, a few miles south of Berwick, where, from some undiscoverable cause, or at any rate some cause which has not been explained, an accident occurred through a portion of the train running off the line, occasioning a delay of between five and six hours, and preventing the arrival of the pursuer's pigs in sufficient time for the market next morning. Now, although none of the pursuer's pigs were injured, and although the pursuer's claim is not for any such injury, but simply for loss of market in respect of their not having been timeously brought to Newcastle, I did not understand it to be disputed that the defenders would be liable in such a claim if it were shewn that the accident at Windmillhill Station arose from their negligence or other fault. Neither did I understand it to be disputed by the defenders that the delay of between five and six hours at Windmillhill of itself raised a presumption, in the absence of all evidence to the contrary, that there must have been negligence or other fault on their part in the sufficiency of the railway, or of the engines or waggons composing the train, or in the mode in which it was conducted on the occasion of the accident. But what the defenders relied upon, as I understood their argument, was, that while the precise cause of the accident, and consequent detention at the Windmillhill Station could not be ascertained it was proved that they had used all due and necessary precautions, and therefore could not be subjected in damages to the pursuer. It appears to me that in law this is a good defence. In the case of Lyon v. Lamb, 22d June 1838, 16 S. 1188, where damages were claimed by a passenger against a coach pro-

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prietor for injury sustained by the breaking down of a stage coach, it was held that the presumption is against the proprietor, and that he is bound to shew that the carriage and machinery were sufficient, and that there was no negligence; but it was also held, in the circumstances of that case, that he had satisfied this obligation. And in the English case of Readhead v. Midland Railway Company, 10th May 1869 (Law Reports, 4 Queen's Bench Cases, p. 379), the same principles of decision were recognised and given effect to by the Exchequer Chamber affirming a judgment of the Court of Queen's Bench. These cases, which related to the safe carriage of passengers, are authorities equally applicable in the present case, where the timeous delivery of goods is in dispute.

There being, then, no warranty, guarantee, or insurance by the defenders—implied or express—that the pursuer's pigs should, in all circumstances, be brought to Newcastle at or before a given time, it is clear and free from doubt, I think, that they cannot be made liable in the pursuer's second claim of damages if they have sufficiently shewn that the accident at Windmillhill Station was not caused by negligence or other fault on their part. The question, therefore, is narrowed to whether this has, or has not, been shewn. Now, it appears from the proof that the usual examination was made of the waggons composing the train at Berwick shortly before the accident, and that after the accident the fullest examination had also been made without anything being found to be wrong that could account for the accident. Nor do I see that anything more was, in the circumstances, incumbent on the defenders. And, if so, it follows that they are entitled to absolvitor from the second of the pursuer's claims, unless, indeed, it could be held that the defenders must be liable because they have been unable to account for the accident, and shew what its precise cause was. It was suggested as not being quite clear whether the Lord Ordinary may not have proceeded upon some such ground of liability as this; but if he did, I must own my inability to concur with him. Nor can I hold that it is sufficient to subject the defenders in liability that possibly there was something deficient in the carriage which was broken to pieces, and that that was the cause of the accident. I cannot adopt any such ground of liability as this in the face of the proof, which shews, I think, that the defenders used all necessary and proper precautions to ensure that nothing in connection with their train was defective or wrong.

The result, according to my opinion, is, in concurrence with your Lordships, that the Lord Ordinary's interlocutor falls to be affirmed in regard to the pursuer's first, and recalled in regard to his second, claim of damages.

LORD GIFFORD concurred.

THE COURT pronounced this interlocutor:—"Adhere to the said interlocutor as regards the first claim of the pursuer, and of new decern against the defenders therefor, amounting to £28 sterling, with interest at the rate of five per cent from 8th October 1872 till payment, in terms of the conclusions of the summons: Alter the said interlocutor as regards the second claim of the pursuer, and assoilzie the defenders from the conclusions of the summons relative thereto, and decern: Find the pursuer entitled to one-half of his taxed expenses, and remit to the Auditor to tax, and to report."

RENTON & GRAY, S.S.C.—DALMAHOY & COWAN, W.S.—Agents.

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Young v. Brown.

JANE TAYLOR OR YOUNG, Pursuer and Appellant.—*Scott Moncrieff.*
THOMAS BROWN, Respondent.—*Alison.*

Process—Appeal—Court of Session Act, 1868, *sec.* 71—*A. S.* 10*th March* 1870.—The above Act of Sederunt provides that in appeals from the Sheriff-court the appellant shall print and box the note of appeal, record, interlocutors, and proof, if any, within fourteen days after the process has been received by the clerk of Court, otherwise the appeal shall be held to have been abandoned (the Court having power to repone within eight days). In an appeal where the appellant had omitted to box a print of the note of appeal along with the other papers, *held* that, as the mistake was merely in an innocent and formal omission to comply with a regulation as to process contained in an Act of Sederunt, the Court might (although the reponing days had expired) allow it to be rectified by lodging a print of the note of appeal.

1ST DIVISION. Sheriff of Lanarkshire. M.

THIS was an appeal from the Sheriff-court of Lanarkshire, under the Court of Session Act, 1868. The process and note of appeal were received by the clerk on 9th January 1875, and duly marked by him of that date. The appellant on 22d January timeously printed, boxed, and lodged with the clerk a print of the record, proof, and interlocutors, and on the following day the case was in the Single Bills, and, no objections being stated by the respondent, was sent to the roll. It was afterwards discovered that the appellant, in his print, had omitted to include the note of appeal (which was written on a separate paper, and not on the interlocutor sheet, the 66th section of the Court of Session Act, 1868, permitting the appeal to be minuted either way). The appellant on 16th February 1875 printed, boxed, and afterwards lodged an appendix containing the note of appeal.

The respondent lodged a note praying that, in respect of the appellant's failure to print the note of appeal, in terms of the Act of Sederunt of 10th March 1870, sec. 3 (sub-sec. 1), the appeal should be either dismissed, or the clerk instructed to retransmit the process to the Sheriff-clerk, with the necessary certificate of abandonment, in terms of the 3d section (sub-sec. 5) of the Act of Sederunt.

The respondent's counsel referred to the case of Park v. Weir, reported only in the Scottish Law Reporter, vol. xii. p. 11.

LORD PRESIDENT.—This is a very narrow and critical objection. The pursuer having lost her case in the Sheriff-court appealed to the Court of Session. The appellant had the option, under sec. 66 of the Court of Session Act of 1868, either of writing her note of appeal on the interlocutor sheet, or of lodging a separate note of appeal. She made use of the form of a separate note of appeal, which was lodged on 9th January. Now, it was the duty of the appellant (under A. S. 10th March 1878, sec. iii., sub-section 1), within fourteen days of that date, "to print and box the note of appeal, record, interlocutors, and proof, if any, unless within eight days after the process has been received by the clerk he shall have obtained an interlocutor of the Court dispensing with printing in whole or in part." She did not take this second course, and so her duty was, on the fourteenth day after lodging her appeal, to print and box the note of appeal, record, interlocutors, and proof. She has printed the record, interlocutors, and proof, and the case was sent to the roll on 22d January 1875. Now, it appears that this print does not include the note of appeal. If the note of appeal had been written on the interlocutor sheet this would not have been so likely to have occurred. But being on a separate paper, the agent has omitted to have it printed and boxed, and it is maintained that in consequence of this

the Sheriff's judgment has become final, and that the clerk's duty is to retransmit the process to the Sheriff-court. No. 85.

Feb. 19, 1875. Young v. Brown.

According to the letter of the Act of Sederunt this is a good objection. But I confess to a reluctance to sustain so technical an objection if it is possible to get the better of it. Now, it is important to observe that the provision founded on occurs in the Act of Sederunt, and not in the statute. The regulation is made in place of the 71st section of the statute, and it is important to observe that under section 71 this objection would not have been fatal. Therefore the objection stands on a regulation of a form of process made by the Court. When we are satisfied that under an Act of Sederunt only a formal and innocent omission has been made, we may allow the thing to be rectified. It has been already rectified by the agent lodging an additional print containing the note of appeal.

I may mention that the case of Park v. Weir[1] has not been accurately reported. An appeal had been taken, and then fallen from, and the process was returned by the clerk to the Sheriff-court. The process never was before the Court, although it had been in the clerk's hands. The appellant brought a second appeal, but the Sheriff's judgment had become final.

While I am, therefore, for repelling the objection, it is impossible to absolve the appellant's agent from all blame, and I think that the appellant should be found liable in expenses.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"The Lords having considered the note for the respondent, No. 20 of process, and heard counsel for both parties, refuse the prayer of said note: Hold the omission to print, box, and lodge the note of appeal obviated by the print appendix of 16th February current, now lodged, containing the note of appeal; but find the appellant liable in the expenses of the said note, No. 20 of process, and the discussion thereon, which modify to £3, 3s., and for which decern against the appellant for payment to the respondent."

R. A. VEITCH, S.S.C.—JOHN GILL, L.A.—Agents.

MRS MARGARET INGLIS OR ADDISON AND OTHERS, Petitioners.— *M'Laren.* No. 86.

Feb. 23, 1875. Addison, &c.

Process—Proof—Writ—Attestation—Conveyancing Act, 1874 (37 *and* 38 *Vict. c.* 94, *sec.* 39).—A person died leaving a trust-disposition bearing to be subscribed by himself and attested by two witnesses, but without a testing-clause. His representatives presented a petition under sec. 39 of the Conveyancing Act, 1874, craving a proof, and thereafter to have it declared that the deed was subscribed by the granter and witnesses. The Court allowed a proof by commission, and thereafter found and declared as craved.

THIS was a petition presented by the widow and daughters of James Anderson, engineer, Glasgow, under section 39 of the Conveyancing (Scotland) Act, 1874.* The petition stated that Addison died in December 1ST DIVISION. B.

[1] October 15, 1874, 12 Scottish Law Reporter, p. 11.

* "No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect, according to its

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1874, leaving a trust-disposition and settlement bearing to be subscribed by himself and two witnesses; that the testing-clause was not filled up, and the precise date of signing was not known to the petitioners, also that the names of the trustees as originally written were deleted and others substituted in the testator's own handwriting.

The prayer was in these terms,—"To allow the petitioners a proof of the averments contained in this petition, and thereafter to declare that the trust-disposition and settlement above mentioned was subscribed by the said James Addison, the granter or maker thereof, and by the said George Miller and John Alexander Rankin, the witnesses by whom the said trust-disposition and settlement bears to be attested [and that the said trust-disposition and settlement is a valid deed, and entitled to effect according to its legal import;] and to find the petitioners entitled to the expenses of the present proceedings out of the funds of the trust-estate of the said James Addison; or to do otherwise in the premises," &c. The Court directed it to be amended by omitting the words in brackets.

The petitioners stated that it was doubtful upon the authorities whether the testing-clause could now be filled up after the testator's death.[1]

LORD PRESIDENT.—The 39th section of the recent Conveyancing Act provides that no instrument subscribed by the granter, and bearing to be attested by two witnesses subscribing, shall be deemed invalid or denied effect because of any informality of execution. The burden, however, of proving that the deed was subscribed by the granter and witnesses is laid on the party using or upholding it. The present petition has been presented for the purpose of having it declared that the trust-disposition was subscribed by the maker, and the witnesses by whom it bears to be attested, and the petitioners ask for a proof that that was the case.

The condition of the deed, apart from the difficulty about the names of the trustees, is that the testing-clause has not been filled up. Whether that case was immediately within the contemplation of the framers of the statute I do not know, but it certainly falls within the meaning of the words of the clause, provided the testing-clause cannot now be filled up.

If the position of the case had been merely that the testing-clause had not been filled up, but could still be filled up, I am not sure whether it would have fallen within the scope of the statute. But I think there is sufficient doubt whether the testing-clause could be filled up to induce us to apply the enactment. I am, therefore, for allowing a proof to be taken by commission.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

This interlocutor was pronounced:—"Having resumed consideration of

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legal import, because of any informality of execution; but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same; and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses."

[1] Hill v. Arthur, Dec. 6, 1870, 9 Macph. 223, 43 Scot. Jur. 171; Dick's Tutors v. Dick, 1798, Hume, 908; M'Pherson v. M'Pherson, Feb. 7, 1855, 17 D. 357, 27 Scot. Jur. 149.

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the amended petition and heard counsel for the petitioners, Allow them a proof that the disposition and settlement produced and founded on in the petition was subscribed by the now deceased James Addison, mentioned in the petition as maker thereof, and by George Miller and John Alexander Rankin, also mentioned in the petition as witnesses of the subscription of the said James Addison: Grant diligence at the petitioners' instance against witnesses and havers, and grant commission for their examination to Professor Berry, Glasgow."

Professor Berry having reported the evidence,

THE COURT, on 13th March, pronounced this interlocutor:—"Having resumed consideration of the amended petition, with the report of commission by Professor Berry, No. 16 of process, and heard counsel, Find and declare that the trust-disposition and settlement in the petition mentioned was subscribed by the now deceased James Addison, as the maker thereof, and by George Miller and John Alexander Rankin, as witnesses attesting the subscription of the said James Addison, and decern."

RONALD, RITCHIE, & ELLIS, W.S.—Agents.

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Feb. 23, 1875.
Dow & Co. v.
Union Bank.

W. F. DOW AND COMPANY AND F. JACOBSEN, Appellants.—*D.-F. Clark—Brown.*

THE UNION BANK OF SCOTLAND, Respondents.—*Lancaster—Dundas.*

Bankruptcy—19 *and* 20 *Vict. cap.* 79 (*Bankruptcy* (*Scotland*) *Act*, 1856), *secs.* 25, 108, *&c.*—In a sequestration a creditor, being a brother of the bankrupt, produced, as the only voucher of his debt, a decree in absence obtained by him against the bankrupt within sixty days of bankruptcy,—*objection* to his vote *sustained.*

Bankruptcy—Affidavit.—The Bankruptcy Scotland Act, 1856, sec. 25, provides that when a creditor is a corporation, an affidavit "by the secretary, manager, cashier, clerk, or other principal officer of such corporation shall be sufficient." *Held* that an assistant manager of a joint-stock banking company was a principal officer of the bank in the sense of the Act.

Bankruptcy—Affidavit.—In a sequestration the Sheriff allowed an addition to be made to an affidavit by one of the creditors. The addition was made by the deponent, and initialed by him and by the magistrate before whom the original deposition had been made.

Objections (1) that the addition was not part of the oath, and (2) that it was not duly authenticated, *repelled.*

Bankruptcy—Affidavit—Valuation of Securities.—A creditor used an arrestment within sixty days of the bankruptcy of his debtor. In his affidavit he deponed that he put no value upon it. *Objection* that he ought to have put a value upon it *repelled*, in respect that by sec. 108 the arrestment was not effectual to the creditor.

1ST DIVISION.
Sheriff of Mid-Lothian.
M.

IN the sequestration of Henry Jacobsen, merchant, Glasgow, the first deliverance in which was dated 26th December 1874, a motion for renewing personal protection to the bankrupt was carried by a majority in value of the creditors of £667 against £577.

The Union Bank, the only creditor in the minority, appealed to the Sheriff, on the ground that the real majority had been against the motion. The chief objection stated by the appellants was to the vote of Frederick Jacobsen, a creditor for £590. He was a brother of the bankrupt, and claimed upon a decree in absence obtained in the Court of Session against the bankrupt within sixty days of the sequestration. None of the grounds and warrants of the decree were produced.

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The creditors in the majority on their side objected to the vote of the Union Bank, in respect of the terms of their affidavit. It bore to be made by John Affleck, banker in Glasgow, and one of the principal officers of the Union Bank. Originally the affidavit concluded as follows:—"Depones that no part of said debt has been paid or compensated to the said bank, and that they hold no other person than the bankrupt bound for the debt, and no security for the same.—All which is truth, as the deponent shall answer to God. JNO. AFFLECK, *Deponent.* JOSEPH A. WRIGHT, *J.P.*" But the Sheriff allowed the following addition to be made on the margin before the words "All which is truth."—"Other than arrestment of the sum of £50 in the hands of the Royal Bank of Scotland, being sum in deposit-receipt, dated on or about 3d December 1874, in name of the said Henry Jacobsen, conform to execution of arrestment, dated 18th December 1874. Further depones, That the deponent and said bank put no value on said arrestment in security, so that it cannot be deducted from said sum of £577." The addition was initialed by the deponent and the magistrate.

Mr Affleck signed a mandate to vote in the sequestration—"Jno. Affleck, assist. manager."

The Sheriff-substitute (Hallard), on 15th January 1875, pronounced this interlocutor:—"Sustains said appeal: Recalls the resolution whereby protection was renewed to the bankrupt for six months, said resolution not being supported by a majority in value."

Dow and Company and F. Jacobsen, creditors, appealed to the Court of Session. They objected to the affidavit of the Union Bank (1) Mr Affleck, being assistant manager, was not the principal officer.[1] (2) The marginal addition was not made upon oath. (3) Being only initialed, it was not sufficiently authenticated.[2] (4) The bank were bound to put a value on their security.[3] (5) F. Jacobsen's claim was good. In Turnbull v. M'Naughton[4] the distinction was taken between a decree *cognitionis causa tantum* and a decree in absence against a debtor.

The respondents cited the cases undernoted.[5]

At advising,—

LORD PRESIDENT.—The question decided by the Sheriff-substitute refers to the claim of Frederick Jacobsen, and as regards that question I have no hesitation in agreeing with the view taken by the Sheriff-substitute. It has been decided that a bill or other document of debt recently granted to a conjunct and confident person is not good as a voucher in a question of voting. But what the claimant founded on here was a decree of this Court. He produces the extract-decree without anything else. It appears to me that that decree is certainly

[1] 19 and 20 Vict. cap. 79, sec. 25.—"When the creditor is a corporation, an oath of verity made as aforesaid by the secretary, manager, cashier, clerk, or other principal officer of such corporation, shall be sufficient." . . . Anderson v. Monteith, July 7, 1847, 9 D. 1432, 19 Scot. Jur. 634; Campbell v. Myles, May 27, 1853, 15 D. 685, 25 Scot. Jur. 413.

[2] Mackersy v. Guthrie, March 7, 1829, 7 S. 656; Miller v. Lambert, June 27, 1848, 10 D. 1419, 20 Scot. Jur. 515.

[3] Gibson v. Greig, Dec. 17, 1853, 16 D. 233, 26 Scot. Jur. 120; Woodside v. Esplin, July 15, 1847, 9 D. 1486, 19 Scot. Jur. 657; M'Ewen v. Cleugh, Dec. 7, 1842, 5 D. 273, 15 Scot. Jur. 106; Hay v. Durham, Feb. 5, 1850, 12 D. 676, 22 Scot. Jur. 242.

[4] June 27, 1850, 12 D. 1097, 22 Scot. Jur. 505.

[5] Dyce v. Paterson, Dec. 19, 1846, 9 D. 310, 19 Scot. Jur. 144; Anderson v. Guild, June 13, 1852, 14 D. 866, 24 Scot. Jur. 519.

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not a better voucher than a bill or other document of debt which bears at least the bankrupt's acknowledgment of the debt. But this decree shews nothing more than this, that a claim was made and not resisted by the bankrupt. The grounds of action are in no way indicated; and the grounds and warrants of the decree are not produced.

The only remaining question is whether the vote of the Union Bank is liable to any serious objection. Several objections have been taken, some of them of a strictly technical kind. They all arise on the face of the affidavit. It bears to have been made by "John Affleck, banker in Glasgow, and one of the principal officers of the Union Bank," and is signed by him. It is said that he is not one of the principal officers of the bank. The evidence offered of that is a mandate to vote, signed "Jno. Affleck, assist. manager," thereby shewing that there is a manager over him, so that he is not the highest officer. The question is whether that being so, he is qualified under the 25th section of the statute. It is argued that in every bank there is one principal officer, and that he is the only party who can make the affidavit. I think that is too strict a construction. Probably in every bank all the officials are in some sense under a single head. Yet there may be more than one principal officer. For example, if the cashier is the head official of a bank, surely the secretary is also a principal officer. It seems to be sufficient compliance with the statute if the deponent is in the position of one of the principal officers, and, therefore, I think this objection is not well-founded.

The next question is, whether the affidavit is to be read with or without the marginal addition. The amendment was made by the authority of the Sheriff under the 51st section of the Bankrupt Act. The object of the provision is to prevent votes being rejected on mere matters of form which can easily be set right at the time. Accordingly, the Sheriff, finding that an arrestment had been used, thought it necessary that it should be mentioned as a security, and directed Affleck to make this addition, which we find on the margin initialed by the deponent and the magistrate. It is said that this addition has not the sanction of the oath. I am of opinion that that is a bad objection. The addition is inserted into the affidavit by the deponent. I cannot doubt that that makes it part of the oath, and that the deponent intended to swear, and did swear to this addition as much as to the original affidavit. There was no necessity for a fresh oath. It is like an explanation or addition made by a witness, which, though given after a considerable interval, forms part of his deposition.

The next question is whether the addition is sufficiently authenticated. I am of opinion that it is. It is not disputed that the initials were placed there by the deponent and the magistrate. But it is said that the addition cannot be incorporated with the affidavit without full subscription. This addition, however, seems to stand in the same position as amendments on any ordinary judicial proceedings, such as are in use every day to be authenticated by initials only, and to require subscriptions would be to introduce a rule of great severity for no reasonable purpose. The cases of Mackersy v. Guthrie and Miller v. Lambert were very different. In the former the marginal addition was not authenticated at all, and in the latter it was signed by the party, but not by the magistrate. But, at all events, those were not cases under the 51st section, because they occurred before the power of amendment existed.

The only remaining question is, whether the affidavit, taken along with the marginal addition, is a good affidavit under the Act? The objection is that it does not put a value on the security which is said to have been constituted by

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the arrestment dated 18th December 1874. Now, it must be kept in view that the first deliverance in the sequestration was on 26th December. That date did not require to be stated in the affidavit, because it was necessarily present to the minds of all parties to the sequestration. That being so, when the bank say they have used an arrestment dated 18th December, it is equivalent to saying, in so many words, "we have used an arrestment, but it is of no use to us. Being transferred to the trustee under section 108, it is now his arrestment." The terms of the clause make the matter abundantly clear. "The sequestration shall, as at the date thereof, be equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding; and no arrestment or poinding executed of the funds or effects of the bankrupt on or after the sixtieth day prior to the sequestration shall be effectual; and such funds or effects, or the proceeds of such effects, if sold, shall be made forthcoming to the trustee." The expression of section 40 of the former statute, 54 Geo. III. c. 137, is somewhat different, but the meaning is the same. The older enactment provides that the arrestment shall not "give a preference to the arresting creditor," while the present enactment is that the arrestment shall not be "effectual." But that means effectual to the arresting creditor, and the only way in which it could be effectual to him is by securing him a preference. It is, notwithstanding this, an effectual arrestment in other respects; for it has created a *nexus* on the funds arrested, and secured that they shall be forthcoming to the trustee, while, if the arrestment had not been used, these funds might have been paid to the bankrupt prior to the sequestration, and squandered by him before the trustee's title came into existence. It is impossible, therefore, to say that this was a security which the creditor was bound to value and deduct from his debt. It was no longer a security to him. If it was of any use, it was for the benefit of the creditors. This is no new doctrine, for in the case of Allan,[1] which I referred to, it was held under the old Act that where a trustee proposed to a creditor that he should loose his arrestment, and complained to the Court because he refused to do so, the trustee had mistaken his position. As Lord Mackenzie said,—"The trustee committed a mistake in asking Allan and Sons to loose their arrestments. So far from the trustee desiring to have the arrestments loosed, I think he should have desired them to be held as standing good for the benefit of all concerned. If they were loosed, the subjects arrested might be exposed perhaps to hazard of different sorts, whereas the benefit of the diligence just accrues to the bankrupt estate if it be not loosed." That doctrine is precisely applicable; and it appears to me that the whole of the provisions for valuing securities are quite inapplicable. The object of these provisions is that the creditor should not be allowed to embrace in his claim those portions of his debt for which he is entitled to rank preferably; and secondly, that the valuation made in the affidavit may enable the trustee to take the creditor at his word, and acquire his security in exchange for the amount, with the addition of 20 per cent. But supposing this security had been valued, it could not have been assigned to the creditors or the trustee, because it was theirs already.

I, therefore, think that all the objections are unfounded, and that the Sheriff-substitute's judgment should be adhered to.

Lord Deas concurred.

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[1] Allan v. Fyfe, Nov. 28, 1835, 14 S. 80.

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LORD ARDMILLAN.—The only point in the case which I have felt to be one of difficulty is the question whether the bank were bound to put a value on a security which they state to be of no value. That is a subtle question, and may be a nice question, and I reserve my opinion upon it. I am not satisfied that Lord Ivory's opinion in the case of Gibson v. Greig has been correctly ascertained, and I am still less satisfied that Lord Rutherfurd concurred with Lord Ivory to the extent now urged. But we have a satisfactory ground of decision in the 108th section, to which reference has been made.

LORD MURE concurred.

THE COURT refused the appeal.

JOHN WRIGHT, W.S.—J. & F. ANDERSON, W.S.—Agents.

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Feb. 24, 1875.
Allan v. Shaw and King.

THOMAS ALLAN (Inspector of Poor of Cambusnethan), Pursuer.—*Alison.*
JOHN SHAW (Inspector of Poor of Kilbarchan), Defender.—*J. G. Smith*—*Brown.*
JAMES KING (Inspector of Poor of Shotts), Defender.—*J. A. Crichton.*

Poor—Settlement—Poor-Law Amendment Act, 1845, 8 *and* 9 *Vict. c.* 83, *sec.* 76—*Continuity of Residence.*—A miner, who rented a room in his father-in-law's house in the parish of S, went to work in the neighbouring parish of M, at first returning to visit his wife on Saturdays, but after about two months he took a house in M, to which he removed his wife and furniture. After another month he returned to S. *Held* that the continuity of residence required by the 76th section of the Poor-Law Amendment Act for a residential settlement had been broken.

2D DIVISION. Ld. Mackenzie. I.

ON 16th October 1871 Charles Hood, with his wife and children, became chargeable as a pauper in the parish of Cambusnethan. He died on 30th October 1871, and his widow and children continued to be supported by the parish of Cambusnethan. This action was raised by the parish of Cambusnethan against Kilbarchan, the parish of the pauper's birth, and against Shotts as the parish of alleged residential settlement, for repayment of £49, 17s. 8d., disbursed for the maintenance of Hood and his family.

It was admitted for Kilbarchan that Hood was born in that parish, but it was averred that he resided continuously, within the meaning of the 76th section of the Poor-Law Amendment Act, between May or June 1861 and October 1866 in the parish of Shotts, and thereby acquired a residential settlement in that parish for himself and family, which he retained. Shotts denied that there had been such continuous residence.

Upon the 20th October 1874 the Lord Ordinary, "in respect that the defenders admit that one or other of them is liable for the support and maintenance of the paupers sued for," allowed the defenders a proof of their averments.

The result of the proof is thus stated by the Lord Ordinary in the note to his interlocutor of 8th December 1874;—"According to the proof, Charles Hood resided and worked as a miner at Bowhousebog, in the parish of Shotts, from about the month of July 1861 to 31st December 1861. He then left that place for Garscadden, in the parish of Old Monkland, where he stayed about a fortnight, but, not finding the work at that

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place to suit him, he returned to Annieshill, in the parish of Shotts, and resided there until about a week before his marriage in 1862 to Mary Shields, when he removed to Bowhousebog, in the same parish, where he resided until 9th July 1863. He was married on 3d May 1862. After the marriage Charles Hood and his wife resided in a room, which he rented and furnished, in her father's house in Bowhousebog. On 9th July 1863 Charles Hood went to Rosehall, in the parish of Old Monkland, to work as a miner, and he remained at Rosehall until 2d October 1863, when he returned to Bowhousebog, where he resided at first in the room in his father-in-law's house which he formerly rented, and afterwards in houses taken by him, until 25th October 1866. He then left for Clydesdale Row in the parish of Cambusnethan, and resided there until 24th June 1867.

"The question between the parish of Kilbarchan, in which Charles Hood was born, and the parish of Shotts, in which it is averred that Charles Hood acquired a residential settlement, is, whether his residence from 9th July to 2d October 1863 in Rosehall, in the parish of Old Monkland, interrupted the continuity of Charles Hood's residence, and prevented him from acquiring a settlement by residence in the parish of Shotts. It is important, therefore, to ascertain what was the character of that residence of twelve weeks in Rosehall.

"According to the evidence of his wife, Charles Hood left Bowhousebog for Rosehall, which is nine or ten miles from Bowhousebog, to better his condition. During the whole of his residence at Rosehall he worked at his trade of a miner in the pit there. For the first three weeks or thereby he lived in lodgings at Rosehall. During that time his wife resided at Bowhousebog, in the room which he continued to retain and pay rent for in his father-in-law's house, and her husband supported her, and went to see her on the Saturdays. It is proved by Andrew Lees, the contractor under whom he was working at Rosehall, that Charles Hood's wife came to Rosehall and told him that, if he was going to work there, he was to take a house. Charles Hood accordingly took a house in the Rows, near the pit at Rosehall, and removed his furniture to that house from the room in Bowhousebog, which he then gave up, and his wife and he thereafter resided in that house at Rosehall, as sole tenants thereof, until 2d October 1863. His wife depones that he only lived in lodgings at Rosehall for about three weeks before he took a house. Andrew Lees depones that he only had the house at Rosehall for a month before he left on 2d October 1863. It does not clearly appear from the proof whether he lived in lodgings or resided in the house which he took during the other five weeks of the twelve weeks that he remained at Rosehall. Charles Hood was not under contract to work for any specific period while at Rosehall, and was not obliged to give notice before leaving. He left on a day's notice, and returned to Bowhousebog, where he and his wife again took the room in his father-in-law's house in which they had formerly resided, and thereafter resided in Bowhousebog until 25th October 1866. His wife depones that during the time she and her husband lived together in Rosehall he had nothing to do with Bowhousebog or any other place in the parish of Shotts. According to Andrew Lees' evidence, Charles Hood's reason for leaving Rosehall, and returning to Bowhousebog, was that he thought that he could make a shilling or eighteenpence more wages per day at Bowhousebog. Lees also says that Charles Hood spoke frequently about going away for a fortnight before he went, but his wife states that while staying at Rosehall he did not say anything to her about going back to Bowhousebog, although she repeatedly asked him to go back."

The Lord Ordinary, on 8th December, pronounced this interlocutor:—

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"Finds that Charles Hood, the husband of the pauper Mrs Mary Shields or Hood, and the father of the paupers Marion Hood, Mary Hood, George Hood, and Charles Hood, was born in the parish of Kilbarchan; that he became chargeable as an invalid pauper in the parish of Cambusnethan on 16th October 1871; and that he died in that parish on or about 30th October 1871: Finds that the said Charles Hood did not, at any time before he and his wife and children became objects of parochial relief, reside for five years continuously in the parish of Shotts: Finds that the settlement of the said Charles Hood was, on 16th October 1871, in the parish of Kilbarchan as the parish of his birth: Decerns against the defender, John Shaw, inspector of poor for the parish of Kilbarchan, in terms of the conclusions of the summons: Assoilzies the defender, James King, inspector of poor for the parish of Shotts, from the conclusions of the summons, and decerns: Finds the defender, John Shaw, liable in expenses to the pursuer, and also to the defender, James King: Allows accounts," &c.*

Shaw, inspector of Kilbarchan, reclaimed.

Argued for the reclaimer;—Hood's absence at Rosehall did not infer a breach of the continuity of his residence in Shotts. During the earlier period of that absence it was not doubtful that he was residing, within the meaning of the statute, in Shotts, because his house and wife were there, and he visited them on Saturdays.[1] Nor did the absence from Shotts when his wife was absent also, and the furniture removed, infer a breach

* NOTE.—(After the narrative given above)—"Such being the facts as disclosed by the proof, the Lord Ordinary is of opinion that Charles Hood's residence in Rosehall, at all events during the time that he and his wife kept house there, was an industrial residence, entirely separate from his previous and subsequent residence in Bowhousebog. If, after lodging for three or thereby weeks at Rosehall, he had returned to Bowhousebog, and had never given up his residence in that place until 25th October 1866, that absence might have been regarded as a tentative proceeding on his part to see whether the work at Rosehall would suit him. But after he gave up his residence at Bowhousebog he ceased to have any connection with that place, and during the time that he and his wife had a house and resided in Rosehall, that house was his only residence or home. His absence from Bowhousebog was not accidental, and his residence in Rosehall was not incidental to or in any way connected with his former residence in Bowhousebog, but was, the Lord Ordinary thinks, entirely subversive of it. He left Bowhousebog in the hope of getting better wages at Rosehall, and he afterwards returned to Bowhousebog because he expected to get higher wages there. But for that expectation he might not have returned to Bowhousebog.

"It was maintained for the parish of Kilbarchan that Charles Hood, during the whole time of his residence at Rosehall, intended to return to Bowhousebog. The Lord Ordinary is of opinion that no such intention is proved. All that appears from the proof is that he spoke to Lees about returning to Bowhousebog for a fortnight before he went, and that he did not do so to his wife. But, supposing that such intention were proved, the fact is that for at least four weeks he had an industrial residence in Rosehall, and had no house in or other connection with Bowhousebog. The Lord Ordinary considers that mere intention to return to Bowhousebog, even if proved to have existed during the whole residence at Rosehall, cannot, in the circumstances of this case, affect the decision. The question here is one of fact, and not of intention.

"Such being the view which the Lord Ordinary takes of the proof, he is of opinion that Charles Hood did not, during the period between July 1865 and 25th October 1866, reside for five years continuously in the parish of Shotts, and that he did not acquire a settlement by residence therein under section 76 of the Poor-Law Amendment Act."

[1] Greig v. Miles and Simpson, July 19, 1867, 5 Macph. 1132, 39 Scot. Jur. 617; Milne v. Ramsay, May 23, 1872, 10 Macph. 731, 44 Scot. Jur. 435.

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of continuity. The pauper had not abandoned Shotts as the place of his residence; his life in Old Monkland was tentative and experimental, his intention being to return to Shotts if Old Monkland did not suit, and he did return. If it was true, as was now generally received, that the word "continuously" in the 76th section of the statute was open to construction, the intention of the pauper could not be left out of view. But there never was any intention to sever connection with Shotts, and deliberately to adopt another parish. No doubt the removal of the wife and furniture was an overt act of a decided kind, but the force of that circumstance was sufficiently displaced by the fact that the removal was the act of the wife herself, and, apart from intention, there was no absolute severance of ties with the parish of Shotts. The pauper had always his father-in-law's house to return to in a parish which he had made the main place of his residence for a number of years. *Separatim*, assuming entire severance from the parish of previous residence it was still an open question whether, the *animus revertendi* not being excluded, absence for such a short period as a month would be held to infer a breach of continuity. Longer periods of similar absence had been held as not affecting this result.[1]

Argued for Shotts;—When the character of the absence was so distinctly ascertained as here length of time was not of much moment. Here it was proved that during Hood's last month at Rosehall his connection with the parish of Shotts was completely severed. The intention of the pauper as regards his residence was not an element in the inquiry.[2]

At advising,—

Lord Neaves.—This is a case of importance to the poor-law, and has been well brought under our notice. There is undoubtedly a conflict of authority; and we have to decide between opposing decisions. The safest rule to follow seems to me to be that adopted by the Lord Ordinary. The paupers themselves are not affected by the question, nor are the parishes probably much interested, because success one day is failure on another. It is better for all parties to have a fixed rule, if it be at all a fair one. When a person residing in one parish transports himself by a plain overt act into another, and there goes on working as he did in the parish he has left, that, I think, should be held as a severance from the one parish and the adoption of the other. I think that this man, when his wife came to reside with him at Rosehall, did adopt Old Monkland as his residence in the same sense in which he had previously resided in Shotts.

One recommendation of this view is that we are thereby saved from saying how much or how little in particular cases will infer a breach of continuity. That would be a perplexing question, and we should require to adopt a sort of tariff or sliding scale. I am against establishing an arbitrary presumption in this class of cases.

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[1] Mackenzie v. Cameron, Dec. 10, 1858, 21 D. 93, 31 Scot. Jur. 66; Hay v. Cumming, June 6, 1851, 13 D. 1057, 23 Scot. Jur. 490; see Hutchison v. Fraser, Feb. 11, 1858, 20 D. 545, 30 Scot. Jur. 294, and opinion of the Lord Justice-Clerk therein.

[2] Opinion of the Lord Justice-Clerk in Crosby v. Taylor and Greig, Oct. 21, 1869, 8 Macph. 43, 42 Scot. Jur. 9.

Reference was also made to M'Gregor v. Watson, March 7, 1860, 22 D. 965, 32 Scot. Jur. 410; Beattie v. Kirkwood and Adamson, May 30, 1861, 23 D. 915, 33 Scot. Jur. 461; Beattie v. Leighton and Mitchell, Feb. 10, 1863, 1 Macph. 434, 35 Scot. Jur. 260; Hamilton v. Kirkwood and Smith, Nov. 13, 1863, 2 Macph. 107, 36 Scot. Jur. 49; Hastings v. Hughan and Semple, Jan. 27, 1866, 8 P.-L. Mag. 331; Hewat v. Hunter, July 6, 1866, 4 Macph. 1033, 38 Scot. Jur. 525.

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LORD ORMIDALE.—I cannot resist the conclusion that the continuity of the pauper's residence in the parish of Shotts was interrupted. The question might have involved some difficulty had it been raised at the end of the first two months after he himself had removed from that parish, because during that time he had left there in his former residence his wife, and any furniture of which he may have been possessed; and moreover he appears to have returned every Saturday, and lived with his wife till the Monday. But a material change took place at the end of two months. His wife then ceased entirely to reside at Bowhousebog in the parish of Shotts, and went to live with her husband, the pauper, at Rosehall, in the parish of Old Monkland; and all his furniture was also then taken to Rosehall, where he rented a dwelling-house. In these circumstances I cannot entertain any serious doubt that the Lord Ordinary has come to a right conclusion.

I wish, however, to guard myself from being supposed to hold that personal presence in a parish is indispensable in all circumstances to the continuity of a residential settlement in it in the sense of the poor-law. That would be contrary to reason. A man who has his dwelling-house in a parish will not lose his settlement there on account of occasional incidental and temporary absence in the course of the ordinary transactions or exigencies of life. He may, for instance, go out of the parish temporarily, to see a sick relation; or he may be obliged, in obedience to the laws of his country, to be absent occasionally, for example, to attend the assizes in another parish as a juror or witness; or he may, if a seafaring man, require to be away from his house and family for longer or shorter periods of time in the prosecution of his lawful calling. These are some of many illustrations which might be given.

A good deal was said about the length of time during which a person must be absent in order to cut the continuity of residence. I am not inclined to think the duration of absence a good test. In the present case, according to the evidence, Hood, the pauper, was about a month out of the parish of Shotts with his wife and furniture. I rather think that if the period had been reduced to a week, or even less, the continuity of his residence in Shotts would have been equally broken. In short, whenever it is clear that a pauper had for some time, long or short, entirely given up his residence in a parish, it is of little importance how soon he may go back to it, for in my opinion the continuity, if once interrupted, cannot be restored. The residence, in order to establish a settlement, must begin to run *de novo*.

The element of intention is the only other point I have to notice. In a certain sense, and in many cases, intention cannot be disregarded. Take the case of a person leaving the parish where his residence is to visit a sick relation, or for some other temporary purpose. In such cases the intention cannot be left out of account. But in these and in all poor-law cases the intention must be gathered from the positive acts of the party. Mere intention as manifested by words only, and not carried into action, can have no effect in acquiring or losing a residential settlement.

Having regard to these considerations, I concur with Lord Neaves in opinion that the Lord Ordinary's interlocutor under review ought to be adhered to.

LORD GIFFORD.—I have come to the same result. The question, in cases like the present, turns upon the meaning and application of the statutory word "continuously." In order to found a residential settlement, the pauper, or the party

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on whom the settlement depends, must have "resided for five years continuously." The question is what break or interruption in its nature or in its extent will prevent the residence from being in the sense of the statute "continuous."

Now, speaking generally, I think continuous residence will be interrupted when the residence of the pauper in a parish has been so severed and put an end to that he no longer belongs to that parish but to a new parish. I do not think it turns so much on the mere duration of personal absence, although that may be an element. In the case of a man flitting with his family and furniture, and taking up a new residence and new employment in a different parish, there is almost as complete a severance the first day as after a lapse of time, at least a very short time indeed will do. It is like cutting a chain; it does not matter how many links are taken out,—the complete removal of one link will sever continuity as well as the removal of many, and so I rather look to the nature and character of the absence or non-residence than to its mere duration. And the change of residence is always of more importance than mere personal absence. Indeed personal absence, even for a considerable time, will not interrupt continuity of residence if the house or residence is maintained, or if the absence is only incidental to the residence. In the present case, I think there was sufficient severance from the parish of Shotts to prevent the pauper's residence in that parish from being "continuous."

It is said that Hood's residence in Old Monkland was experimental, and perhaps it was so at first. But the experiment was not to last for ever. After a period not very well fixed,—for there is a discrepancy between the evidence of the widow and of Andrew Lees,—the experiment came to an end. Hood sent for his wife and furniture, gave up his house, and ceased to pay rent in one parish, and took and occupied another house, and began to pay rent in another parish. When he did so, I think his connection with Shotts entirely ceased. It must be remembered that this is a case of a householder. Difficult cases may arise in regard to single servants or mere lodgers, who have no home of their own, and no family or furniture. Everything here points to a complete severance from the parish of Shotts. I do not think that it matters that Hood had been living with his father-in-law. Having a father-in-law in a place is not sufficient to keep up a constructive residence, but his father-in-law was merely his landlord, to whom he paid rent for an unfurnished room, which he furnished and made his own. Even if the period of absence had been shorter it would have been sufficient to break the continuity. I do not, however, altogether lay out of view the duration. The last part of Hood's residence at Rosehall, in which he had a house there, throws some light upon the former part; and I rather think that if we had had to consider whether there was a new settlement in the parish of Old Monkland, his residence there must be held to have commenced with his going there on 9th July 1863, and not merely from the date of the removal of his wife and furniture. There was in all three months absence, and looking to its character and incidents I think continuity of residence in Shotts was interrupted thereby.

LORD JUSTICE-CLERK.—I concur, but I think the case a very narrow one. In these poor-law cases it is very important to find some certain and intelligible rule, which can be easily followed. I do not think that the term "continuous residence" has by construction been made any clearer now than it was immediately after the passing of the Poor-Law Amendment Act. It is impossible to

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give a definition which shall fit all cases, or even most cases. The construction must vary according to the social condition of the country, and the particular circumstances of the case. It does not, however, follow that the practical administration of the poor-law may not be regulated by general principles sufficiently intelligible.

The question is, whether the parish of Shotts is to be liberated from a burden which it would have had to bear if Hood's residence in the parish had been continuous for five years. The parish says that his absence from July to October 1863 has this effect. The question is as to the application of a statutory rule, and, I think, is about as narrow as well could be. Up to 9th July 1863 Hood lived with his father-in-law in the parish of Shotts. So far as he had any household goods they were in his father-in-law's house. He left the house to try to get work at Rosehall, in the parish of Old Monkland, but he did not mean to transfer his establishment at first. His wife objected to that arrangement, and after some weeks he took one of the colliers' houses at Rosehall, and lived there with his wife, it appears for about a month. During the last fortnight he spoke of going back to Bowhousebog, and he did go back. So far as the intention of the man is concerned it is not proved that he intended to remain at Rosehall. On the contrary, it appears pretty clearly that he had formed no such intention. But, on the other hand, his connection with the parish of Shotts was completely severed in point of fact. He left nothing behind him, and there is as little indication of an intention to return when he left as there is of an intention to remain at Rosehall. We must, I think, look to the fact, which must be our guide, and although I incline to think the shortness of the absence of more weight than it has received from your Lordships I do not differ from the judgment.

The pursuer having moved for the expenses of attending in the Inner-House, counsel for Kilbarchan opposed the motion, on the ground that the pursuer had no interest in the discussion of the reclaiming note,[1] and referred to the Lord Ordinary's interlocutor of 20th October 1874. The Court refused the motion.

THE COURT adhered.

MORTON, NEILSON, & SMART, W.S.—A. J. DICKSON, S.S.C.—WADDELL & M'INTOSH, W.S.—Agents.

No. 89.
Feb. 24, 1875.
Mackenzie's Trustees v. Mitchell, &c.
2D DIVISION.
R.

MALCOLM MUNRO MACKENZIE AND OTHERS (Mackenzie's Trustees), First Parties.—*Fraser.*
MARY JANE SIMPSON MITCHELL AND OTHERS, Second Parties.—*M'Laren.*
SOPHIA MACKENZIE, Third Party.—*J. M. Duncan.*

Succession—Testament.—A testator directed his testamentary trustees to divide his whole estate equally among his sons and daughters, with the proviso that, should his only unmarried daughter's "share of the division not amount to £150 per annum," the trustees were to "invest in good and safe security as much as will realise that amount," but gave no directions as to the disposal of the capital so invested. The daughter's share of the estate was not sufficient by itself to provide £150 a-year. *Held* that the additional sum which it was necessary to invest for this purpose belonged to the other children, from whose shares it had been taken, subject to the life interest of the daughter.

JOHN BELL, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

[1] Greig v. Miles and Simpson, July 19, 1867, 5 Macph. 1132.

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Stephen v. Aiton.

WILLIAM STEPHEN AND OTHERS, Complainers.—*D.-F. Clark—Brown.*
WILLIAM AITON, Respondent.—*Asher—Jamieson.*

Property—Harbour—Statute—Private Act—Right to Beach Boats.—The fishermen of the sea-coast village of B had from time immemorial laid up their boats for the winter on certain ground belonging to the proprietor of the village, to whom they paid a rent (which from an early period was £1, 17s. 6d.), for their houses and certain other privileges, the right of laying up the boats not being specified in the agreements. In 1845 the proprietor obtained an Act of Parliament for the improvement of the harbour of the village, which authorised him to levy dues on all vessels entering the harbour,—and "on all boats laid up at B for the winter season, 5s." He subsequently charged 5s. from each fisherman on that account, the rent being diminished to that extent. The same system was for some years continued by a new proprietor who purchased the estate in 1865. In 1874 he asserted a right to exclude the fishermen. In a suspension and interdict brought against him by the fishermen, *held* that they were entitled to the use of the ground for laying up their boats on payment of 5s. until the proprietor provided them with another safe and suitable place, in respect that the Act, in authorising the proprietor to levy dues, had by implication imposed a corresponding obligation to provide the accommodation, for the fishermen laying up their boats.

1ST DIVISION.
Ld. Curriehill.
M.

THIS was a suspension by William Stephen and others, fishermen, residing in Boddam, a village on the coast of Aberdeenshire, as individuals, and also as a committee elected by the fishermen of Boddam for transacting the fishing affairs of the village of Boddam, against William Aiton of Boddam. The prayer, as amended in the Inner-House, was to interdict the respondent "from troubling, molesting, or interfering in any way with the complainers and the other fishermen belonging to the village of Boddam, in laying up for the winter season, beaching, or taking their boats above high-water mark at or near the harbour of Boddam, upon the ground coloured blue and green in the plan or sketch herewith produced, . . . on payment of five shillings for each boat," in terms of schedule A appended to the Act 8 and 9 Vict., cap. xxv.

The complainers averred that prior to 1845 the fishermen of Boddam had been from time immemorial in use to beach their boats on the ground in question, and that their right to do so was expressly recognised by an Act of Parliament passed in that year for the improvement of the harbour of Boddam, and that the proprietor now refused to allow boats to be beached on the ground in question. They also averred that the ground claimed was waste or uncultivated land within the meaning of 29 Geo. II., cap. 23, sec. 2.*

They pleaded;—(1) The acts complained of being a violation of the rights possessed by the complainers at common law and enjoyed by them for immemorial time they are entitled to suspension and interdict as craved. (2) The complainers are entitled to be protected in the exercise of their right to beach their boats on the ground in question in respect of the provisions of the Act 8 and 9 Vict., c. xxv. (3) The complainers are

* "All and every person or persons employed in the said (British) fishery on the coasts of that part of Great Britain called Scotland, or on the said coasts of Orkney, Shetland, or any of the said islands, shall have and exercise the free use of all ports, harbours, shores and forelands in that part of Great Britain called Scotland, or in Orkney, Shetland, or any of the said islands, below the highest high-water mark, and for the space of a hundred yards, on any waste or uncultivated land beyond such mark, within the same, for landing their nets, casks, and other materials, utensils, and stores, and for erecting tents, huts, and stages, and for landing, pickling, curing, and drying, and re-loading their fish, without paying any foreland or other dues."

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entitled to be protected in the exercise of said right in terms of the Act 29 Geo. II., c. 23.

The respondent pleaded;—(1) That the complainers had set forth no title to insist in the suspension. (2) That the statements were irrelevant. (3) That the ground was his exclusive property.

A proof was led. It appeared that the fishermen of Boddam had for more than forty years occupied houses on the ground of the proprietor of Boddam, and paid him a yearly rent. At first they had no leases. In 1830, by agreement between the proprietor, and the fishermen, sixty in number, the fishermen obtained a lease of twenty-one years of "the houses and yards possessed by the said fishermen respectively, together with the privilege of fishing for white fish, as presently possessed by them; and also of the scalps within the flood-mark, for laying down their mussels and other bait, and also with the privileges of roads and accesses, and of the rocks for laying down and sunning their fish, as presently enjoyed by them." The rent was to be £1, 5s. for the first ten years, and £1, 7s. 6d. for the next eleven years.

In 1838, in consideration of an extension of the lease for seven years, and that a new harbour was about to be built by the proprietor, it was agreed that the rents should be raised 10s.

In 1839 the estate was purchased by the Earl of Aberdeen, whose successor sold it in 1865 to the respondent.

In 1845 Lord Aberdeen obtained an Act (8 and 9 Vict., c. xxv.) "for improving and maintaining the harbour or port of Boddam." The 7th section provided that it should be lawful for the Earl to demand certain duties from every vessel which should enter the harbour. Among these, "For all boats laid up at Boddam for the winter season, 5s."

It appeared that after the expiration of the fishermen's lease in 1858 they continued to pay a yearly rent of £1, 17s. 6d. till 1865, when Lord Aberdeen issued the following "conditions on which houses in the village of Boddam occupied by fishers are to be held, and dues for boats using the harbour, &c. Houses and boats as under, viz.:—Each house yearly, £1, 2s. 6d.; each herring boat fishing, 5s.; each do. beached, 5s.; each white fishing boat, 5s.; each boat for light dues, 2s. 6d."

After the respondent became proprietor his factors regularly collected 5s. from each of the fishermen, for which receipts were granted as "beaching dues." In 1874 the respondent asserted a right to exclude the fishermen from beaching their boats on the ground, except with his special permission.

The fishermen had always used the ground in question for beaching their boats, and there was no other equally convenient. The respondent deponed that the ground was useful for herring-curing and ship-building, and that he intended to excavate it in order to extend the harbour.

The Lord Ordinary, on 10th December 1874, refused the suspension.*

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* NOTE.—(After a narrative of the facts) . . . . "After the note was passed and the record was closed a proof was allowed to both parties, which has now been taken at considerable length.

"The ground coloured blue and green upon the plan lies to the west or north-west of the present harbour of Boddam—the part coloured blue being separated from that coloured green by a road from the bed of the harbour to the high road leading to the village. Both pieces of ground are above high-water mark, and consist of shingle, and are well adapted for beaching boats during the winter season. Indeed, no other ground at all adapted for the purpose exists in the neighbourhood so convenient—or, indeed, at all convenient—for beaching the boats belonging to the village; and it is proved that in the present exposed condition of the harbour it is necessary for the safety of the boats during the winter to draw them up on the beach above the reach of the tide.

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The complainers reclaimed, and argued;—They had a right by immemorial possession to the use of the ground for beaching the boats.[1] The

"It appears from the proof that until the extension of the harbour in 1849, after the passing of the Act 8 and 9 Victoria, cap. xxv. (to be afterwards noticed) the boats were comparatively few in number, and the ground coloured green appears, for at least thirty years prior to that date, to have been regularly used, and to have been amply sufficient, for beaching all the boats in winter. After the extension of the harbour, however, Boddam became a regular herring fishing station, and the number of boats increased, and, in addition to the ground coloured blue, the ground coloured green has ever since been more or less used as beaching ground by the fishermen of the village. Of late years it seems to have been fully occupied in this way in the interval between the close of one herring fishing season and the commencement of the next, *i.e.*, from the end of September till the following month of July. During the fishing season both pieces of ground are let by the proprietor as curing stations, and occasionally part of the blue ground is, by permission of the proprietor, used for shipbuilding.

"The ground in question is undoubtedly the property of the respondent, Mr Aiton, who is asserting and maintaining his right of property, and has intimated to the fishermen that without his permission, and without making such payment as shall be agreed upon, no person is to be allowed to beach a boat upon the said ground.

"The right of property being clearly in the respondent, the complainers must, in order to succeed in their present complaint, establish that they have by grant, prescription, or statute, acquired a right to use the ground irrespective of the respondent's permission.

"(1) The complainers do not aver that they or any of the fishermen of Boddam have obtained from the proprietor or his predecessors any written grant expressly entitling them to use the ground for beaching their boats, but they maintain that under their written titles to their houses as explained and defined by immemorial usage they have the right now claimed by them. The so-called titles are, however, merely minutes of agreement for leases between the fishermen and the successive proprietors of the estate. Only copies of these minutes are produced, but the parties have agreed to hold these as equivalent to the originals. It is necessary to explain in detail the nature of these agreements.

"The earliest agreement on which the complainers found is a minute entered into in 1830 between Robert Robertson, then the proprietor of the estate, and a large number of fishermen in the village, by which he agreed to grant to them leases of their respective houses for twenty-one years from Martinmas 1830, with the privilege of fishing for white fish, as then presently possessed by them, and also of the scalps within the flood-mark for laying down their mussels and other bait, and also with the privileges, and roads, and accesses, and of the rocks for laying down and sunning their fish as then enjoyed by them, for the annual payment of £1, 5s. per annum for the first ten years, and £1, 7s. 6d. for the last eleven years of the lease 'in name of rent or tack duty,' and in the event of the herring fishing being carried on at Boddam during the lease, the fishermen agreed to pay for each boat employed in the said fishery the one half the same rates of duties as might be payable at the time for the herring boats employed at Peterhead. The proprietor further reserved full power to use the harbour for loading and shipping all sorts of goods and merchandise during the lease,—to regulate and improve the old fishing village, and to lay off stances for building additional houses, as he should see proper, and also to build additional harbours at any places on the shore of Boddam he should think fit. At the end of the lease the roofs, doors, and windows of the houses were either to be paid for by the proprietor or removed by the fishermen. In 1832 regulations were issued by the proprietor to be observed by the fishermen who had been parties to the agreement, and these seem to have been acted upon by all concerned.

"At that time the harbour of Boddam appears to have been inconveniently

[1] Home v. Young, Dec. 18, 1846, 9 D. 286, 19 Scot. Jur. 109.

harbour Act of 1845, which gave the proprietor the right to levy dues from the fishermen, imposed upon him by implication the correlative obli- No. 90. Feb. 27, 1875. Stephen v. Aiton.

situated, and unsuited to the requirements of the district. The fishermen, however—who had previously been in use during the herring season to go to Peterhead and other fishing stations—became desirous that Boddam itself should become a herring fishing station, and should accommodate the boats, not only of the local fishermen, but of strangers, during the herring season, and should also be made available for larger vessels loading and unloading goods. To secure these results a new harbour was essential. A new agreement was accordingly, in 1838, entered into between the tenants of houses and Mrs Gordon (the daughter and successor of Mr Robertson), and her husband, setting forth, *inter alia*, the agreement of 1830, and that the fishermen of the village had applied to the proprietors to erect a new harbour 'in order to afford a greater protection to the fishing boats, and more particularly to furnish more extended accommodation for prosecuting the herring fishery at Boddam than at present exists, it being the intention of the fishermen to pursue the said fishery at Boddam rather than at distant stations as has heretofore been practised by them, and Mrs Gordon and her husband being desirous to encourage the establishment of a herring fishery at Boddam, and to erect such a pier or breakwater as, while it would afford the protection and accommodation asked for by the fishermen in the said village, and be sufficient to accommodate other fishermen and curers who may be induced to come to Boddam to fish for herrings during the fishing season, would also accommodate vessels for the purpose of loading and unloading cargoes therein, and for the other general purposes of a harbour, have agreed to extend the said present lease to the further period of seven years.' They also agreed to lay out a sum of money in the erection of the said pier on a site and according to a plan which had been communicated to and approved of by the fishermen, and both parties homologated the agreement of 1830 and the regulations of 1832, and became bound to extend the lease for seven years from and after Martinmas 1851. Each of the fishermen became bound to pay 10s. a-year of additional rent during the currency of the original lease, *i.e.*, to pay £1, 15s. for each of the first ten years of the original lease then unexpired, and £1, 17s. 6d. for each of the remaining eleven years of that lease, and £1, 17s. 6d. during the seven years' extension of the lease. It was also agreed that the fishermen should have right, 'during the currency of the said lease,' to use the said pier, or breakwater, and harbour, and beach enclosed thereby, as well as the old harbour of Boddam, for the herring fishing, as well as for the white fishing, as occasion might require, without any dues being chargeable for their herring boats, and other boats employed at the said fisheries of Boddam. But the proprietors were to have power to levy such rates as they might consider reasonable on all vessels and boats entering the harbour, not belonging *bona fide* to the fishermen resident in the said village of Boddam paying the rents hereinbefore mentioned. The proprietors reserved to themselves the full use of the harbour, power to make and alter rules and regulations for the government of the harbour, and with reference to the berthing of ships, vessels, and boats, and the full and absolute right of property in the harbour and shore, and in the rates and duties to be charged.

"In consequence of this agreement Mrs Gordon and her husband appear to have constructed a new pier, which still exists and forms part of the present harbour, and the rents stipulated which, as the foregoing narrative shews, included all necessary harbour accommodation, both for the herring and for the white fishing, continued to be paid to Mr and Mrs Gordon, and to the Earl of Aberdeen, who bought the property in 1839, down to the expiration of the extended lease in 1858, and for some years thereafter,—the rent during the last eighteen years being £1, 17s. 6d. It will be observed that the written title under which the fishermen thus held their houses and used the harbour was a mere title of tenancy which was to come to an end in 1858, and which, if continued after that date, was continued merely by tacit relocation, and could be terminated by the landlord at the expiration of any year. Even assuming,

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gation of giving the fishermen necessary accommodation; and the Act had been so interpreted and acted upon ever since. They contended further therefore, that the complainers could establish that for time immemorial they had beached their boats upon the ground in question they cannot merely by possession upon such a title be held to have acquired a permanent right to continue the occupation of the beach against the will of the proprietor.

"(2) The complainers, however, maintain that they have a servitude right to beach their boats there, on the principle which regulated the decision in the Eyemouth case (Home v. Young, 9 D. 286), viz., that as inhabitants of the village of Boddam they and their predecessors have by immemorial possession acquired right for the whole community to beach their boats upon the ground in question. This contention appears to me to be untenable. The principle of the Eyemouth case is not applicable to the present case at all. The village of Boddam is not a burgh of barony or a corporation of any kind. It consists merely of houses belonging to the proprietor of the estate on which they are built, and let by him to tenants. The occupancy, therefore, of these houses by the fishermen, without which they could never have had the alleged possession of the beach, having been merely temporary and under an express contract of lease with the proprietor, is very different from the title and possession founded on in the cases of Eyemouth and Dysart, and similar cases. In all of these it was held that where a burgh territory has been erected into a royal burgh or a burgh of barony, the burgh thus incorporated is capable of acquiring for the community, by and through the possession of individual burgesses and inhabitants, a right to use the territory for certain public purposes, although the feudal title thereto might still remain in the Crown or in the baron, and that the right of use so acquired may be enforced, not only by the community against encroachment by the baron or third parties, but by individual inhabitants against the magistrates of the burgh, in the event of their attempting to alienate the property, or to convert it to uses inconsistent with the enjoyment of the community. There is in the present case no corporation or community capable of acquiring such a right either directly or indirectly through the possession of the inhabitants. I am, therefore, of opinion that the first plea in law for the complainers, viz., that the acts complained of 'are a violation of the rights possessed by the complainers at common law, and enjoyed by them for immemorial time,' is not well founded. And if this view be sound it is unnecessary to decide whether the servitude claimed by the complainers is a servitude recognised by the law of Scotland, or whether the complainers are entitled to claim such a servitude on behalf of the general body of fishermen of the village of Boddam.

"(3) The complainers, however, maintain that they have right to beach their boats on the ground in question, in respect of the provisions of the Act 8 and 9 Vict., cap. xxv. They allege that by that statute 'the right of fishermen to beach their boats on the space specified in the preceding article was expressly recognised and provided for,' and also, 'that the spaces above referred to are within the limits of the harbour of Boddam, as defined by the Act.' The complainers are in error in saying that this alleged right of the fishermen is by the Act expressly recognised and provided for. No such right is referred to in the Act. The complainers' counsel, however, explained at the hearing that the following entry in the schedule of tonnage dues appended to the Act, viz.:—'III. For all boats laid up at Boddam for the winter, 5s.,' must be read with reference to the agreement of lease current at the date of the Act (1845), and to the usage then in force by which the boats were then in use and had from time immemorial been in use to be beached upon the ground coloured blue. And they contend that the proprietor (Lord Aberdeen) by obtaining the Act for the enlargement and improvement of the harbour, with power to levy the tonnage dues therein specified and particularly quoted, became bound to find ground for laying up boats in winter, that this obligation is now incumbent on the respondent as proprietor of the estate, and that the Act of Parliament thus distinctly recognises the right of the fishermen to beach their boats at or near the harbour on the ground immemorially used for that purpose, whether within the limits of the harbour or not. They

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that, comparing the plans of the harbour with the description in the harbour Act, the ground in question was within the limits of the harbour, and therefore open to the fishermen.

The respondent argued;—Whatever rights flowed from the Act were obviously common to the whole public, yet the complainers claimed a privilege, which they alleged was peculiar to the fishermen of Boddam. The public had a right of admission to the harbour. But the ground was not within the limits of the harbour. Fishermen could not claim any permanent right to use waste ground under the Act of Geo. II. If the proprietor wanted it for other purposes, as he did in this case for herring-curing and other purposes, it was no longer waste.[1]

In the agreements between the proprietors and the fishermen in 1830 and 1838, in which the privileges guaranteed to the latter were enumerated, nothing was said about beaching.

At advising,—

LORD DEAS.—From time immemorial the fishermen of Boddam have been in the habit of laying up their boats during the winter on the ground in dispute. It is

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also say that the respondent has for some years been exacting 5s. for each boat beached expressly as beaching dues under the Act, and that he has thus interpreted the Act in their favour, and that he is bound to supply the necessary accommodation. I do not think that this is the sound construction of the statute. Although the harbour in its present state may be unfit for the protection of boats laid up therein during the winter season, it appears from the map, plan, and sections of the proposed improvements lodged in the Sheriff-clerk's office at Aberdeen, with reference to the bill which ultimately was passed by the Legislature, that a much larger and more complete work was contemplated, involving the excavation of a large quantity of rock, the extension of the then existing pier, first in an easterly direction, and then at right angles thereto in a southerly direction, and the construction of a breakwater still further south to protect the proposed entrance to the new harbour. A large open space would thus have been provided within the harbour, and under the protection of the pier and breakwater, and it was apparently with reference to the harbour thus improved and extended that the dues for laying up boats at Boddam in winter were to be charged under the schedule. There seems to be no warrant whatever, either under the enacting clauses of the Act of Parliament, or under the schedule, for holding that any right on the part of the complainers to lay up their boats in winter on the respondent's lands above high-water mark is recognised by the Legislature, and the fact that the contemplated harbour has never been fully constructed will not confer upon them any such right. Nor can the erroneous description of his charge for beaching the boats, as being dues under the Act, introduced by the respondent into some of his more recent receipts granted to the fishermen, alter the true construction of the Act.

"It appears that in 1865 Lord Aberdeen shortly before the sale of the property, instead of charging the fishermen (whose leases had all expired in 1858), a slump rent of £1, 17s. 6d. for their houses, and for the use of the harbour and beaching, subdivided the charges as follows, viz. :—[2]

"Some of these are no doubt harbour dues, but neither the house rent, nor the lights, nor the charge for beaching, come under that category.

"(4) The complainers maintain, however, in the last place that the ground in question is in point of fact within the limits of the harbour as defined by the Act." [His Lordship then stated his opinion that the ground in question did not fall within the limits of the harbour as described in the Act of Parliament.]

"On the whole, it appears to me that the complainers have failed to establish any of the grounds on which their suspension is laid, and that the same must therefore be refused, with expenses."

[1] Hoyle v. M'Cunn, Dec. 2, 1858, 21 D. 96, 31 Scot. Jur. 63.

[2] *Supra*, p. 471.

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also admitted that there is no other ground there which is available for the purpose. But it is also clear that that use was fixed by arrangement from time to time with the proprietors, and it appears that up to the time when the Earl of Aberdeen parted with the property the proprietor dealt liberally with the fishermen.

The Earl of Aberdeen was desirous to make a harbour at Boddam on certain conditions, and obtained an Act of Parliament for the purpose in 1845. After the passing of the Act the custom of beaching the boats, gratuitously, was still continued down to about 1865. After the present proprietor purchased the property, in that year, a payment of 5s. a-year was levied for each boat. Subject to that payment, the custom of beaching the boats has continued down to the present time, and the question to be tried in this process of suspension and interdict is whether the fishermen can claim the privilege of beaching the boats as matter of right.

On 8th October 1874 the Lord Ordinary pronounced the following interlocutor :—"The Lord Ordinary having heard the agents for the parties, and having again considered the note of suspension, passes the note, and, in respect the respondent, who is now present with his agent, undertakes to give ground for safely beaching the boats at the sight of the harbour-master during the dependence of the present process, finds it unnecessary, *hoc statu*, to dispose of the question of interdict."

Now, it is clear that in 1845, when the harbour Act was passed, the fishermen were allowed the use of the ground in question for beaching their boats, and when the proprietor applied for the Act he must have been aware that the fishermen had a material interest in the provisions of the proposed Act. If the Act proposed had been distasteful to them, they would, no doubt, have appeared and opposed it. It was therefore the interest of the proprietor not to propose an Act which would be unsatisfactory to the fishermen. So the Act was obtained, and we find in section 7 the following provision :—"And be it enacted that it shall be lawful for the said Earl and his heirs and successors to demand and receive for every vessel which shall enter within the limits of the said harbour any sum not exceeding the several rates and duties on tonnage specified in the schedule A hereunto annexed."

That section, in its terms, refers to rates and duties on tonnage; but coming to schedule A, which is referred to, we find, in the first place, payments for vessels other than herring boats; and then we have the following duties :—

For herring boats :—

For all herring boats engaged at the fishery at Boddam, for the period of their fishing season, to be paid at the commencement of the fishery, and that in lieu of all tonnage duties payable for such herring boats, . £0 5 0

For all other boats under 25 tons coming into said harbour for any purpose whatever, ... 0 0 7

And all above 25 tons to be charged the same as coasting vessels.

For all boats laid up at Boddam for the winter season, . . 0 5 0

These payments, and particularly the payment of 5s. for each boat laid up for the winter, are in lieu of tonnage duties. The question is, whether, on a fair construction of the statute, it was not one of the conditions on which the proprietor was allowed to get the Act without opposition, that the fishermen should be allowed to lay up their boats at Boddam on payment of 5s. for each boat. I am disposed to read it so, and I do not think it could fairly be read otherwise. That this is the fair construction of the Act is very much confirmed by what

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followed upon it, for up to 1865 the boats were allowed to be laid up just as before, while the duty of 5s. was, during that period, dispensed with. That dispensation is not wonderful, considering the liberal way in which the then proprietor was in the habit of dealing with the fishermen. Farther, in 1865 Mr Aiton himself construes the Act in this way, that the fishermen are entitled to lay up their boats for a payment of 5s., and so he allowed them, till lately, to use the ground for that purpose, and exacted the 5s., and I do not see how there could be a clearer indication of what was his construction of the statute. The only thing not expressed in the schedule of the Act is the particular ground on which the boats are to be laid up, but they are to be laid up at Boddam, that is, somewhere on the estate of Boddam, and the reasonable inference is that they are to be laid up on or near the ground used for that purpose from time immemorial. If the particular ground had been specified in the Act, or if we were to hold that the provision in the Act applied specifically to the particular piece of ground, then the proprietor might not be entitled to use it for other purposes, such as a shipbuilding yard, however valuable for such purposes, which would be a great disadvantage to him. But I construe the words as meaning that the fishermen are to be allowed to lay up their boats on ground at Boddam convenient for that purpose, and so the proprietor may change the ground and give them another piece of ground instead. Nor is there anything to hinder him to make the harbour in such a way as to give them accommodation to lay up their boats within the harbour itself.

The deposition of Mr Aiton bears:—"I would not allow boats to be built there, as my intention is to excavate the ground and to increase the harbour inland, for two reasons,—because the rock dies away there, and because the further inland the harbour is made the quieter it is. The ground is convenient for shipbuilding purposes, and any shipbuilding which has taken place in my time has been on that ground. (Shewn No. 18)—The works delineated on that plan have not been all executed. . . . . Following upon the notice which I issued, four or five of the fishermen came to me. I had not made up my mind about the charge for beaching before they came. I gave them a note to Mr Barclay, the harbour-master, that they had arranged for their stances, and that he was to charge 7s. 6d. and point out the stances for them. I came to fix 7s. 6d. simply to take it out of the category of the 5s. that had been charged as harbour-dues. . . . . I was at a meeting before the Lord Ordinary in the Bill-Chamber on 8th October. At that date the whole of the boats had been beached, with the exception of those away for mussels, and I am not sure whether these had returned or not. The question between the fishermen and myself came to be whether they would pay 2s. 6d. more or not, and that question was raised solely in consequence of their 'appeal.' It struck me that if I allowed the 'appeal' to pass I should very likely be stultifying myself. Cross-examined.—I recognise no right on the part of the fishermen to beach their boats at Boddam. I am exceedingly anxious that they should do it, but I maintain my right to charge such rate as I think proper for the privilege. I do not think that I told them until after the interdict was served that I did not recognise their right of beaching. I am not aware whether my agent received a letter on the subject from Messrs Boyd. A protest was served upon me personally. I handed it over to my agent. I do not think I directed him to reply to Messrs Boyd. I am not aware that he wrote to Messrs Boyd. (Shewn letter of 16th September 1874)—I do not think that letter was written with my authority, but the views

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therein expressed are in accordance with my views on the subject. There is a statutory charge in the Act of Parliament of 5s. for laying up boats for the winter. I understand that to refer to boats laid up in the harbour. I am aware that boats could not with safety be laid up in the harbour, but had the works been carried out which are contemplated by the Act it would have been safe. At present the boats could only be beached where they are now beached, or on other ground belonging to myself or other people, of which there is plenty. . . . . I became proprietor in November 1865. So far as I am aware, the harbour works were in the same condition then in which they are now. (Q.) Has there been any proposal made to extend it? (A.) In 1870 I excavated space sufficient for twelve boats additional. (Q.) Has there been any proposal to execute the additional works as contemplated by the parliamentary plan? (A.) No, not yet."

Now, on the face of this deposition, the proprietor can hardly dispute that he must in some way or other provide ground for beaching the boats. No other place than that in dispute has yet been given, although he says he means to give it within the harbour. In that state of matters it is not necessary to go further. The proprietor must allow the fishermen to lay up their boats on the piece of ground in question until he provides other suitable accommodation. If that is a sound view it is of no moment whether or not the ground in dispute is within the limits of the harbour,—at least it is of no moment to the fishermen, although it may be an important question for the proprietor. I do not think, however, that it is necessary to decide that question just now, but I may say that I do not see how the defender's construction of the Act, as regards the bounds of the harbour, can be supported, for it does not bring within the harbour various objects mentioned in the Act as within it. But without deciding that question I think we have here enough to enable us substantially to sustain the complainers' claim.

LORD ARDMILLAN.—The complainers are fishermen in the village of Boddam. The respondent is proprietor of the estate of Boddam, including the village, and the harbour to which the fishermen resort. The former proprietor of Boddam, Mr Robertson, and afterwards Mrs Robertson or Gordon, wished to encourage the fishing and to make a fishing-station at Boddam, and in 1839 the Earl of Aberdeen purchased the estate and continued to encourage the fishermen, and entered into liberal and favourable agreements with them. In 1865 the respondent, Mr Aiton, purchased the estate from Lord Aberdeen. It is, in my opinion, instructed by the proof that for many years—I think for much more than forty years—the fishermen were in the habit of beaching their boats on the piece of ground near the harbour of Boddam which is now in dispute.

At the date of the respondent's purchase in 1865 that long customary possession and exercise of the privilege of beaching their boats existed, and it was known to the respondent. The terms or dues exigible for beaching boats were 5s. each boat. That had been arranged and acted on long before the respondent's purchase, and he, knowing the fact, and well aware of the terms, continued to claim and receive from the fishermen 5s. a-boat, and to give or permit those authorised by him to give receipts to the fishermen for "dues for beaching boats, 5s." After this had been continued for some years the present dispute unfortunately arose. The respondent now denies to the fishermen the privilege hitherto recognised. His contention is, that the fishermen have no right whatever to beach their boats at Boddam.

Now, it is beyond doubt that beaching of boats is necessary to the fishermen,

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who cannot carry on their business without it; that the piece of ground in question is convenient and suitable and well adapted for beaching boats, that it is the only suitable place accessible or available at Boddam, and that the boats of the fishermen, if not beached, but left in the stormy season floating in the harbour, would probably be knocked to pieces. In this state of matters, with long-continued possession, with long and unbroken custom and practice of beaching the boats, with a purchase by the respondent in the knowledge of the claim and of the exercise of the privilege, and with the recognition of it by the respondent after his purchase by claiming and receiving the previously agreed on dues for beaching, a notice was issued by the respondent forbidding the beaching of any boats on the lands of Boddam. Payment of the customary dues of 5s. a-boat has been offered, but refused. This is not a question of the amount of fees. The right to exclude the boats, unless a new bargain is made, is maintained by the respondent. He is undoubtedly the proprietor of the ground in question, and his claim to such a right must be met. The complainers must instruct a right to use his property for the purpose of beaching their boats.

I do not think that the Eyemouth case supports the complainers' argument. Boddam is not a burgh of barony, and no rights for the benefit of the inhabitants have been acquired by magistrates or corporation.

But when the estate was sold the privilege of beaching boats at 5s. a-boat was distinctly set forth, recognised, accepted, and acted on by the proprietor and by the fishermen. Even apart from the question raised in regard to the limits of the harbour, I think the right of the respondent to stop by peremptory notice the practice of beaching boats by the fishermen on the lands of Boddam near to the harbour may be seriously doubted.

As the result—I think the natural result—of the previous possession and of the desire of the proprietor and the fishermen to improve the fishings, the Act of Parliament of 1845, 8 and 9 Vict. c. xxv., declares the conditions on which the rights are conferred on the grantee, and, in my opinion, it also fixes the limits of the harbour to such an extent as to shew that the piece of ground in question cannot be held as excluded as not within the bounds of the description. But though I am disposed to take this view of the description of the harbour given in the statute which authorises the construction of the harbour and the exaction of rates and dues, I do not look on that question of construction as necessary for the decision of this case.

The safer and more satisfactory ground of decision is, in my opinion, that the granting leave to the proprietor to levy dues was on the condition that he should grant the privilege of "laying up boats at Boddam for the winter season" at 5s. a-boat. He could not demand the dues without recognising the privilege, and he did demand and receive the dues. It has been suggested that "laying up" for the winter does not mean "beaching." But there is no force in that suggestion. The word was well understood. The respondent himself, or his collector, gave receipts for these sums of 5s. a-year for "beaching dues." He also admits in his deposition that he understood the charge was for beaching, and that laying up in the harbour is not safe for the boats, and that the place now in dispute is the natural and only safe place. Yet he refuses it, except on his own terms, of which he is alone to be the judge.

I think the complainers are entitled to succeed.

LORD MURE.—I agree with your Lordships that it is not necessary for the dis-

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posal of the question here raised to decide whether the ground in dispute is within the limits of the harbour, and as at present advised I shall only say that I am not satisfied that the line contended for by the respondent can be adopted consistently with the provisions of the Act of 1845. I also concur as to the grounds upon which this question of interdict should be decided, because, having regard to the position of the parties at the date of the Act of 1845, and to the possession which the fishermen at Boddam then and have since had of this ground for beaching their boats, I think that the respondent is not entitled to prevent these fishermen from continuing so to use the ground on payment of 5s. of beaching dues as heretofore, unless he is prepared to provide them with some other convenient place.

Such private Acts are to be dealt with on the footing that there is a contract between the individual who obtains the Act and the community for whose benefit as well as that of the proprietor the Act must be supposed to have been passed. The natural presumption is that unless there was some such mutual arrangement, the local community would have opposed the passing of the Act. Now, that being the principle upon which the case must, as I apprehend, be dealt with, I find in the schedule to the Act a provision that "all boats laid up at Boddam for the winter season" are to pay 5s., and this payment must, I think, be held to have reference to the laying up of boats upon the ground in question, upon which they were then in use to be beached, and not to boats laid up in harbour, as contended for by the respondent, because it appears from the evidence, that after the Act was passed the boats were not laid up for the winter in the harbour, but upon the ground in dispute, while the property belonged to Lord Aberdeen, and down to the date of the present complaint. Mr Aiton in his evidence, which seems quite candid, says, "I saw the particulars of the purchase when I got the estate. I noticed that a charge of 5s. was made for beaching boats." When the respondent therefore acquired the estate he was in the knowledge of the payment in question, and immediately after his purchase in 1865 receipts are granted by his factors to the complainers for 5s. "as beaching dues." The receipts are in the same terms down to 1873, and in 1870, when the respondent's son was collector, it appears, from a notice which he issued in that year, that beaching meant being "laid up on the lands of Boddam," thereby negativing the present contention of the respondent, that the statutory dues referred to boats laid up in harbour. There was thus, as I conceive, a complete adoption by the respondent of the custom which had existed from time immemorial of the fishermen beaching their boats on this ground, and I agree with your Lordships that the fishermen, who have all along been using this ground for beaching their boats on payment of the statutory dues are entitled to interdict in the terms proposed.

The LORD PRESIDENT was absent.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Find that the complainers are entitled to the use of the ground in dispute for laying up or beaching their boats in the winter season on payment to the respondent of 5s. for each boat so laid up or beached, and this so long as the respondent shall not have provided other safe and suitable accommodation for that purpose, either within the limits of the works proposed to be executed or completed by him under the Act of Parliament 8 and 9 Victoria, chap-

ter XXV., or elsewhere at Boddam; and to this extent and effect sustain the first and second pleas in law for the complainers: Interdict, prohibit, and discharge, in terms of the prayer of the note of suspension and interdict as amended, and decern: Find the complainers entitled to expenses," &c.

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ALEXANDER MORISON, S.S.C.—JOHN AULD, W.S.—Agents.

No. 91.
Feb. 28, 1875.
M'Leod's Trustees v. M'Leod.

DANIEL REID AND OTHERS (M'Leod's Trustees), Pursuers.—*D.-F. Clark—M'Laren.*
GEORGE WILLIAM LESLIE M'LEOD, Defender.—*Fraser—Moncreiff.*

Succession—Mortis Causa Conveyance—Titles to Land Act, 1868, 31 *and* 32 *Vict. c.* 101, *sec.* 20.—*Held* that, under the 20th section of the Titles to Land Act, 1868, a *mortis causa* deed, in which the testator appointed trustees, empowered them to "realise all his heritable and moveable property," and directed them as to the disposal thereof, but which contained no words of direct conveyance or gift, was sufficient to carry the testator's heritable as well as his moveable estate.

Observed that the statute puts heritage precisely in the same position as moveables, when dealt with in a testamentary writing.

2D DIVISION. Lord Shand. R.

THE late Mr Gordon M'Leod of Lochbay died on 4th January 1873, leaving a deed of settlement, dated 27th October 1863, in the following terms:—"I, Gordon M'Leod of Lochbay, Isle of Skye, considering that it is expedient to provide for the proper upbringing and education of my children, in the event of my death, whilst they or any of them are under the age of twenty-one years, do hereby nominate, constitute, and appoint the following persons, viz., . . . to be my trustees and executors, and the curators or guardians of my said children . . . until they respectively arrive at the said age of twenty-one years; and my wish is that my said children shall, at all events, whilst under the age of sixteen years, be brought up by and under the personal superintendence of one or other or both of my said sisters, who shall, by the allowance from the interest of their own money by the late Mr Leslie of Dunlugas (their grandfather's) trustees, and from the interest of my means and estate, be paid a suitable sum of board and for school-fees and other expenses needful." After directing payment of certain legacies, the deed proceeded,—"I hereby empower my said trustees to realise all my heritable and moveable property when they see fit, and to invest the proceeds (after paying the said legacies, as well as my lawful debts, death-bed and funeral expenses), on good heritable bonds." . . . After directions for the distribution of some articles of jewellery, the deed proceeded,—"And I empower my said trustees and executors, and the acceptors or acceptor, survivors or survivor, a majority of them residing in Scotland being always a quorum, to intromit with my means and effects in every way competent to executors, guardians, tutors, or curators, and to sue for and discharge all debts or claims due to me. The whole residue of my estate will be divided equally amongst my said children on their attaining majority, or to their representatives."

The deed contained no words of direct conveyance to the trustees, either of the testator's heritable estate, or of his moveable estate.

In 1870 Mr M'Leod acquired the estate of Glencassley, in addition to lands of which he was proprietor at the date of his settlement.

The present action was raised on 4th September 1874 by Mr M'Leod's trustees against George William Leslie M'Leod, his only son and heir, concluding that the defender should be ordained to make up titles and convey the lands of Glencassley and others to the pursuers, or otherwise that the estate should be adjudged from him.

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A curator *ad litem* was appointed to the defender, who was in minority.

The question was, whether, under the 20th section of the Titles to Land Act, 1868,* Mr M'Leod's settlement was valid as a general disposition of his heritable estate, although it contained no words of conveyance or gift.

On the 24th December 1874 the Lord Ordinary ordained the defender to make up titles to the lands of Glencassley and others, and convey the same to the pursuers.†

* Sec. 20 of the Titles to Land Act, 1868, provides:—"From and after the commencement of this Act it shall be competent to any owner of lands to settle the succession to the same, in the event of his death, not only by conveyances *de præsenti*, according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings, and no testamentary or *mortis causa* deed or writing, purporting to convey or bequeath lands, which shall have been granted by any person alive at the commencement of this Act, or which shall be granted by any person after the commencement of this Act, shall be held to be invalid as a settlement of the lands to which such deed or writing applies, on the ground that the granter has not used, with reference to such lands, the word 'dispone' or other word or words importing a conveyance *de præsenti;* and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain, with reference to such lands, any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the grantor, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands, within the meaning of the 19th section hereof, by the grantor of such deed or writing, in favour of the grantee thereof, or of the legatee of such lands, and shall be held to create, and shall create in favour of such grantee or legatee, an obligation upon the successors of the grantor of such deed or writing to make up titles in their own persons to such lands, and to convey the same to such grantee or legatee."

The Conveyancing Act, 1874, came into operation on 1st October 1874; see sec. 27.

† "NOTE.—. . . . . It will be observed, on the one hand, that the deed contains no express words of conveyance, bequeathment, or gift of the truster's heritable estate, and the same observation may be made in regard to moveable property. On the other hand, it is quite clear that the granter regarded the deed as one which would give the trustees right to his heritable property. He appoints the parties named to be trustees and executors, to be guardians of his heir-at-law, as well as of his other children; provides that the interest of his means and estate shall be applied for the maintenance and education of his children; and in express terms empowers his trustees to realise all his heritable and moveable property, and after payment, out of the proceeds, of his debts, to invest the remainder in good heritable bonds; and he directs the residue of his estate to be divided equally amongst his children, obviously including his only son and heir. It was maintained for the defender that this last clause as to residue applied only to the moveable estate, in respect of the words which immediately preceded it, which have reference to personal estate; but I am clearly of opinion that it was not the intention of the truster to limit the meaning of the word 'estate,' as used in the residuary clause, to personal estate only. While the deed thus contains no transitive verb of conveyance, it appoints trustees, empowers these trustees to realise and administer the truster's heritable property, directs the interest of his means and estate to be applied for behoof of his whole children, and directs the residue of his estate, including, in the truster's view, his heritable estate, to be divided equally among his children. There being no objection to the deed as not duly tested, the pursuers maintain that these provisions are sufficient under the statute to confer on them a right to the heritable estate, and to impose on the heir-at-law an obligation to grant them a conveyance.

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The defender reclaimed, and argued;—The Titles to Land Act, 1868, dispensed with the use of technical words in the bequest of lands; but it was still necessary to use words expressive of gift or conveyance.[1]

"The first part of the section of the statute in question provides that, contrary to the established law previously existing, an owner of lands may settle the succession to the same, in the event of his death, not only by conveyances *de præsenti*, but by testamentary or *mortis causa* deeds or writings. It further provides that 'no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands . . . . shall be held to be invalid as a settlement of the lands to which such deed or writing applies, on the ground that the granter has not used, with reference to such lands, the word "dispone," or other word or words importing a conveyance *de præsenti*.' This second part of the clause renders the use of the technical word 'dispone' unnecessary, and may be held as practically enacting that no technical expression shall be required to make an effectual conveyance. The succeeding part of the clause, which from this point proceeds to enact affirmatively what will in future be sufficient to give right to heritable estate, is the most important in the present question, and is to be construed not merely with reference to the direct effect of the words there used, but also with reference to their effect reflectively in the interpretation of what has gone before. The provision is, that 'where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain with reference to such lands any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing . . . . shall be deemed and taken to be equivalent to a general disposition of such lands, within the meaning of the 19th section hereof.'

"This concluding part of the clause of the statute in providing what shall be taken to be sufficient to give a right to heritable estate is evidently intended to put the law in regard to the forms necessary for the conveyance of heritage as nearly as possible on the same footing as the law regulating the forms necessary for the conveyance of moveables. In so far as express words of conveyance, gift, or bequeathment were required for an effectual *mortis causa* conveyance of personal estate, they shall still be necessary in regard to heritage, but if words short of this will be sufficient to give right to moveables, the same rule shall be applied, in so far as the language used by the testator admits of it, in regard to heritage.

"The general evil which the provision of the statute was intended to remedy was the failure of the law in requiring the use of a particular form of language to give effect to the will of the testator in regard to his heritable estate, where his will was clearly expressed, and the statute should be construed so as to provide as far as possible a complete remedy for that evil. In regard to the disposal or destination of personal estate, any clear expression of the testator's will or intention, without reference to any particular form of expression contained in a document sufficiently tested, was and is sufficient and effectual.—Bell's Principles, section 1862. It appears to me, on a consideration of the terms of section 20th of the statute, that its intention was to make the law the same in regard to heritable estate. If that be the purpose of the statute, it should be so construed, if the language admit of it, as to produce that effect. I am of opinion that, giving to the language its fair meaning, that is its true effect; and that if a testamentary deed or writing, although it does not contain words of direct conveyance of heritable estate, yet contains a distinct expression of the granter's will and intention by the deed to carry right to heritage, the deed will be effectual for that purpose.

"Thus, if a testator nominates and appoints certain persons to be 'trustees to

[1] Pitcairn v. Pitcairn, Feb. 25, 1870, 8 Macph. 604, 42 Scot. Jur. 306; Edmond v. Edmond, Jan. 30, 1873, 11 Macph. 348, 45 Scot. Jur. 236; see opinions of the Lord President and Lord Deas in both cases.

No. 91. Counsel for the pursuers were not called upon.

Feb. 28, 1875. M'Leod's Trustees v. M'Leod.

LORD JUSTICE-CLERK.—This is a question of importance, but even if the decision in Hardy's Trustees [1] had not been pronounced, I should not have had much difficulty.

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administer and dispose of my whole heritable estate, subject to the following directions,' and then gives instructions as to the realisation and disposal of his whole property, or if a testator appoints certain persons to be trustees of my estates, heritable and moveable, and goes on to give powers of administration, and directions as to how his property, real and personal, is to be disposed of, as it is clear that, although the deed contains no transitive verb, or direct words of conveyance, it was the testator's will and intention, as expressed by himself, that his trustees should have right to his heritable property for the purposes of his deed, I think the deed would be effectual under the statute. It appears to me the same result would follow if a testator nominated and appointed 'A B, my son, to be heir of the whole heritable estate belonging to me at the time of my death, or to be heir to succeed to me in the whole heritable estate belonging to me at the time of my death,' whether subject to certain conditions or obligations or otherwise. Such language would be a clear expression of the testator's will and intention that his deed should give right to heritage, and would therefore, in my opinion, be equivalent to a general disposition under the statute. It is obvious that in the cases just supposed of a nomination of trustees, or trustees and executors of personal estate, or to administer personal estate, the deed would be sufficient to confer right to moveables; and as the words are sufficient to have that effect, I think it follows from the statute that where the same words plainly refer to lands they must receive the same effect in regard to heritage.

"In the course of the argument the defender pleaded that a simple nomination by a testator of an heir would not be equivalent in effect to a general disposition of heritable estate, and expressions to that effect in the opinion of the Lord President in the case of Edmond, to be immediately noticed, were founded on. The question has not yet occurred for decision, but it is quite obvious that a bare nomination of an heir, without any additional words shewing that the nomination is made expressly in order to give right to the testator's whole heritable estate, is in a very different position from such a nomination, if followed by words clearly expressive of the testator's will and intention to that effect. The nomination of an executor, or the nomination of an executor and universal legatory, have known and settled meanings in the law, as fully explained in the opinions of the learned Judges in the case of White v. Finlay, 15th November 1861, 24 D. 38. The bare nomination of an heir has no such settled meaning, for the term is sometimes used to designate the heir *in mobilibus*, and varies in its signification according to the relation it holds to other terms preceding and following it in the deed in which it occurs. There are thus reasons for holding that the provisions of the statute may not be sufficient to make the mere nomination of an heir equivalent in effect to a general disposition. The case is, however, different where the nomination is followed by words shewing the plain will and intention that the person nominated should succeed to heritable estate.

"It was maintained by the defender that the words 'such deed or writing,' introducing the third or concluding part of the clause to which I have specially referred, refers back to the previous words, 'deed or writing purporting to convey or bequeath lands,' and thus imports these words into that part of the clause which refers specially to what is sufficient to give right to moveable estate as a test for an effectual deed as to heritage. On this assumption it was maintained that as the deed must be one 'purporting to convey or bequeath lands,' an express word of conveyance or gift is necessary. I am disposed to think that, on a sound construction of the statute, the words referred to must be imported into the last clause, but I do not think that these words make it necessary that the deed should contain a transitive word of conveyance. To

[1] Hardy's Trustees, May 13, 1871, 9 Macph. 736, 43 Scot. Jur. 407.

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Two cases in the First Division were cited, which do not, I think, affect the present question. The first of these, Pitcairn v. Pitcairn, turned on whether the word "effects" could be construed to include lands. In the other case, Edmond v. Edmond, the question was whether a bequest of the testator's whole

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hold this, would, I think, practically take away the whole force of the provision of the Act, which refers to the form or terms of deeds sufficient to give a right to moveable property. But the words 'purporting to convey' cannot, I think, be construed as equivalent to meaning, or intending to use express words of conveyance, or anything more than meaning, or intending, or bearing to convey, and such meaning or intention may be clearly shewn without express words of conveyance. The word 'purport,' taken from the French *pour* (for) *porter* (to bear), does not appear to me to have the limited meaning for which the defender contends. In the view of the statute, which, for the reasons I have just stated, appears to me to be the sound one, I think it clearly follows that the deed in question gives a valid right to heritage under the statute. The powers expressly given to the trustees to deal with the heritable property, and to dispose of it as directed in the deed, plainly shew that it was the testator's will and intention to give right to heritage. The case cannot, I think, be distinguished from that which I have already considered, by way of illustration, in which the testator appoints trustees of his estate, heritable and moveable, or appoints trustees to administer and dispose of his estate, heritable and moveable, in terms of directions given.

"Three cases have occurred in which the Court have construed the provisions of section 20th of the statute. Two of these, which were decided by the First Division of the Court, viz., Pitcairn, 25th February 1870, 8 Macph. 604, 42 Scot. Jur. 306, and Edmond, 30th January 1873, 11 Macph. 348, 45 Scot. Jur. 236, raised only the question whether the words used by the testator covered and included heritable property. In the former of these cases the word 'effects,' and in the latter the words 'money, bonds, debets, bussness and other affects whatsoever,' were held to relate to moveable estate only. The Court were not called on to decide in either of these whether an express word of gift or conveyance was necessary. There are certain expressions in the opinions of the Lord President and Lord Deas which seem to indicate a different view of the statute from that which I have adopted. These expressions were, however, *obiter*, not necessary to the decision of the case, and the point now directly raised was not before the Court for decision. I have therefore not felt myself bound by the expressions referred to. If they should be regarded, as maintained by the defender, as expressing the opinion that words of direct gift or conveyance are required to give a right to heritable estate, although not required to give right to personal estate, I must with much deference say, that I do not concur in that view of the statute. It appears to me, however, that the expressions referred to do not go the length which the defender in argument maintained.

"The remaining case of Hardy's Trustees, 13th May 1871, 9 Macph. 736, 43 Scot. Jur. 407, which was decided by the Second Division of the Court, is, I think, a direct authority on the present question. The testator, in that case, had not used any direct words of conveyance, but merely appointed trustees with power to take charge of his farm, and means and moveables, and power to manage the farm, or give it up as they thought best for his family. This deed was held to give right to the lease which, as heritable property, could only be carried by a deed in such a form as would carry heritable estate. If, in addition to the farm, the testator had mentioned heritable estate generally, or particular lands belonging to him, the decision would obviously have been the same, and applied to such lands as were referred to.

"It may be noticed that in 'The Conveyancing (Scotland) Act, 1874,' (37 and 38 Victoria, cap. 94), which came into operation on the 1st of October last, it is provided by section 27 that it shall not be competent to object to the validity of a deed as a conveyance of heritage on the ground that it does not contain the word 'dispone,' provided it contains any other word or words im-

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property was affected by a subsequent enumeration. These did not raise, and could not decide, the present question.

It has been contended that, while the 20th section of the Titles to Land Act, 1868, dispensed with the necessity of technical words in a *mortis causa* conveyance of lands, words of direct conveyance are still necessary, and that mere intention to be gathered from the deed is not sufficient. Had the section ended with the words "No testamentary or *mortis causa* deed or writing . . . shall be held to be invalid as a settlement of the lands to which such deed or writing applies, on the ground that the granter has not used with reference to such lands the word 'dispone' or other word or words importing a conveyance *de presenti*," there might have been some ground for this contention. But the section goes on to say, "And where such deed or writing . . . shall contain, with reference to such lands, any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the grantor, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed, &c. shall be deemed and taken to be equivalent to a general disposition of such lands," &c. So that the only question is whether there are here words sufficient to confer upon the executor of the grantor the right to claim these lands had they been moveable property. There can be no doubt that, although there are here no words of direct conveyance, the words employed in regard to the *universitas* of the estate are sufficient to indicate the intention to convey the moveable estate to the trustees, and, if that be so, then it must also be sufficient to carry the heritage.

The case of Hardy is precisely in point; there were no words of conveyance used in the deed.

The case of Connal's Trustees v. Connal[1] is not altogether an authority, but it has some analogy to the present. The case related to an English deed, the question being whether the statute of 1868 applied to the authentication as well as to the words of the conveyance. Lord Cowan said,—"My notion of the clause is, that its purpose is to confer on the owner of heritable property the same power of intimating his will and intention as to the succession to his heritable estate as he had before with regard to his moveable estate."

I am therefore of opinion that we should adhere to the interlocutor of the Lord Ordinary. It is perhaps fortunate that we have had an opportunity of

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porting a conveyance, or transference, or present intention to convey or transfer. As the words of this statute are different from those of the Act 1868, by which the present question must be determined, it does not appear to me that this enactment can be referred to with advantage in the construction of the earlier Act. It was the purpose of that Act to deal with *mortis causa* deeds, as distinguished from *de præsenti* deeds of conveyance, intended at once to take effect. It appears to me, therefore, to be proper to determine the construction of that statute with reference to its own terms only, particularly as the language of the later Act is quite different. The later statute provides that words importing a present intention to convey or transfer (even in the absence of words importing conveyance or transference) shall be sufficient. The language of the earlier Act refers rather to the intention to confer a right than the intention to convey. There may or may not be a difference in the effect of the expressions, but I do not think it necessary or proper to enter on this question in the present case."

[1] Connal's Trustees v. Connal, March 16, 1872, 10 Macph. 627, 44 Scot. Jur. 352.

deciding that a bequest of heritage and a bequest of moveables are placed by the statute of 1868 in precisely the same position as regards formality of conveyance. No. 91. Feb. 28, 1875. M'Leod's Trustees v. M'Leod.

LORD NEAVES concurred.

LORD ORMIDALE.—I am of the same opinion. The statute in question is a remedial one; and the evil intended to be remedied was that while under the former law money or other moveable estate of the largest amount and value could be transferred by *mortis causa* testament or will, while the smallest and most insignificant heritable estate could not be so transferred. We are bound to give the statute a liberal interpretation. But there appears to be enough in the words of the statute to enable us to arrive at the same result as the Lord Ordinary. The 20th section of the statute is the important one. After providing that certain technicalities shall no longer be necessary for the transmission of heritable property, it goes on to provide,—"And where such deed or writing," &c. What Lord Cowan said in the case of Hardy's Trustees is in substance the words of the statute,—"The same words of conveyance will now carry heritage as will suffice to carry moveables."

Now, it is not disputed that we have in the testamentary writing before us quite enough to carry moveables. And if so, it necessarily follows, according to my view of the statute, that there is enough to carry heritage also. The appointment of trustees, and the express power given them to realise all the testator's heritable and moveable property, places his intention beyond all reasonable doubt.

LORD GIFFORD.—Had I thought that there was any real difference or conflict between the two Divisions I should have desired to consult the other Division before deciding this case. But I do not think there is any real conflict. The remarks of the Lord President and Lord Deas in Pitcairn v. Pitcairn and Edmond v. Edmond, which remarks were not necessary for the decision of these cases, do not go the length which was contended for by the defender and his curator *ad litem*, and I think there is nothing in these cases to prevent us from deciding the present one upon its own merits.

Now, I have really no difficulty at all upon the statute. The meaning of the statute is clearly brought out in the last part of the clause, which in substance enacts that the same words in a testamentary writing which would give a beneficial right to moveables shall, if the words are used in reference to heritable estate, and if the intention of the testator be clear, give also a beneficial right to such heritage. The words of the statute are perhaps not very happy, but keeping in view that it is a remedial statute, I think that its meaning is sufficiently clear. I think it puts heritage in precisely the same position as moveables when dealt with in a testamentary writing. Looking at the deed before us, I cannot doubt that the testator intended to convey his whole property, heritable as well as moveable, to his trustees for behoof of his children, and I think this intention must receive effect.

THE COURT adhered.

J. KNOX CRAWFORD, S.S.C.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

No. 92. REV. A. BROWNE (Minister of Beith), Petitioner.—*J. M. Duncan.*

Mar. 1, 1875. Browne.

TEIND COURT. Teind Clerk.

Glebe Lands (Scotland) Act, 1866, 29 *and* 30 *Vict., c.* 71—*Model Feu-Charter—Alterations rendered necessary by the Conveyancing and Land Transfer Act*, 1874, 37 *and* 38 *Vict., c.* 94.—In a petition for authority to feu the glebe of the parish of Beith the Court approved of the following alterations, rendered necessary by the Conveyancing and Land Transfer Act, 1874, on the model feu-charter approved of in the Penicuick case (5 Macph., p. 1145),—(1) In respect of sec. 23, the part of the reddendo clause commencing, "and paying a duplicate . . . . singular successors" (printed at 5 Macph. 1146, lines 1 to 5), was cancelled, and the following words substituted, "and paying a duplicate of the said annual feu-duty at the term of (*being nineteen years after the term from which the feu-duty begins to run*), and at the term of in each nineteenth year thereafter, with a fifth part more of penalty in case of failure, and interest of each of said payments at the foresaid rate from the time the same falls due during the non-payment;" and (2) in respect of sec. 22, the clause prohibiting subinfeudation, printed at 5 Macph. 1146, lines 7 to 17, was omitted.

THE COURT approved of these alterations.

M'EWEN & CARMENT, W.S., Agents.

No. 93. FRANCIS EDMOND AND ANOTHER (Stewart's Trustees), Pursuers and Real Raisers.
ARTHUR WELLESLEY KINNEAR (Stewart's Factor) AND OTHERS, Defenders. —*Begg.*
JAMES MILNE AND OTHERS, Defenders.—*Moncreiff.*

Mar. 2, 1875. Stewart's Trustees v. Stewart.

Presumption of Life.—In a multiplepoinding brought for the distribution of an intestate estate the interest of certain claimants depended on the question whether A B was alive in 1872. It appeared that in 1860, when A B was thirty-four years of age, he had gone to the United States and had joined the Federal Army, and had afterwards deserted, and that his friends had not heard from him since 1862. *Held* that neither his death nor his survivance could be presumed, and that the distribution of the portion of the fund in dispute must be postponed.

1ST DIVISION. Ld. Craighill. M.

THIS was a multiplepoinding raised by the trustees of Miss Marjory Stewart of Carnaveron, who died in 1872, regarding the residue of her moveable estate, which she had not disposed of by her will. She had three nephews, William, Charles, and Patrick Stewart. William and Charles predeceased the testator, leaving each two children. Patrick went to the United States in 1860 when thirty-four years of age, leaving a wife and three children in Aberdeen. He wrote affectionately to his wife till February 1861. Afterwards, the civil war having broken out, he enlisted in the Federal army, but deserted in March 1862, after which, notwithstanding full inquiry, nothing was heard of him.

If he predeceased Miss Stewart, the fund *in medio* fell to be divided equally among her seven grandnephews and grandnieces. On the other hand, if he survived Miss Stewart, the fund fell to be divided into three parts, one-third to the issue of each of the deceased brothers, and one-third to Patrick Stewart, if still alive, or to his three children, if he had died subsequently to Miss Stewart.

As in any view each of the two families of William and Charles Stewart

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had right to two-sevenths of the fund, the Lord Ordinary pronounced an interlocutor finding them entitled to four-sevenths of the fund, and, of consent, the factor *loco absentis* to Patrick Stewart to other two-sevenths.

The families of William and Charles Stewart each claimed one-third of the remaining seventh, on the footing that Patrick Stewart must be presumed to have been alive at the date of Miss Stewart's death. Patrick Stewart's children claimed that the trustees should retain the portion of the fund in dispute until the facts were ascertained, and pleaded—(1) It being uncertain whether the said Patrick Stewart survived or predeceased the testatrix, the fund *in medio* ought not to be divided on the footing of his having survived. (2) Assuming that the said Patrick Stewart predeceased the testatrix, the fund *in medio* would be divisible among the claimants and their cousins, as the next of kin *per capita*, and the claimants would be entitled to three-seventh parts of the fund. (3) In the circumstances, the claimants are entitled to have the difference between the said three-seventh parts of the fund and the third of the fund which falls to the said Patrick Stewart, in the event of his having survived, retained by the trustees or consigned in terms of the claim.

The Lord Ordinary pronounced this interlocutor:—"Finds (1) that the facts admitted, and the inferences legitimately deducible from these facts, neither create a presumption nor warrant the conclusion that the truster was predeceased by her nephew, Patrick Stewart, referred to in the record, or that the said Patrick Stewart is now dead: Finds (2) that it being uncertain whether the said Patrick Stewart is alive or dead, and if dead, when he died, the claimants, Mr W. D. Stewart and Mrs Mary Amelia Ann Stewart or Scawell, children of the now deceased William Farquharson Stewart, who was also a nephew of the truster, and the claimant, Mr A. W. Kinnear, factor *loco tutoris* to William Charles Stewart and Ann Helen Stewart, children of the deceased Charles Stewart, another nephew of the truster, all of whom claim upon the footing that the said Patrick Stewart survived the truster, are not entitled to obtain an immediate division of the undivided seventh of the fund *in medio*, the right to which is the subject of competition between the said claimants and the claimants George Stewart, William Stewart, and Euphemia Campbell Stewart, children of the said Patrick Stewart: Therefore sustains the first and third pleas in law for the claimants, the said George Stewart, William Stewart, and Euphemia Campbell Stewart, and appoints the cause to be enrolled, that parties may be heard as to the order to be pronounced for the interim preservation of the fund, reserving meantime all questions of expenses."*

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* "NOTE.—. . . . The facts of the case, so far as already known, are set forth in the minute of admissions, No. 35 of process, and though these furnish grounds for a suspicion, they, as the Lord Ordinary thinks, neither create a presumption nor afford warrant, in the meantime, for the conclusion that Patrick Stewart predeceased the truster. . . . .

"While the Lord Ordinary is not prepared to deal at present with the fund on the footing that Patrick Stewart is dead, he is as unprepared to deal with it on the footing that he survived the truster. A decision upon the rights of the competing claimants would, it is thought, be in the meantime premature. The cardinal fact is unascertained, and conjectures or even probabilities would not be grounds for judgment. The insufficiency of the facts to warrant the presumption of death is not a reason for adjudicating either upon his right or the rights of others, on the assumption that he is now in life, or was alive when the truster died. Who are the heirs *in mobilibus* of the truster is a question which cannot be answered by aid merely of conjecture, or even of probability. That is a fact which must be ascertained either by proof leading directly or pre-

No. 93. Mr Kinnear, factor for Charles Stewart's children, reclaimed.

Mar. 2, 1875. Stewart's Trustees v. Stewart.

LORD DEAS, LORD ARDMILLAN, and LORD MURE, were of opinion that the Lord Ordinary's interlocutor should be adhered to.

The LORD PRESIDENT was absent.

THE COURT adhered.

D. L. SHAND, W.S.—M'EWEN & CARMENT, W.S.—HAGART & BURN MURDOCH, W.S.—Agents.

No. 94. ROBERT PATERSON, Petitioner.—*D.-F. Clark—MacLean.*
GEORGE M'FARLANE and JAMES HUTTON (Liquidators of Hamilton and Paterson's Cask Company, Limited).—*Guthrie Smith—Harper.*

Mar. 2, 1875. Paterson v. M'Farlane, &c.

Partnership—Joint-Stock Company—Liability inter socios—Companies Act, 1862, 25 *and* 26 *Vict.*, *c.* 89, *secs.* 38 *and* 133, *sub-sec.* 9.—*Held*, in a voluntary winding up of a company limited by shares that after all debts had been paid shareholders who had taken fully paid-up shares in partial payment of a patent sold to the company were entitled to require the liquidators to make a call upon the holders of shares not fully paid up, so as to equalise the actual payments on these shares with the nominal payments of the holders of paid-up shares.

2D DIVISION. I.

THE Hamilton and Paterson's Patent Cask Company (Limited) was incorporated, under the Companies Acts, 1862 and 1867, in May 1872, for the purpose of working certain patents held by John Hamilton and Robert Paterson, and taking over the business carried on by them. By assignation, dated September 1872, the patentees transferred their patents to the company for £1000 in cash, and 4000 one pound shares in the company, to be held as fully paid up. Messrs Hamilton and Paterson further received a sum of above £2000 in cash for their plant and stock in trade.

In the prospectus of the company it was stated:—"The capital of the company has been fixed at £20,000, in 20,000 shares of £1 each. Of these the vendors are to take 4000, fully paid up, as above-mentioned, and the remaining 16,000 are to be issued to the public; and it is not expected that more than 10s. per share will require to be called up."

The articles of association provided:—"There shall be payable the sum of 5s. per share as deposit on application; and the further sum of 5s. per share on allotment. The remaining 10s. per share shall be called up as required."

The articles of association incorporated the regulations contained in Table A in the first schedule of the Companies Act, 1862, with certain exceptions not bearing upon the present question. Among the regulations so incorporated was No. 7, which provides,—"That the directors may, if they think fit, receive from any member willing to advance the

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sumptively to the conclusion; and the negative, that for anything yet known Patrick Stewart cannot be held to be dead, is not equivalent to evidence that he survived the truster. The fact on which the controversy turns is consequently still in doubt, and therefore the Lord Ordinary thinks that the case upon which parties have joined issue is not ripe for decision. These, at any rate, are the views of the Lord Ordinary, and hence the interlocutor which has been pronounced.

"The Lord Ordinary may add, that the decisions referred to at the debate will be found collected on pp. 56-62 of the first volume of Mr M'Laren's Treatise on Wills. These, it is thought, support the first of the Lord Ordinary's findings. The second, so far as the Lord Ordinary can see, is not inconsistent with any rule or principle which they can be held to establish."

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same, all, or any part, of the monies due upon the shares held by him beyond the sums actually called for; and upon the monies so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares, in respect of which such advance has been made, the company may pay interest, as the member paying such sum in advance and the directors agree upon." No. 72,—"The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares."

Besides the vendor's 4000 shares, 14,795 ordinary £1 shares were taken up by the public, upon which 10s. per share was paid.

The company was not successful, and in 1874 it was resolved that it should be wound up voluntarily, and Messrs M'Farlane and Hutton, C.A., were appointed liquidators.

The liquidators sold the stock in trade and patents for £1115. After paying the debts, they found that there would be a surplus of about £1300, out of which they announced, by circulars issued 22d January 1875, their intention of paying a dividend to the shareholders of 2s. 3d. per pound on the amount of capital subscribed by them.

Mr Robert Paterson, who then held 830 vendors' shares, presented a petition under the 138th section of the Companies Act, 1862, against the liquidators.*

The petitioner stated,—"In order to the equitable adjustment of the rights of the contributories of the company amongst themselves, the respondents, as liquidators, were bound so to act as to equalise the losses of the whole shareholders." In their proposal for dividing the surplus "the respondents ignore the fact that the petitioner and others hold fully paid-up shares, or, in other words, have contributed 20s. for each share; while the three-fifths of the shareholders have only contributed 10s. for each share held by them, notwithstanding that they were liable to pay 20s. per share. The consequence of this procedure is, that those shareholders, including the petitioner, who possess fully paid-up shares, lose 17s. 9d. on each share held by them, while the shareholders who have only paid 10s. per share only lose 8s. 10½d. per share." He, therefore, prayed for an order upon the liquidators to make a call of 10s. per share upon all the shareholders who had not paid more than 10s. per share, and thereafter to proceed in terms of the statute with the adjustment

* The material parts of the statute bearing upon the present question are as follows:—"Sec. 38.—In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories among themselves," [with certain qualifications not bearing upon the present question.]

Sec. 74.—"The term 'contributory' shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up."

Sec. 133.—"The following consequences shall ensue upon the voluntary winding up of a company. . . . (Sub-sec. 9) The liquidators may at any time after the passing of the resolution for winding up the company, and before they have ascertained the sufficiency of the assets of the company, call on all or any of the contributories for the time being settled on the list of contributories to the extent of their liability to pay all or any sums they deem necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves. (Sub-sec. 10) The liquidators shall pay the debts of the company, and adjust the rights of the contributories among themselves."

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of the rights of the contributories among themselves, and for interdict against the liquidators making a dividend as proposed in their circular.

Answers were lodged for the liquidators, in which they stated, *inter alia*;—"The directors of the company did not resolve to call up the 10s. unpaid on the ordinary shares, and it was never even proposed by or among them to call up the money. On the contrary, the intention was that the money should be called up only if required for the prosecution of the company's business. Neither did the petitioner propose to the directors that they should make a call, nor did he request the respondents as liquidators to do so. The first and only intimation made to the respondents on the subject was by service upon them of the present petition. In the circumstances the respondents considered that the division of the surplus as proposed by them was proper and equitable, and that a call should not be made by them upon the holders of the ordinary shares."

Argued for the petitioner;—There was no dispute that the company were bound by their agreement with the patentees. The patentees must be held to be precisely in the same situation as if they had paid 20s. per share.[1] The object of the winding up was not only to provide for the payment of the debts of the company, but also to equalise the losses of the contributories.[2] It was held in the case of the Anglesea Colliery Company[3] that a holder of paid-up shares was a contributory in the sense of sec. 133, sub-sec. 9, of the Companies Act, 1862. The circumstances of that case were identical with those of the present.

Argued for the respondents;—The question was whether the liquidators were bound to make a call upon the ordinary shares for the benefit of the vendors' shares. When a common law partnership was dissolved, the assets, after payment of debts, fell to be divided among the partners in proportion to their contributions to the stock of the partnership.[4] There was nothing in the Companies Act which placed a joint stock company on a different footing as to this. The holders of the vendors' shares were not, in any sense, creditors of the company for unpaid calls upon the ordinary shares. If the company had been prosperous, it must be presumed, in the absence of any stipulation to the contrary, that the vendors would have got double profits on their shares, in respect that their contribution was nominally 20s. per share as against 10s. per share paid by the other shareholders. It was, therefore, fair that the measure of profit should also be the measure of loss. The footing on which the public were induced to take shares in the concern was that the ordinary shareholders were not to be called upon to pay more than 10s. per share, unless it was necessary for the purpose of carrying on the business of the company or paying debts. There must be held to be an implied contract to this effect,[5] and to give effect to the petitioner's demand would be contrary to equity.

At advising,—

Lord Justice-Clerk.—The present is a petition at the instance of an alleged shareholder of a company called Hamilton and Paterson's Patent Cask Company (Limited), constituted under the Companies Acts of 1862 and 1867. It is directed against the liquidators of the company, and has for its object to have

[1] Pell, Nov. 30, 1869, L. R., 5 Chan. App. 11.

[2] Graham v. Western Bank, Feb. 23, 1866, 4 Macph. 484, 38 Scot. Jur. 216 (see opinion of Lord Justice-Clerk).

[3] Anglesea Colliery Co., May 7, 1866, L. R., 2 Eq. Cases, 379—*aff.* Aug. 4, 1866, L. R., 1 Chan. App. 555; see also Hodges' Distillery Co., Nov. 25, 1870, L. R., 6 Chan. App. 51.

[4] Bell's Principles, sec. 380.

[5] See the case of the Holyford Mining Co., Feb. 1, 1869, Irish Rep., 3 Eq. 208.

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the liquidators ordained to make a call on the other shareholders, in order to equalise the payments made by the petitioner in liquidation.

It is enough to state for the purposes of this advising that this company was started in the year 1872 for the purpose of working a patent, of which the petitioner was one of the patentees. The capital of the concern was £20,000, in £1 shares. The patentees transferred their patent to the company for £1000 in cash, and £4000 to be paid to that amount in shares of the company, which were to be held as paid up, and the remaining shares to the extent of £14,795 were taken up by the public, and on these, in terms of the articles of association, 10s. a-share was paid.

The concern proved a failure, and is in the course of liquidation under the statute. The debts have all been paid, the patent sold for £1115, including the casks, and there remains a sum of £1300, which the liquidators now propose to divide among the company in proportion to the sums advanced,—in other words, in the proportion of £4000 to £7397. On the other hand, it is maintained by the petitioner, that before any division of this surplus takes place the payments which have been made to account of capital which have been applied in payment of the debts must be equalised,—that is to say, that the patentees holding £4000 of the stock ought only to bear a proportion of the debt corresponding to their shares,—in other words, the proportion, not of £4000 to £7397, but the proportion of £4000 to £14,795, or about one-fourth instead of more than one-half of the whole amount.

If this be right, it is certainly a hard case for the shareholders, for while the patent was valued at £5000, it has, along with the plant and stock in trade, only produced £1115, while the only money that ever was paid into the concern was the £7397 paid by the other shareholders, who have thus in reality furnished seven-eighths of the funds out of which the debts were paid. But notwithstanding that I am very sensible of the hardship, I am of opinion that the petitioner must prevail; and I am confirmed in this opinion by the decisions in the Courts in England, which hardly leave us any alternative in this matter.

In the first place, we must assume that the patentees were holders of 4000 shares of the company, and that these shares were paid up, and it is not competent now to inquire what the value given for these shares was. That has been conclusively fixed in the cases of Pell and the Anglesea Colliery Company, which were quoted from the bar. The shareholders had full notice of the transaction in the memorandum of association, and no ground can be stated on which it can be impeached. I could have understood an argument directed to shew that the nature of the arrangement by which the company was constituted, and under which the resolution to wind up was arrived at, implied that the shareholders were not to be called on to contribute any more than 10s. per share unless the rest of the capital were required for the purposes of the business as a going concern. But that contention, and, indeed, the rest of the argument which was submitted to us, seems entirely excluded by the decision in the Anglesea Colliery Company, decided first by Lord Hatherley, when Vice-Chancellor, and confirmed by the Lords Justices on appeal. The facts of that case were precisely similar. The company under liquidation purchased the rights of another company, and paid for them in a certain amount of shares, the calls on which were to be held as paid up. The liquidators in that case made a call upon the other shareholders, who had only paid a certain proportion per share

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in order to equalise the payments, and it was held, first, that the holders of paid-up shares were contributories in the sense of the statute; secondly, that the liquidation included an equalising of the contributions among shareholders; thirdly, that there was no ground for impeaching the amount represented by the paid-up shares; and lastly, that the call had been properly made. The decision is so completely in point that it is not necessary that we should affirm all the propositions laid down by Lord Hatherley in giving his judgment. It is enough that it forms a precedent on the construction of this imperial statute which we cannot disregard. At the same time, my own opinion entirely coincides with the ground of that judgment. I cannot entertain the argument maintained in that case, and maintained here, that the holder of paid-up shares in such a concern is liable in a greater proportion of the company's debts than those who have only paid up half their calls. How the case might be adjusted as regards the division of profits while the company was a going concern is perhaps a different question. At common law, where the shares of a trading company are equal, a partner superadvancing his capital is credited with interest on the advance before the balance of profit and loss is struck; and there is a provision very much to the same effect in Table A of the first schedule annexed to the Act in question, No. 7 of which provides that "the directors may, if they think fit, receive from any member willing to advance the same all or any part of the monies due upon the shares held by him beyond the sums actually called for; and upon the monies so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest, as the member paying such sum in advance and the directors agree upon." In regard to dividends, again, it is provided by sec. 72, that "the directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares." These provisions seem entirely consistent with Lord Hatherley's views, and to negative the idea that a superadvance of capital of the nature in question creates a larger stake or interest in the concern itself, or a larger responsibility *inter socios*, than is enjoyed or incurred by the other shareholders. But contenting myself with indicating the impression which I have on the subject, I think it enough to say that the case of the Anglesea Colliery Company is precisely in point, and that I think we ought to follow that precedent.

Lord Neaves.—I have arrived at the same conclusion. The decisions which have been pronounced in England, particularly that in the case of the Anglesea Colliery Company, under a system which cannot be regarded as peculiar to that country, leaves us no alternative. Even if we did not concur in the grounds of these decisions it would be highly inconvenient to lay down a different rule in Scotland.

This is, no doubt, a case of hardship for the ordinary shareholders. But there is no allegation of fraud or concealment, or of anything which could set aside the agreement between the patentees and the company. We have a precedent in one of the cases cited, in which the Court refused to go behind such an agreement, and allow an inquiry into the value of the property transferred to the company in consideration of the nominally paid-up shares.

The respondents have attempted to spell out a guarantee that the ordinary shareholders should not be called upon to pay more than 10s. per share, except

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on special cause. But I see no guarantee that the legal rights of parties, whatever they might be, should not take effect. The holders of paid-up shares must not be left to bear more of the burden than the others; for we must hold the patentees to be in exactly the same position as if they had paid up their shares in cash. A holder of paid-up shares is not a contributory in the sense of having to pay anything more, but he is or may be a contributory in the sense that he has paid up more than the others, and so is entitled to have a call made upon them to equalise the contributions.

LORD ORMIDALE.—I have arrived at the same result without any difficulty.

There are two points which we require to keep in view. The first question is, how far a holder of fully paid-up shares is to be regarded as a contributory in the sense of the Companies Act? Proceeding upon the views which were given effect to in the Anglesea Colliery Company, in which the clauses of the statute bearing upon this matter were carefully analysed, I have no doubt that, for purposes of winding up, the petitioner is entitled to be dealt with as a contributory.

The next question is, how is the surplus, after paying all the debts of the concern, to be divided among the contributories, assuming that the petitioner is a contributory? I am satisfied of the soundness of the decision in the Anglesea Colliery Company, which, though not absolutely binding upon us as a precedent, is entitled to the greatest weight. Besides, it is evident that in the Irish case of the Holyford Mining Company the decision would have been the same had it not been for the special contract created by the articles of association in that case. We are not called upon to decide as to what might be the rights of the partners if the company were still a going concern, though it may be right to consider that matter to enable us the better to arrive at a conclusion in regard to the question before us. It is unnecessary for me to say whether all the observations reported to have fallen from the Vice-Chancellor, in deciding the Anglesea Colliery case, regarding the rights of the partners of a going concern, are correct or not. But where as here the company is no longer a going concern, but is being wound up, I am clearly of opinion, both upon principle and upon the authority of that case, that the holders of fully paid-up shares are entitled to have a call made upon the holders of shares not fully paid-up, so as to equalise the contributions upon all.

There may perhaps be room for the suggestion that the patentees in this case made so good a bargain at the establishment of the company as to render their claim to equalisation now less favourable than it might otherwise have been. But I doubt very much the relevancy of any such consideration; and, at any rate, it would not, I think, be safe to proceed upon it without having all the circumstances before us. The patents might have been worth all that was given for them, though from a change of circumstances the company has proved disastrous.

I concur in the interlocutor which your Lordship proposes. It is unnecessary to call up the whole of the partially paid-up shares. The amount of the call necessary to be made is a matter merely of calculation, and need not create any difficulty.

LORD GIFFORD.—I do not differ from the judgment proposed by your Lordships, but I have felt the case to be attended with very considerable difficulty in point of principle, and but for the decision in the case of the Anglesea Colliery Company, as confirmed by the case of the Holyford Mining Company, should

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have been inclined to think that the holders of shares in this Patent Cask Company, held as paid-up shares, have no claim for equalisation in a question *inter socios* against the holders of shares not fully paid up, but on which shares no farther call had been found necessary either for carrying on the business, or for paying the debts due by the company.

The ground of my difficulty is this: I think that in this joint-stock company it was part of the contract that the vendors should accept the price of their patents and of the goodwill sold, or part of said price, in fully paid-up shares—that is, in shares held to be fully paid up—while other partners were only to be required to pay up such calls as were necessary for carrying on the business. I think this is equivalent to a stipulation and special contract that while the capital was distributed in shares some shareholders, for certain good and sufficient reasons, were taken bound to pay up their shares in full, while other partners were not so bound. Now, in principle, I think the effect of such a stipulation is, that the partners who are specially taken bound to contribute a larger capital than the other partners must be held to undertake a larger risk, so that if the whole paid-up capital be lost the holders of fully paid-up shares shall have no claim for equalisation against the other shareholders, but each shareholder shall lose precisely the capital which he became bound to pay in. In short, while the profits are divisible rateably per share, the bargain is that some shareholders shall pay in more on each share than others. The special contract makes the case quite different from a voluntary advance by a partner, or an advance by consent of the directors under the statute.

Suppose the case of an ordinary trading company not incorporated, and not under the statutes at all,—suppose that in the contract of copartnery it is stipulated that each partner shall be equally interested in the profit and loss, but that one or more of the partners is taken bound for some reason or other to contribute twice as much capital as the others,—of course all the partners are liable *in solidum* for the debts of the company; but suppose the debts all paid, and at the winding up that the whole capital has simply been lost, I have the greatest possible doubts whether the partners who, by express contract, had contributed double capital, would have any claim for equalisation *inter socios*. They expressly agreed to run double risk, and they must accept all consequences.

I do not think the case is different in questions *inter socios* with a joint stock company under the statutes. The Legislature looks with considerable suspicion on shares simply "held as paid up," for the Act of 1867 provides that they must be actually paid up in cash, unless there be an agreement in writing prior to the issue of the shares, and duly registered, that the value is to be something else than cash.[1] I presume that this requisite exists in the present case, as I have heard nothing to the contrary. The agreement of the vendors to take their price, or part thereof, in paid-up shares was an inducement to the general public to contribute, and it is somewhat difficult to see in what the inducement consisted if not in this, that the vendors had such confidence in the company that they were willing to run a greater risk than the ordinary partners.

While, however, I cannot help entertaining these diffiulties, the point seems so nearly foreclosed by the cases cited that I defer to the opinions of your Lordships.

THIS interlocutor was pronounced:—"The Lords having resumed

[1] 30 and 31 Vict., c. 131, sec. 25.

consideration of the petition, with the answers thereto, ordain George M'Farlane and James Hutton, the liquidators, to make a call of as much per share upon all the shareholders of the company who have not paid more than 10s. per share as will, with the funds in the hands of the liquidators, be sufficient to equalise the contributions of the shareholders, and thereafter to proceed, in terms of the statute, with the adjustment of the rights of the contributories among themselves, and decern: Find the expenses of both parties payable out of the first of the funds, and remit to the Auditor to tax the same, and to report."

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JOHN WRIGHT, W.S.—MITCHELL & BAXTER, W.S.—Agents.

SIR HEW CRAWFURD POLLOK, Complainer.—*Sol.-Gen. Watson—Balfour—Mackintosh.*
GEORGE BURNS, Respondent.—*D.-F Clark—M'Laren.*

No. 95.
Mar. 3, 1875.
Pollok v. Burns.

Bill of Exchange—Suspension—Intoxication.—In a suspension of a charge upon a bill upon the ground that it had been obtained when the suspender was incapacitated through intoxication, *held* on consideration of a proof as to the suspender's state on the occasion, and his subsequent actings, and in respect that he had never challenged the bill, though frequently applied to for payment of it, until charged, six months after it had become due, that he was not entitled to suspend the charge.

2D DIVISION. Ld. Mackenzie. I.

ON 2d June 1874 George Burns, horse-dealer in Edinburgh, caused Sir Hew Crawfurd Pollok, of Pollok, to be charged on a bill for £110, bearing to have been granted by Sir Hew as acceptor to him. The bill was in the following terms:—

Edinr., 23th Nov. 1873.

£110 stg.

Seven days after date pay to me or my order the sum of one hundred and ten pounds stg., for value received, payable at the Bank of Scotland, Edinr.

Sir Hugh C. Pollock,
Pollock Castle,
Glasgow.

HEW CRAWFURD POLLOK.
GEO. BURNS.

3 Dec. 1873. R. M. A. P. x

Indorsed on Back.
Geo. Burns.

Sir Hew presented a note of suspension of the charge, assigning as his reasons for suspension (1) that the bill was not his writ, and (2) that, assuming the signature to be his, it was impetrated and obtained from him while he was in a state of intoxication, and was not conscious of what he was doing.

The note was passed on caution on 18th June, and thereafter a record was made up and a proof allowed to both parties.

The following narrative of the facts is taken from the averments of parties, and the evidence led.

On 13th June 1873 Sir Hew purchased from Burns a pair of cobs, for which he paid at the time, and on the same occasion a brown horse was taken by Sir Hew, as he said, on trial, with a view to an exchange for a mare of his, but, as Burns maintained, as a purchase on credit. The price of this horse was £110. The horse and the cobs were sent by

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Burns to Pollok Castle, and on 18th August Burns wrote to Sir Hew asking for a cheque for £100 to account of the horse's price. Instead of sending a cheque Sir Hew returned the horse to Burns, at whose stables it arrived on 20th August. Burns on that day wrote Sir Hew stating that as his stables were infected he had sent the horse to a livery stable, and also enclosing a bill at three months for £110 for Sir Hew's acceptance. No notice was taken of this letter or bill, but on 25th September Sir Hew wrote Burns saying he would be in Edinburgh in October.

On Monday, 24th November, Burns and a man Forrester of the Bay Horse Inn, Edinburgh, went to Pollok Castle, as they said, by invitation. On their arrival they were entertained by Sir Hew at luncheon, and afterwards he took them a drive in a dog-cart, he driving tandem. While out on this drive they stopped at various inns and houses and had whisky. After their return dinner was served, and, eventually, they left about seven o'clock. During the time they were at Pollok Castle they stated that the bill charged on was obtained from Sir Hew, but the evidence as to where and when it was signed was very conflicting.

Burns and Forrester differed as to the time and the place, while Sir Hew denied that he ever signed it, and his servants stated that though a bill was talked about they did not see it signed, and at no time were Sir Hew and his guests left alone for more than a minute or two. It appeared that Sir Hew was under a promise to his agent not to grant bills, and that on the morning after Burns's visit he told one of his servants that there had been an attempt made to get him to sign a bill, but that he had not done so.

The evidence as to Sir Hew's state on the occasion was also conflicting, Burns and Forrester saying that he was sober at the time they arrived, and at no time during their visit was he much affected by drink, while Sir Hew maintained that as he had been drinking heavily for some days before, and also on the morning of their arrival, he was quite stupified with drink, and was not in a fit state to understand what he was doing, or to attend to business. Sir Hew's servants corroborated his statements as to the previous drinking, but none of them could be brought to say that he was absolutely incapable at any time during Burns's stay. Sir Hew admitted that he recollected helping Burns on with his great-coat when he was going away. There was no clear evidence as to the amount of drink consumed, but it appeared Sir Hew drank spirits and water during and after dinner.

On his return to Edinburgh, Burns lodged the bill with the Bank of Scotland for collection, and intimation of this fact was duly made to Sir Hew by the cashier on 29th November. On 5th December the protesting of the bill was also intimated by the bank, and on 25th January 1874 Burns wrote threatening to put Sir Hew's name in the black list if he did not retire the bill. On 18th February Burns again wrote in similar terms, and on 11th March the secretary of the bank also wrote requesting payment of the bill, charges, and interest. Burns again wrote on 12th March, but Sir Hew took no notice of any of these communications. There was evidence, however, of his having been in Edinburgh about January or February 1874, and having met Burns in the Bay Horse Inn, where, according to Burns, Forrester, and another witness, the subject of the bill was introduced, and Sir Hew undertook to retire it, but subsequently explained that owing to the absence of his agent in London he had been unable to get money for the purpose. Sir Hew denied that he had ever admitted liability for the bill, or intended to pay it. When examined, however, he declined to swear that the signature was not his

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although he stated that he believed it not to be his. No evidence as to his handwriting and usual signature was adduced by him.

The Lord Ordinary, on 19th December 1874, pronounced this interlocutor:—"Sustains the reasons of suspension, suspends the letters and charge *simpliciter*, and decerns: Finds the respondent liable in expenses, of which allows an account to be given in," &c.*

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* "NOTE.—The present case is a suspension of a charge upon a bill for £110, dated 23d November 1873, drawn by the respondent, George Burns, horse-dealer in Edinburgh, upon and bearing to be accepted by the complainer, Sir Hew Crawfurd Pollok. The reasons of suspension are, that the complainer did not sign the bill, or, if he did sign it, that it was impetrated and obtained by the respondent, and a person of the name of Thomas Forrester, of the Bay Horse Inn, Rose Street, Edinburgh, while the complainer was intoxicated, and not only incapable of understanding or transacting business, but unconscious of what he was doing. Both of these reasons of suspension are denied by the respondent, who avers that on 13th June 1873 the complainer purchased from him a pair of cobs, for which he then paid £120; and that he also then purchased from him, on credit, at the same time, a brown horse, at the price of £110. The complainer, on the other hand, avers that while he purchased and paid for the two cobs, he did not purchase the brown horse, but received that horse on trial, with the view, if he found him to suit, of arranging an exchange of the horse for a mare which he had on grass at Pollok, and that for this purpose the respondent was to come to Pollok Castle. The complainer further avers that the brown horse was found unmanageable and unsuitable, and that on the respondent, instead of coming to Pollok Castle for the above-mentioned purpose, writing him on the 18th August 1873 demanding payment for the horse on the footing of the same having been sold to him, he returned it, as unsuitable, to the respondent's stable, where it was delivered on 21st August. The respondent denies these statements, and avers that he went with Thomas Forrester on 24th November 1873 to Pollok Castle, on the invitation of the complainer, given some time before the date of the bill; that he and Forrester lunched and dined there, and were driven by the complainer round the country between lunch and dinner, and that on referring to the debt the complainer, as it was not then convenient to pay in money, at once and unhesitatingly accepted the bill now charged on, after returning from the drive, and before dinner, which bill the respondent then and there wrote out for the complainer's acceptance.

"1. On the first question, whether the acceptance 'Hew Crawfurd Pollok' on the bill charged on is not the subscription of the complainer, the Lord Ordinary finds for the respondent. Although that subscription differs from, it is on the whole not unlike the complainer's usual subscription, and such difference may be accounted for by the state of intoxication in which the complainer undoubtedly was on the day when the bill is said to have been signed by him. The Lord Ordinary does not believe that the whole bill was written out and signed by the respondent as drawer, and that the complainer's subscription was obtained at the same time. The evidence of the complainer's witnesses, and also the appearance of the bill, exclude, in his opinion, the possibility of all that having been then done. Neither does he consider that the complainer's signature was obtained before dinner, as averred by the respondent. The only time that his signature could have been obtained to the bill stamp was, he thinks, when Jenner, the servant who waited during dinner, and was present after dinner, and until the respondent and Forrester left, went out of the room for a minute or so to get a jug of water, and that was some time after dinner, and very shortly before the respondent and Forrester left. The complainer will not swear that it is not his signature. He depones that he does not believe it to be his signature, but the grounds of that opinion are its difference from his ordinary signature, and that he has no recollection of signing or of having signed it; but that want of recollection may be accounted for by the extreme state of intoxica-

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LORD JUSTICE-CLERK.—This case is an unusual one, and we have heard it very fully discussed. It is also a very painful one, because no one can approve of

tion in which he was at the time above mentioned. Further, there is no witness adduced by him to prove that it is not his signature.

"2. But the Lord Ordinary is of opinion that the case stands in a different position as regards the question whether the bill was accepted by the complainer when he was so much intoxicated as to be wholly incapable of understanding business.

"In order to arrive at a proper conclusion upon this question it is necessary to attend to the proceedings of the 24th of November, and to the state in which the complainer was at various periods during these proceedings.

"It is proved that the complainer had been drinking to excess on the night previous to 24th November, and that on that day he had taken so much drink before the respondent and Forrester arrived at Pollok Castle as to be in a stupid state. It is also proved that he had more drink, including spirits, when these persons lunched with him; and that during the drive after lunch they called at a private house and at two public houses, at each of which he drank whisky. After lunch he was more intoxicated than he was when the respondent and Forrester arrived. On returning from the drive he was also more intoxicated than he was after lunch, and was so far gone that he had to be lifted from the dog-cart and helped upstairs by the witness James Kerr, then overseer at Pollok, being unable to go upstairs unassisted. James Kerr depones that he was then getting unable to walk, or to do anything, and that he was nearly dead drunk, and not in a fit state to do business. William Kerr, the coachman who accompanied the parties during the drive, depones that they were all pretty drunk when they returned to Pollok Castle, and that during the drive Forrester fell off the dog-cart from drink, and that the complainer nearly fell, and was only saved by catching hold of the dog-cart lamp, which he broke. The witness, David Jenner, states that the complainer and the respondent and Forrester had a good deal of drink during and after dinner—the complainer drinking whisky and water; that during dinner the complainer was not in a fit state to do business, and was not speaking coherently; that after dinner, when he left the room for a minute or so to get a jug of water, which was half an hour after dinner, the complainer was drunk, and that he is quite sure that the complainer was not then in a fit state to understand business. Thomas Yule, the gamekeeper, who was sent for by the complainer, and saw him during dinner, says that the complainer was then speaking incoherently; that he could not understand what the complainer meant; that the complainer did not know what he was doing, and was not in a fit state to transact business, and that he was exceedingly drunk. Immediately after the respondent and Forrester left the complainer went to bed, from which he was roused in about half an hour by James Kerr, to meet his agent, Mr Lamond, who had come from Edinburgh on business. James Kerr says that the complainer was not then sensible, and not fit to transact business. Mr Lamond also depones that the complainer was then very drunk, talking incoherently, and not understanding him or following what he said. The complainer also, who gave his evidence, the Lord Ordinary thought, in a straightforward way, depones that he was drunk, that he has no recollection whatever of signing the bill, and that he believes he did not sign it; and it is proved by James Kerr, the overseer, that on the following morning the complainer did not recollect of seeing Mr Lamond, and told him that the respondent and Forrester wanted to get a bill signed, and that he had not done it.

"Such being the state of the complainer on the 24th of November, the next question is as to the time on that day when his signature was obtained to the bill. The respondent depones that after lunch, and before starting for the drive, he asked the complainer to pay his account, and that the complainer answered—'I will settle with you when we come back from our drive.' The respondent also depones that there was nothing said about the horse. The

the actings on either side. Burns has charged Sir Hew Pollok on a bill of £110, said to have been granted by him at seven days' date on 23d November 1873. No. 95. Mar. 3, 1875. Pollok v. Burns.

complainer, on the other hand, depones that he was then asked several times to grant a bill for the price of the horse, and that he answered that he did not wish the horse, that it was returned, and that he would not pay for it. In this the complainer is corroborated by his friend John Pollok, who depones that both the respondent and Forrester pressed the complainer over and over again to sign a bill, which he refused to do, and that the complainer did not say that he would see about respondent's account after the drive. David Jenner also states that before they went out to drive he heard them disputing about the complainer's liability for the horse; that the respondent and Forrester wanted the complainer to sign a bill for the horse, and that the complainer refused, and said he would have nothing to do with the horse. Jenner also states that the complainer did not say he would settle or arrange with them after they came back from the drive. The respondent depones that after returning from the drive, and before dinner, the complainer at once agreed, on being asked, to sign the bill, requested it to be drawn at seven days after date, instead of three, four, or five months which he was offered, and that he then signed the bill at the dinner table before dinner, without making any objection to do so. Forrester states that the bill was signed before dinner in the room off the dining-room. But David Jenner depones that the respondent and Forrester asked the complainer several times to sign the bill both before, during, and after dinner, and that the complainer always refused to do so. Margaret M'Lellan, who was present during the first part of the dinner, states that the respondent asked the complainer several times to sign the bill, and that he always refused. David Jenner further states that it is his belief that Sir Hew did not sign a bill after dinner, and that he was in attendance during the whole time of dinner until the respondent and Forrester went away, but he admits that he was out of the room for a jug of water, that he only required to go down a few steps for it, and that he was not out of the room for more than a minute or so. The Lord Ordinary is of opinion that up to this time the bill had not been signed, and that it was during the time that Jenner was absent that the complainer's signature was obtained. The bill must, he thinks, have then been signed blank, because Jenner was not out of the room a sufficient time for the respondent to write out and address the bill, and subscribe it as drawer. The body of the bill must, the Lord Ordinary thinks, have been written out at a subsequent date, and it bears internal evidence that this was the case, the complainer's acceptance being written close to the body of the bill, and above the subscription of the drawer. The Lord Ordinary observes that the amount of the bill in figures at the top was originally written £100, and that it has been afterwards altered to £110, being the amount for which the bill has been written out. The respondent gave no explanation of this; and it may be noticed, that the respondent had some time previously sent for the complainer's acceptance a bill for £100, which the complainer did not accept, but sent to his agent.

"After careful consideration of the proof the Lord Ordinary is of opinion that the complainer's signature was obtained after dinner, and very shortly before the respondent and Forrester left Pollok Castle, when the complainer was in such a state of complete intoxication as not to know what he was doing, and to be incapable of understanding business.

"The respondent avers that the complainer purchased a brown horse from him on 13th June 1873, and that the bill was granted for the price of this horse. The Lord Ordinary is of opinion that this alleged purchase has not been proved. The respondent and Forrester depone that the horse was not taken on trial, but bought. But the complainer denies this, and depones that he only took the horse on trial, with a view, if the horse were found to suit, of his subsequent purchase, and the purchase at the same time by the respondent of the mare which the complainer then had on grass at Pollok Castle. The complainer's evidence on this point is corroborated by that of his coachman, William Kerr, and also by that of James Kerr, the overseer, who states that

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The bill is produced. It is anything but a distinct document. The sum apparently in the figures has been altered. It bears date on a Sunday, if I do not mistake, and the acceptor's name is placed above the drawer's. But, notwithstanding, it may be a good enough document of debt. The bill bears to have been granted in November 1873, but nothing was done for four or five months. Intimation had been sent by the Bank of Scotland, where the bill had been lodged for collection, to Sir Hew, but no notice was taken of the intimation, and at last the charge is given out of which this suspension has arisen. The defence is twofold. The first defence is that the bill is a forgery, and that the signature of Sir Hew Pollok, adhibited thereto, is not genuine. But that defence seems untenable. Sir Hew says he does not believe it to be his signature, but there is no other proof. No persons are adduced who knew Sir Hew's handwriting to say the subscription is not his, and we have specimens here, after considering which I am satisfied that it is the handwriting of Sir Hew Pollok, although not a favorable specimen. I think the case is reduced to the second plea, and that is, that if the bill was signed by Sir Hew Pollok, it was signed while he was in a state of incapacity through intoxication. Now, that is not a favourable plea under any circumstances. Where that plea is taken regarding a party deceased the circumstances are different, but where the person himself comes forward to say that he does not know what he signed because he was drunk, there are things very important which in the ordinary transactions of life should not be lost sight of. It is certain that some transaction took place between the parties regarding the horse in question. Sir Hew says the transaction was a barter for another horse. Burns alleges that it was not; that he did not even give a trial of the horse; and that it was an out-and-out sale. I do not think it is proved that it was an out-and-out sale. Neither do I think there is any proof of exchange. It appears to me that the proof comes to this:—That the horse was taken on trial with a view to sale, and I am also of opinion that having kept the horse for the period for which he did keep it, Sir Hew Pollok, if that question had been tried, could hardly have maintained with success that he had not bought the horse. It seems that a bill was sent to him for signature for the price of the horse somewhere in August, the sale having taken place in June. On receiving that bill he did not sign it, but sent the horse back. The

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when the horse and cobs arrived at Pollok Castle the complainer told him that he had bought the two cobs, but that the horse had come on trial. The sending by the respondent of the bill for £100 above mentioned is not favourable to his contention that the horse was sold to the complainer for £110. The Lord Ordinary attaches much greater importance to the evidence of these witnesses, and to the whole evidence for the complainer, than to the evidence for the respondent. He cannot believe the evidence of the respondent and Forrester with reference to the occurrences on 24th November, when the complainer's signature was obtained. The evidence given by the respondent differs from that given by Forrester on various important particulars, and their evidence is clearly disproved on essential points by the complainer's witnesses. The respondent and Forrester, and their acquaintance Henderson, who then frequented the Bay Horse Inn, gave evidence to the effect that the complainer stated to them in or about January 1874 that he had come to town to settle the bill, and that on going to his agent for the money he failed to get it, in consequence of his agent being out of town. The complainer denies having made any such statement, and the Lord Ordinary believes him. The respondent and his two witnesses do not agree in their account of what then took place; and, having regard to the position which the complainer had then taken with reference to the horse, he thinks it very improbable that he did what these witnesses state."

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horse was received by Burns, who repudiated it, and said that his own stables were in a state of infection, and he sent the horse to other stables to remain at livery at the expense of Sir Hew. He did nothing else until November of the same year. It may be doubted whether Burns was entitled to take that ground. He was entitled to say "That is your horse, and whether it is with me or with another I am not responsible." At the same time, he knew that Sir Hew repudiated that view, and I think he was hardly dealing very liberally with his employer when he allowed this long bill to run up without taking steps to have the difference settled. I must say that the means he took to recover payment of the price of the horse were very unwarrantable. He could not get Sir Hew to answer his applications, and so he and Forrester went to Pollok Castle. He says he was invited, but it does not appear that he was so. But they went and they dined with Sir Hew, and I think the evidence comes to this, that on various occasions during that day they tried to get Sir Hew to speak about business, and particularly to sign a bill for £110, they having brought a blank stamp with them. It is a remarkable circumstance that the question of sale or no sale was never brought up that day by the parties, although Burns knew that Sir Hew repudiated the sale. During dinner, they say, they got the signature to the bill. The view of Sir Hew represented to us as regards the transactions of that day is very nearly the truth. That he was exceedingly drunk at any time he could have signed the bill I think is proved, and also that Burns and Forrester did not act as they ought to have done when they knew that the matter was in controversy, in obtaining or even accepting the bill from Sir Hew under such circumstances. I cannot approve of their conduct, and I think it is anything but a creditable proceeding. If a challenge of the document had been made at once, as soon as Sir Hew found that he had signed it, I do not think the transaction could have been supported. But that is not the position in which the case stands, and it is in that respect that it raises a very important general principle. Where the plea of intoxication is taken by the person who says he was intoxicated and incapable when he did the act which he wishes to repudiate, he is bound, the moment his sober senses return and he knows what he has done, to take his ground at once. That is essential. In this case Sir Hew was made aware that a bill was lying at the Bank of Scotland for £110 in December. He was perfectly aware that the persons who visited him on the 24th wanted a bill for that amount. The case is that he refused over and over again to grant it. He stated to his servant next morning that he had been asked to sign a bill, and he said (I do not think very confidently) that he had not done it. That shews that he had recollection enough to know that it was in discussion, and then he got the intimation that a bill of his was lying at the bank. He could not have failed to know that the bill at the Bank of Scotland was the bill they wanted him to sign. He also had a discussion about the bill in Edinburgh a considerable time afterwards. He does not say that he ever indicated for a moment on that occasion that the bill was signed by him when he was drunk, and that was never said at all until this charge was given. It seems impossible to admit the plea of incapacity through intoxication, stated for the first time at an interval of six months. I think the actings of Sir Hew Pollok necessarily amount to a confession that the bill was obtained when he was not unconscious, that he knew what he was doing. Whether he was induced by the fumes of the wine he had taken to do a favourable act to Burns which he would not otherwise have done is not the question, and I assume, from the fact that he

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never stated the plea until the judicial demand was made, that he was conscious that he was not incapacitated, and that he knew what he had done. In that view I am constrained to differ from the Lord Ordinary's interlocutor. I am of opinion that the Lord Ordinary's interlocutor must be altered, and that we must hold this to be a good charge.

LORD NEAVES.—I concur. I think this a very important case, though not very pleasant or creditable to either party. An important branch of the law is involved.

The first reason set forth for the suspender is that the bill was not signed by him. But that cannot be sustained in the circumstances. No doubt a bill is not a probative instrument in the usual sense. But although it is privileged, the party who denies his signature to a bill must prove that the signature is not his. Here Sir Hew Pollok will not swear that this is not his signature. Apart from that, his whole conduct in regard to this bill is such as to foreclose him from making out this first point.

The next reason of suspension is, that the bill is invalid, in respect it was executed when Sir Hew was intoxicated. I confess that I am inclined to hold such a plea as that can only be sustained in a case of total intoxication and incapacity, and not of mere facility through drink. It is important that the drinking which is said to have led to this intoxication cannot be held to have been induced with a view to obtaining this bill when Sir Hew was drunk. This is not the case of a simpleton who was usually sober being seduced into drunkenness. Sir Hew would drink with any one, and needed no pressure or persuasion.

Any question of this nature is very delicate, but it becomes particularly so when it arises in the case of a man who comes into Court averring of himself that he is an habitual drunkard. Such a man can easily pretend to be worse than he is.

I am prepared to give a drunk man a certain protection, but not a privilege. He is not a ward of the law to be tenderly watched over, he is a delinquent and must be regarded as such, and must be watched carefully. His case in support of such a plea as we have here depends upon his own evidence, and no one can contradict him.

An habitual drunkard, whenever he comes to his lucid interval and recollects or is informed of what he has done during his drunkenness, ought at once to set matters right. It is his duty to see to the bottom of the matter as soon as he becomes *compos mentis*.

Sir Hew Pollok is in a wholly different case from an innocent person who is charged on a document which he knows nothing of. When a man who states that he is an habitual drunkard is told of a document of debt which he may have granted when he was drunk, he is bound to make inquiry and to find out the truth. The bill might have been endorsed for value any day, and the granter was bound to have put matters right if he meant to challenge it.

Sir Hew Pollok here admits that he spoke in the morning of having been pressed to sign a bill, so whenever he heard of the bill afterwards he was bound to set things right, and reveal his own fault in the matter. The bill was not mentioned to him once only; letter after letter was written to him, and the very date of the bill supplied. He came to Edinburgh too, but never moved in the matter of this bill.

For an habitual drunkard to plead privilege in respect of his own infirmity

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and vice is not to be countenanced. I think, therefore, that Sir Hew is precluded by his own actings from pleading his intoxication as a defence against a charge upon this bill, and I concur in the judgment proposed by your Lordship.

LORD ORMIDALE.—I have come to the same conclusion, and upon very much the same grounds.

The record discloses two reasons of suspension,—the only two which were relied upon,—1st, That the bill in question is not Sir Hew Pollok's writ, or, in other words, that it is a forgery; and, 2dly, That it was granted when the complainer was so intoxicated as not to know what he was doing. The Lord Ordinary ought, I think, to have in his interlocutor expressly repelled the first of these reasons, for in the note to his judgment he states his opinion, I think rightly, to the effect that the bill is the writ of the complainer and not a forgery.

The second reason of suspension is the important one, and it is undoubtedly attended with considerable difficulty, so much so, indeed, that were it not for the considerations immediately to be noticed by me, I would have been disinclined to differ in regard to it from the Lord Ordinary,—the more especially as he has had an opportunity, which I have not had, of seeing and hearing the witnesses. But I concur with your Lordships in thinking that in connection with the evidence touching Sir Hew Pollok's condition when he subscribed the bill his conduct and actings in relation to it afterwards are of the greatest importance. There are not only letters written to him by Burns, but also by Burns's bankers, with whom the bill had been deposited for collection. Sir Hew, however, although he duly received these letters, does not answer them to the effect of denying his liability. He did not write that he knew nothing of the bill and did not intend to pay it. On the contrary, he came to Edinburgh and saw Mr Burns. But when in Edinburgh he did not act like a man on whom a forgery had been committed or who had been swindled when drunk. On the contrary, his conduct, according to the only view I can take of the evidence, was that of a man who knew he was liable, and meant to satisfy his liability by paying the bill which he had granted. I do not think, therefore, that he can now be assoilzied on any of the grounds stated by him.

LORD GIFFORD.—After very full and anxious consideration I am inclined to concur in the proposed judgment in this important and painful case.

Two questions arise,—(1) Does this bill bear the signature of Sir Hew Pollok? He states upon record that it does not, and if it does not then it is a forgery, and there would be an end of the case. I am of opinion that the signature is genuine, and that it was adhibited at the meeting at Pollok Castle, about which we have so much evidence. It is quite clear that the bill was asked at that meeting. Indeed, Mr Burns and his friend went for the very purpose of procuring the bill from Sir Hew, and I think it is proved on the evidence that they did succeed in obtaining it, although the circumstances in which they did so are very far from being free from suspicion. Upon the parole evidence of the parties at Pollok Castle I think that the genuineness of the signature is proved. Even Sir Hew Pollok himself does not venture to deny absolutely that the signature may be his. Then the evidence as to handwriting is unsatisfactory. I do not attach much importance to the absence of the evidence of experts, for such evidence is more of the nature of argument than of proof. All they can do is merely to point out resemblances or differences in the disputed signature

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as compared with genuine specimens of handwriting. They afford valuable assistance to the Court, just as counsel do, but this Court must itself judge *comparatione literarum*. But then there is a total want of the testimony of persons conversant with Sir Hew's writing, and this kind of evidence is always valuable, and might easily have been had. For example, Sir Hew's bankers or agents, who are familiar with his handwriting, might have been expected to speak to the disputed signature. But not one of them is brought.

For myself, I have carefully compared this signature with genuine signatures in process, and I find it, at first glance, very dissimilar from them, so much so that he must be a very venturesome forger who would try to pass this as Sir Hew's signature. But on looking more closely resemblances appear all the more striking that they are not immediately obvious, and on the whole, I think the signature was really affixed by Sir Hew.

(2) The second and only other question is, whether this signature was obtained when Sir Hew was in a state of incapacity arising from intoxication. In such a case the whole circumstances must be looked at, the question really being a pure jury question.

I am inclined to agree with Lord Neaves that total incapacity from intoxication must be proved in order to support such a plea as this, not mere facility through drink. What is necessary is, that when the document was signed the granter was not capable of understanding what he was doing, and did not know the meaning or the nature of the obligation he incurred by his signature. Therefore we must inquire what was the nature of the debt which was claimed from Sir Hew, and what were the circumstances in which the bill for that alleged debt was taken. Keeping this in view, a great deal of the difficulty of the case is removed. The bill is for the price of a horse, and the question of Sir Hew's liability for that price was not a new subject with him at all. Frequent letters had been written to him on the subject, and Burns in one asks him for a cheque for the price. It is clear that Sir Hew knew to what that letter referred, because after getting it he returned the horse. But he also knew that the demand was insisted in notwithstanding the return of the horse. He knew that Mr Burns wanted payment for the horse, and when Mr Burns came to him in November Sir Hew quite understood what he wished him to do. The whole history of the proceedings of that day are important. Burns goes to Pollok Castle. He lunches and drinks, and dines and drinks with Sir Hew, and finally obtains this bill in the circumstances proved. Now, certainly, on the part of Burns, all this is not very creditable, but still, the question is, did Sir Hew know what he was about? Sir Hew was capable of driving, of acting as host sitting at table entertaining his guests, of asking for drink and pressing them to drink. It lies on Sir Hew to shew the total incapacity on which he founds, and I think he has failed in making it out.

But I go more on the fact that next morning he recollected that he had signed or might have signed a bill, and still he did nothing. Nor did he do anything even after the bank letter came stating that they held the bill for collection. He should then have repudiated it, and if he had done so this case might have had a very different aspect. Whenever the document was brought home to his consciousness he was bound to repudiate it at once, if he intended ever to challenge it.

There is to my mind a trace of sufficient recollection all through, and I therefore hold him barred from now challenging this bill. This is not the case of a

man taking advantage of another's intoxication to induce him to enter into a new bargain, nor is it a case of inducing a usually temperate man to drink with a view to deceiving him. No. 95. Mar. 3, 1875. Pollok v. Burns.

I therefore agree that this suspension should be refused.

THIS interlocutor was pronounced:—"Recall the interlocutor complained of: Repel the reasons of suspension: Find the letters and charge orderly proceeded, and decern," &c.

J. A. CAMPBELL & LAMOND, C.S.—MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—Agents.

FLETCHER NORTON MENZIES AND OTHERS, First Parties.—*D.-F. Clark—Thomson.*
MRS CATHERINE MENZIES OR MURRAY AND HUSBAND, Second Parties.—*Sol.-Gen. Watson—Darling.*
MRS EMILY NIEL MURRAY OR BAIRD AND OTHERS, Third Parties.—*Sol.-Gen. Watson—Darling.*

No. 96. Mar. 5, 1875. Menzies v. Murray.

Husband and Wife—Marriage-Contract Provision—Trust.—By antenuptial contract of marriage a wife conveyed all her property to trustees for payment of the revenue to the spouses in liferent, and of the fee to the children of the marriage, whom failing, to herself or any person nominated by her, whom failing, to her heirs, executors, and assignees, excluding the *jus mariti*. When the wife was sixty-five years of age, she, with consent of her husband and of the children of the marriage, all of whom had attained majority, and had offered to renounce their rights, called on the trustees to denude of the trust-estate in her favour. *Held* (1) that the trust-conveyance by the wife had been intended to secure her liferent as a provision in the event of her surviving her husband; and (2) that it was in its nature irrevocable by the wife, although not expressly declared to be so.

1ST DIVISION, with three consulted Judges. B.

BY antenuptial contract of marriage in 1845 between Captain J. H. Murray and Miss Catherine Menzies, Captain Murray, "in contemplation of the marriage" (which followed), "and in consideration of his liferent interest in the trust-conveyance," by Miss Menzies, "hereinafter written," conveyed to himself and Miss Menzies, in conjunct fee and liferent for her liferent use allenarly, and to the children of the marriage in fee, reserving to himself a power of division and a limited power of settlement in the event of his having children by a second marriage, all his property, *acquisita et acquirenda*, which liferent provision, partially restricted in the event of her contracting a second marriage, Miss Menzies accepted in full of all legal claims,—"For which causes, and on the other part," Miss Menzies conveyed to F. N. Menzies and others, as her trustees and executors, all her property then belonging to her, or which should belong to her at the time of her death, particularly a sum of £5000 contained in a bond to which she had right, for the following purposes:—First, For payment of the revenue to the spouses and the survivor of them, Captain Murray's liferent to be restricted to one-half in the event of his contracting a second marriage during the existence of a child of this marriage; "and secondly, for payment and transference of the fee of the whole of said trust-funds and effects generally and particularly before conveyed to the child or children of the said intended marriage, but always with and under the special reservations and declarations after-written; whom failing, to the said Catherine Menzies, for her own sole and individual use and behoof, or to and for the use and behoof of any person or persons to be nominated and appointed under and in virtue of any will or letter of instructions she

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may hereafter leave; whom failing, to her own nearest and lawful heirs, executors, and assignees whomsoever; hereby expressly excluding from said fee the *jus mariti* of the said Jack Henry Murray, her intended husband, and declaring that no part of said trust-funds and effects shall be subject to his administration or affectable by his debts or deeds."

The trustees were bound to invest the trust-funds as Miss Menzies might direct "without the consent or concurrence" of Captain Murray,—the investments always to be "made in conformity to and for the special trust-purposes above-written;" reserving to Miss Menzies the power of division, and a limited power of settlement, in the event of her having issue by a second marriage. It was provided that the provisions in favour of children should be in full satisfaction to them of all that they could claim by their parents' death. In 1847 the trust-funds were invested in the purchase of the house and lands of Croftinloan in Perthshire.

There were three children of the marriage, Mrs Baird, and two others.

The trustees (first parties), Captain and Mrs Murray (second parties), and the children (third parties), presented this special case.

They stated that Mrs Murray was sixty-five years of age, and that the children had all attained majority.

"Mrs Murray has made a requisition upon the parties of the first part, as acting trustees foresaid, to the effect that her son and youngest child, Jack George Murray, having come of age, the trustees should make over to her, the said Mrs Murray, the property of Croftinloan (which constitutes the whole trust-estate under their management), and bring the trust to an end on receiving a renunciation by the children of their whole rights under the said marriage-contract, and a discharge to the said trustees of all their actings and intromissions from Mrs Murray herself and her husband, and from her son and her daughters, with consent of the married daughter's husband, Mr Baird. The parties hereto of the third part concur in said requisition.

"It is maintained on the part of Mrs Murray and her husband and children that the right to the fee of the property has vested in the parties hereto of the third part, as the sole children of the marriage between Captain and Mrs Jack Henry Murray; that in respect of Mrs Murray's age there is no prospect of other children being born of the marriage; and that her children as fiars, and herself and her husband as liferenters of the property, are entitled to bring the trust to an end, and to call upon the trustees to denude of the trust-estate in manner above-mentioned.

"It is, on the other hand, maintained for the trustees, the parties of the first part, that they are not entitled to denude of the estate—at all events during the subsistence of the marriage; that it cannot be known until the dissolution of the marriage who the fiars of the property may be; and that the trust, in so far as Mrs Murray's life interests are concerned, was created for the purpose of protecting these interests during the subsistence of the marriage, and is to that extent irrevocable; and that they are not bound and are not entitled or in safety to convey the property to her during the subsistence of the marriage."

This question was submitted for the opinion and judgment of the Court,—"Whether the marriage-contract trustees, the parties hereto of the first part, are bound or entitled to denude of the trust-estate in favour of Mrs Murray, on the joint requisition of the whole parties hereto of the second and third part, and on obtaining a full discharge of all their trust actings and intromissions from these parties?"

Argued for the first parties;—The general rule that a trust may be brought to an end with the concurrence of all the parties interested suffered an exception in the case of a marriage-contract provision for a wife. In

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the case of Hope,[1] the only parties interested were the husband and wife, and there was no doubt that if they had been strangers to each other they could have terminated the trust. Although the money there came from the wife's father, while here it was her own, the principle was the same, that it was protected as being a provision for her, possibly during the marriage, certainly if she survive her husband.

In the case of Ramsay[2] the Court held that, in the circumstances, the money was not a proper marriage-contract provision, not that it was less protected because it belonged to the wife, and had not been settled by another person.

The case of Torry Anderson[3] was also *a fortiori* of the present. Although in this case there was not an express clause of irrevocability, the trust, being for the benefit not only of the wife but of her issue, was equivalent.

It was also maintained for the first parties that the fee of the trust-estate had not vested in the children, but the decision did not turn on that point.

Argued for the second and third parties;—As all parties interested, both liferenters and fiars, concurred in desiring it, the trustees were bound to denude.[4] In the case of Torry Anderson, the minority of the Judges held that the parties could not tie up their hands; and the majority in that case, and also the Judges in the case of Pringle, proceeded to a great extent on the clause barring revocation. In the case of Hope there was an onerous contract not only between the parties, but their parents also, and the latter, who were the settlers of the fund, were not parties to the release. The case of Ramsay was the converse. There the issue was whether the parents were the stipulating parties. It was unsuccessfully argued that they were.

The case was appointed to be argued before seven Judges.

At advising,—

LORD JUSTICE-CLERK.—The assumption on which the advising in this case proceeds is, as I understand, that the fee or beneficial interest of Mrs Murray's property, conveyed by the antenuptial contract of marriage, is now fully vested in the parties of the third part to this case, and is effectually represented by them. On that assumption the devolution over to Mrs Murray herself, under the destination in the settlement, has failed. The husband, Captain Murray, is entitled, along with his wife, to the liferent of his wife's property during the subsistence of the marriage, the survivor of the spouses being entitled to the liferent after its dissolution. The spouses and the children have agreed to terminate the trust as regards the wife's property, and to convey it to Mrs Murray in fee, and the question is whether, in these circumstances, the trustees are bound or entitled to comply with that request.

No question of revocation arises here in any proper sense of that term. The proposal to the trustees is founded on the assumption that all the interests created by the marriage-settlement have, by this agreement, been secured and provided for, either by actual fulfilment, or by valid and competent renunciation.

[1] Hope, March 15, 1870, 8 Macph. 699, 42 Scot. Jur. 362.

[2] Ramsay v. Ramsay, Nov. 24, 1871, 10 Macph. 120, 44 Scot. Jur. 77.

[3] Anderson v. Buchanan, June 2, 1837, 15 S. 1073, 9 Scot. Jur. 509; Pringle v. Anderson, July 3, 1868, 6 Macph. 982, 40 Scot. Jur. 563.

[4] Pretty v. Newbigging, March 2, 1854, 16 D. 667, 24 Scot. Jur. 338; Foulis v. Foulis, Feb. 3, 1857, 19 D. 362, 29 Scot. Jur. 166; Scheniman v. Wilson, June 25, 1828, 6 S. 1019.

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If that be so, the proposal is reasonable, and we must therefore consider, in the first place, whether there are any interests provided for by the marriage-contract which are not secured, and, secondly, if there be, whether these have been validly renounced and extinguished. If all the interests involved in the marriage-contract have been sufficiently satisfied, I should not think that there was any such sanctity in the machinery of a trust as to lead the Court to maintain it to the annoyance, and perhaps the injury, of those for whose benefit alone it was originally constituted. In one respect the present case differs from all the cases cited as precedents. In most former cases the children of the marriage had failed, and the trust only subsisted as regarded the fee for the heirs or disponees of the wife. In this case, on the assumption I have already mentioned, the main purpose of the marriage-contract has been fulfilled, and the heirs of the marriage, being of age to act, are vested in the beneficial interest provided for them, and now propose to dispose of it. The husband's life interest in the proceeds of the property is secured by the contract itself, and nothing remains which can be said to be unsatisfied but the wife's contingent liferent in the event of her survivance of her husband. She has now arrived at the age of sixty-five, and in mere money value the amount involved cannot be considerable. There has been no offer or undertaking, however, to provide for it, and we must now determine whether that interest was intended to be secured by the marriage-contract, and, if so, whether, during the subsistence of the marriage, the wife can validly discharge it.

This is a question of very considerable importance. It is true that the amount, if valued by an actuary, might be inconsiderable. But the right and interest arise precisely in the circumstances in which such a provision comes to be of the greatest value. In ordinary cases a provision to the wife in liferent and the children of the marriage in fee can never be anything but a right of liferent while the hope of children remains. It is only in cases in which that hope is past that such a question as this can arise; but a provision which secures to the wife in her declining years the benefit of a competency cannot be regarded as a trivial matter, however short may be the period for which, according to the calculations of an actuary, she is likely to enjoy it.

The first question, therefore, is, whether, under this marriage-contract, the limitation of the wife's right to a liferent was simply a restriction for the benefit of the heirs of the marriage, or whether the interposed trust was intended to preserve the fee of the property from which the liferent was drawn, against any inducements that might arise during the marriage to part with it. This is a question to be solved on the construction of the marriage-settlement itself, and on the intention of the parties to it as expressed in that instrument. The mere fact of the provisions being contained in an antenuptial contract is not necessarily conclusive of this matter. In the authorities referred to instances were quoted in both directions. In the cases, for instance, of Torry Anderson and of Pringle, the clause which was contained in the marriage-settlements, which were the subject of construction in both cases, by which the intending spouses mutually contracted not to revoke, was held by the Court not so much to bar revocation as to indicate the intention of the contracting parties to provide for the protection of the wife. On the other hand, in the recent case of Ramsay's Trustees, in the First Division, it was held, on the terms of that deed, and I assume rightly held, that in so far as regarded the part of the property to which the judgment applied, the trust was one for administration only,—that

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the property was entirely under the control of the wife, and was not intended to form part of the matrimonial settlement.

In considering to which of these two classes the present provision belongs I have found no ground for thinking that it was intended for restriction merely, and not for protection. The circumstances of the present case, of course, were not within the contemplation of the parties when the contract was executed; but it is difficult to say that when a wife is secured in the contingent liferent of property worth no more than £8000 (or that amount in money), it was intended to leave her exposed to the hazard of the whole being spent by her husband during the marriage. The contingency was one against which it was plainly prudent to provide, and, in my opinion, the contract did provide against it.

The second branch of the inquiry is that which has most importance and interest. It is whether, assuming that it was intended by this contract to protect the wife's contingent interest, it is now in her power, there being no interests involved but her own, to renounce that right to the effect of extinguishing the trust, and acquiring the absolute right to her own property. The demand is certainly made in the most favourable circumstances in which it could have come to be considered, and possibly it might be greatly for the advantage of the wife and the family that the arrangement should be made. Nor am I at all insensible to the great authority which has been adduced in support of the affirmative of the proposition. The case of Torry Anderson was very keenly contested, but notwithstanding the fact that it may possibly be shewn by an analysis of the opinions that a majority of the Judges in that case mainly rested their decision on the clause prohibiting revocation, I am of opinion, after careful study of it, that the judgment did involve a general principle, to which I think in this case still greater breadth and firmness ought to be given. I am of opinion that, *stante matrimonio*, a wife has no power to alienate or diminish the rights secured to her by such a trust under an antenuptial contract of marriage, unless such power is conferred by the contract itself. I assume that the interests are intended to be protected by the contract, and that the machinery provided is sufficient for the purpose. But if they are, I think that during the marriage the wife has no control over them. The case of Pringle was a very strong illustration of this principle, and a very hard one, for there there was no hope of children, yet the wife could not use any portion of the fee of her own property to liberate her husband from inconvenient claims. It is true that there was in that contract also a clause by which the spouses undertook not to revoke. But Lord Cowan's very clear opinion shews that he looked upon the case of Torry Anderson as establishing the general principle to which, I think, we ought now to give effect,—that rights intended to be secured to a wife by her antenuptial marriage-contract, and vested in trust for that purpose, cannot be abandoned or renounced by her while the marriage subsists. What she may do on the dissolution of the marriage is an entirely different matter. She is then a free agent. But the element which rules while the marriage subsists is, that she is not considered a free agent in matters in which her husband has, or may have, an adverse interest.

No doubt this rule may operate hardly in many cases, but in its general operation I believe it is the soundest and most salutary we can adopt. It would be hard to say that the relations of a bride, who brings her husband a considerable fortune, should have no power by any instrument a conveyancer could frame to place her means of future subsistence beyond the reach of matrimonial impor-

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tunity. By deciding the reverse I believe we shall solve this important question in the way most consonant with sound principle and social expediency.

LORD DEAS.—I am of opinion that, by the law of Scotland, provision may be made in favour of the wife, in an antenuptial contract of marriage, which cannot be evacuated during the marriage. More particularly, I am of opinion that it is competent thereby to provide to the wife, in the event of her being the survivor, either in the way of liferent or annuity, and either out of the husband's estate or out of her own estate, or out of the estate of some friend or relative who becomes a party to the contract, a life income of the benefit of which it shall not be in her power to deprive herself by any gratuitous deed, although consented to by her husband, executed during the subsistence of the marriage. If this be so, it follows that she will be equally disabled from gratuitously discharging the fund or estate which is burdened with that income, or the trust by which her right to it is protected and secured, as from discharging her eventual right to the income itself.

I do not think it is material from whose means or estate the income flows, provided only it is clearly a marriage-contract provision, the eventual right to which vests absolutely in the wife so soon as the contract is signed and the marriage celebrated. If the provision be made or reserved from the wife's own estate, that appears to me to be rather *a fortiori* than otherwise in favour of its indefeasibility, because the object and effect of the law is not to lay a restraint on the wife to her prejudice, but to throw around her a protection for her benefit, and it would be very anomalous if that protection did not extend to what came from herself. Being thus of the nature of a protection against marital influence on the one hand and self-sacrifice on the other, it extends no further and lasts no longer than is necessary for the accomplishment of its purpose. Accordingly, the subsistence of the marriage does not incapacitate the wife from disposing of the fee, if it belongs to her, of the liferented fund by *mortis causa* deed, nor does the origin and nature of the provision prevent her, after the marriage has been dissolved by the predecease of the husband, from dealing, either onerously or gratuitously, with the income at her pleasure.

If the marriage-contract declares the provision to be irrevocable that may certainly afford a clear indication that when entering into the contract the parties meant it to be a proper marriage-contract provision. But if, from the nature of the provision itself, it be clearly a marriage-contract provision, I do not think a declaration of irrevocability necessary. The marriage is irrevocable, and that which is so vital to the contract as the wife's means of livelihood after she has no longer the husband to provide for her, must necessarily be assumed to be in like manner irrevocable, if nothing appears to the contrary.

Nor could a clause of irrevocability prevent the parties from altering or evacuating the provision or the stipulated security for the provision, unless the law itself interposed for the protection of the wife. The only formidable plea in favour of the power to alter or evacuate,—and it is undoubtedly a plea requiring great consideration,—is that, where you have all parties interested concurring, they may do what they like with the fund. But if that were a good plea, it would be equally applicable where there was a clause of irrevocability as where there was not. An express clause of irrevocability could no more stand in the way than a clearly implied irrevocability. The triumphant observation in either case would be who can hinder them?

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It is the law which interposes equally in both cases by a wise and equitable protection, not unknown in other relations of society,—as, for instance, in the case of persons under age, weak and facile individuals, persons who have voluntarily interdicted themselves, and so on,—and this upon a principle which, in order to prevent gross wrong and injustice, it is peculiarly necessary to apply to stipulations made by or on behalf of a lady when about to surrender her liberty, and to some extent her will,—to merge her wishes and her interests in those of her husband,—to change her very character, and to be, in short, no longer mistress of herself in the sense in which she was so when these stipulations were made.

It may be fairly conceded that, as a general rule, all parties interested may do what they like with their own, and that this principle of protection to the wife by antenuptial contract is exceptional, just as the principle of protection to other parties in circumstances such as I have alluded to is exceptional. It may further be conceded that there may be stipulations in a marriage-contract in favour of a wife which are not properly marriage-contract provisions, and consequently do not fall within this principle of protection. A wife is, certainly, not deprived of all power of dealing, either gratuitously or onerously, with her separate means and estate, in favour of her husband, as well as in favour of other parties, by the mere fact of her means and estate being placed under trust by an antenuptial contract. For instance, the whole fortune of the wife may have been placed under trust simply with a view to the probability of there being issue of the marriage, but if there shall be no issue the wife may dispose of her fortune at her pleasure. In such a case, if there be no exclusion of the *jus mariti*, and the trust subsists for administration merely, I see nothing to prevent the wife, with the husband's consent, from *de præsenti* revoking or evacuating the trust. It is just from the fact that the wife's disqualification to deal with her separate rights and estate is not universal that the delicacy of such questions as the present arises. Hence also the inexpediency of any attempt to define the limits of this protection, or to specify the particular circumstances in which it will or will not be applicable.

The present is a case to which I think the protection very clearly applicable. By antenuptial contract, dated in January 1845, the husband, Captain Murray, in contemplation of the marriage which followed, and in consideration of the liferent interest thereinafter conferred on him in his wife's estate, conveyed to himself and her, in conjunct fee and liferent, for her liferent use allenarly, and to the child or children of the marriage in fee, subject to certain reservations and powers which need not be here noticed, the whole means and estate then belonging to or which should belong to him at his death.

On the other hand, the wife conveyed to her brothers Sir Robert Menzies (who has resigned the trust), and Fletcher Norton Menzies, Esq. and to Patrick Keir, Esq., who are parties to this case, and the survivors and survivor of them, as her trustees and executors, for the ends and purposes therein specified, the whole means and estate then belonging or which should belong to her at her death, and particularly a sum of £5000 to which she is stated to have had right in terms of an obligation granted by certain parties to her father and mother (the precise nature of which is not explained in the case, and does not seem to require to be so for the purposes of the question now alone to be decided), as also her claims under a bond of provision executed by her father in July 1823, which claims are stated in the case to have made up the trust-funds, including the £5000, to £8953, as in the year 1857. The first purpose of this trust is declared to be for payment of the annual rent or revenue arising therefrom to the husband

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It may be fairly conceded that, as a general rule, all parties interested may do what they like with their own, and that this principle of protection to the wife by antenuptial contract is exceptional, just as the principle of protection to other parties in circumstances such as I have alluded to is exceptional. It may further be conceded that there may be stipulations in a marriage-contract in favour of a wife which are not properly marriage-contract provisions, and consequently do not fall within this principle of protection. A wife is, certainly, not deprived of all power of dealing, either gratuitously or onerously, with her separate means and estate, in favour of her husband, as well as in favour of other parties, by the mere fact of her means and estate being placed under trust by an antenuptial contract. For instance, the whole fortune of the wife may have been placed under trust simply with a view to the probability of there being issue of the marriage, but if there shall be no issue the wife may dispose of her fortune at her pleasure. In such a case, if there be no exclusion of the *jus mariti*, and the trust subsists for administration merely, I see nothing to prevent the wife, with the husband's consent, from *de præsenti* revoking or evacuating the trust. It is just from the fact that the wife's disqualification to deal with her separate rights and estate is not universal that the delicacy of such questions as the present arises. Hence also the inexpediency of any attempt to define the limits of this protection, or to specify the particular circumstances in which it will or will not be applicable.

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and wife and survivor of them, subject to a certain eventual restriction of the husband's liferent, which it is likewise unnecessary to notice. The second purpose of the trust is for ultimate payment and transference to the children of the fee, whom failing, to the wife or her *mortis causa* nominees, "whom failing," so the deed proceeds, "to her own nearest and lawful heirs, executors, and assignees whomsoever, hereby expressly excluding from said fee the *jus mariti* of the said Henry Jack Murray, her intended husband, and declaring that no part of said trust-funds and effects shall be subject to his administration or affectable by his debts or deeds." The contract contains a clause to the effect that action and execution, if necessary, should pass upon it in favour of the wife, at the instance of any one of the trustees. The only further stipulation contained in the contract which it is necessary to notice is a stipulation that the trustees should be bound, when required by the wife, and without the consent of the husband, to call up the trust-funds and lay them out in the purchase of lands, or in such other way and manner as she might direct, either during the marriage or after its dissolution, "declaring always that the reinvestments by the said trustees shall be made in conformity to and for the special trust-purposes above written." In accordance with this stipulation the trust-funds, amounting, as already mentioned, to £8953, were, upon the wife's requisition, invested in 1857 in the purchase of the house and lands of Croftinloan in Perthshire, and that investment has not hitherto been disturbed.

It is stated in the case that Mrs Murray is now sixty-five years of age, that the only children of the marriage are two daughters and a son, who have all attained majority, that Mrs Murray has made a requisition on the trustees to make over to her the property of Croftinloan, which constitutes the whole trust-estate, "and bring the trust to an end on receiving a renunciation by the children of their whole rights under the said contract of marriage, and a discharge to the said trustees of all their actings and intromissions from herself and her husband, and from her son and her daughters, with consent of the married daughter's husband, Mr Baird." These parties all concur in the requisition. But the trustees decline to comply with that requisition on two grounds, either of which, if sustained, is sufficient,—1st, That Mrs Murray cannot competently divest herself of the protection of her eventual liferent interest stipulated by the marriage-contract; and 2d, that the beneficial fee of the capital liferented does not vest under the contract till Mrs Murray's death, or, at all events, not till the dissolution of the marriage, so that the necessary consent of the fiars to what is now proposed cannot be obtained.

The second of these objections is, to a great extent, special, as all questions of vesting generally are; and if that had been the only question in the case I think it probable that we should not have called in the aid of your Lordships, without consulting upon it further than we thought it necessary to do. I have formed no opinion upon that second objection, because assuming, for the sake of argument, but for the sake of argument alone, that it might have been got over, I am of opinion that, applying to the case in hand the law I have stated in the outset, the first objection is of itself fatal to the demand now made.

It may be that none of the cases in the books are quite the same with this case. But they are important, nevertheless, as affirming the principle of protection to the wife for her marriage-contract provisions, as a principle not unknown to our law, leaving only a question as to the applicability of that principle to the case before us.

The case first in date which falls to be noticed—although by no means the most apposite—is that of Torry Anderson, 2d June 1837 (15 S. 1073). There was in that case an exclusion somewhat unusual, and certainly invidious, of the husband from all right and interest, not merely in the fee, but in the annual income and administration of the wife's extensive heritable estates during the subsistence of the marriage, and of his courtesy in the event of his survivance. It is perhaps not surprising that some of the Judges should have thought the light afforded by the clause of irrevocability necessary to shew that the parties really intended such invidious stipulations to be irrevocable. But however that may be, the judgment in the case is important as recognising the existence in our law of the principle of protection in favour of a wife for her marriage-contract provisions, although leaving, as I have said, a question under what circumstances that principle falls to be applied. If there had been no such principle the protection could not have been given, whether with or without the clause of irrevocability. An unmarried woman could undoubtedly have revoked a trust-deed which she had declared to be irrevocable, and the effect of the judgment therefore necessarily was to displace the able arguments of the minority, who disputed the existence of any such principle.

The principle was again affirmed—at the distance of thirty years—by an unanimous judgment of the Second Division in the case of Pringle v. Anderson, 3d July 1868 (6 Macph. 982). Here, again, the estates of the wife were large, and there was a similar invidious exclusion of the husband from all pecuniary and administrative rights and interests in these estates during the subsistence of the marriage. True, there was the same declaration of irrevocability. But, of course, the remark applicable to the one case is equally applicable to the other,—that the judgment affirms the existence, in the law of Scotland, of a principle of protection peculiar to the case of a wife for her marriage-contract provisions, although I admit that neither of these two judgments can be said to affirm that the principle will extend to provisions which are not expressly declared irrevocable.

The next case, however—that of Hope v. Hope, 15th March 1870 (8 Macph. 699)—does decide that the element of an express clause of irrevocability is not essential to the application of the principle of protection, although undoubtedly a different element was involved in that case which does not occur here, namely, that the husband's father became jointly and severally bound with him for the wife's eventual annuity, in security of which the trust conveyance was afterwards granted, which the spouses were found not entitled to evacuate. But the clear import of the case of Hope is that irrevocability may be inferred where there is no express clause of irrevocability; and if in that case it was inferred from the nature of the provision, coupled with the joint and several obligation of the husband's father, it would be a narrow distinction to hold that the absence of that joint and several obligation would have been fatal to the inference that the provision was intended to be irrevocable.

As regards the case of Ramsay, 24th November 1871, (10 Macph. 120), I shall only say that I do not regard the judgment of the majority (from which I dissented), as intended to interfere with the principle of protection applicable to a wife's marriage-contract provisions. The Lord President, without whom there would not have been a majority, construed the contract as importing that the £5000 (which was not sought to be interfered with) was a marriage-contract provision,—that the other sums were intended to be placed at the wife's disposal

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absolutely, "both during the subsistence of the marriage and after its dissolution," that the interposition of the parents in the contract was intended to make the wife's position in this respect more clear and satisfactory, and that the fee of the £5000 being provided to the children and the eventual liferent of one-half of the balance to the husband, sufficiently accounted "for the constitution of the trust, without resorting to the speculation that it was constituted to make the exclusion of the *jus mariti* effectual." On these grounds his Lordship came to the conclusion that as the £5000 remained secured to the children, and the husband had renounced his liferent of the balance, the wife might dispose of the other funds at her pleasure. His Lordship, however, added,—"But in coming to this conclusion, I desire to say that I do not think that this is any precedent for holding that a lady who has marriage-contract provisions settled on her under antenuptial contract has power to renounce or give them away, because I do not look upon the trust-settlement of the residue of Mrs Ramsay's property, in this case, as part of the marriage-contract provisions at all."

If I could have construed the contract in the case of Ramsay as his Lordship did I should probably have come to the same conclusion. But it appeared to me—for reasons I need not resume—that the construction of the contract was all the other way; and, in particular, that the terms in which the parents became parties to the contract and dealt with the large sums practically at their disposal was favourable to the inference that the amount was intended to form a marriage-contract provision, or, as I see I expressed it in my opinion, "that the object was to preserve this sum as a provision for the lady in case of her surviving her husband." The material observation to be made on the case of Ramsay, therefore, is that nothing adverse to the doctrine now proposed to be affirmed can be held to have been there decided.

I observe one passage in my opinion in that case which, to prevent misconception, it may be as well to explain. In saying that had the contract been simply between the spouses themselves I should have been disposed to come to the same conclusion with their Lordships, I was following up what I had just said—that a destination, failing issue of the marriage, to the heirs, or heirs and assignees, of the lady, was in effect no destination at all, and could not have restrained her free action, although occurring in a contract which created a trust. I did not however mean to say that if in such a contract there was an exclusion of the *jus mariti* the trust could be revoked at the will of the spouses. My opinion upon that point was and is the other way.

Having thus three well considered cases—Torry Anderson, Pringle, and Hope—decided at intervals during the last forty years, each of which, whatever may be said of it otherwise, affirmed that the principle of protection to a wife for her marriage-contract provisions is not unknown to our law, it would, I think, be very unfortunate if any doubt could now be supposed to rest upon the existence and soundness of that principle. It appears to me that it is founded in nature—that the admirable subjugation of the will of the one sex to the pleasure of the other for the mutual benefit of both calls for it in return on the ground of humanity; and that, if not already universally received, it can only be a question of time its being recognised, in some form or other, and with whatever modifications, in the law and practice of every civilised country.

In the present case the income reserved by the wife for her eventual widowhood is what, to a person in her position, must be regarded as the very moderate income to be derived from a capital under £9000, the husband being entitled

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to the enjoyment of that income during the marriage. It is proposed to revoke and withdraw the trust constituted for securing to her that eventual income. I think it must be conceded that, if the principle of protection to a wife for her marriage-contract provisions is to receive effect at all, it must be given effect to in such a case as this; and I am therefore of opinion that the question put to us must be answered in the negative.

LORD NEAVES.—I concur with the opinions which have been delivered. The question is, whether it is in the power of the Court, on the consent of all parties interested, to dispense with the clause of a marriage-contract, the effect of which is to place beyond the reach of interference by herself or any other person a certain portion of the wife's fortune reserved for her liferent use. I am willing to assume that every obstacle to the consideration of this question, in a pure form, is out of the way, although we have never yet decided that there is any limit of age after which the possibility of the birth of children may be left out of account.

I think if we were to decide this question in favour of the demand made, the effect might be to imperil generally the security of such provisions. The proposal of these beneficiaries is, in my opinion, not competent, but is forbidden by the law.

The cases bearing on the subject are but few, and in some of them there was the peculiarity that the provision was declared in the contract to be irrevocable. These cases, however, shew this, at least, that it is competent to restrain the free agency of the wife by the terms of the marriage-contract. The clause of irrevocability never could be effectual if the law looked upon the wife after marriage as a free person, because no person in ordinary circumstances can restrain himself by a deed declared to be irrevocable if it does not confer a *jus quæsitum* on other parties. In such contracts the clause is held to be irrevocable, because the law looks upon the condition of a married woman as one requiring protection, even from her own acts. In contemplation of marriage, while still free, she enters into a solemn marriage-contract, which is framed with the object of protecting her rights. The question is, whether, while under coverture, exposed it may be to the importunity of her husband, or still more powerfully influenced by her desire to please him, she is not by the law itself prevented from relaxing in favour of her natural guardian, for such he now is, those restraints which were intended for her protection against him. It is, I think, part of the policy of the law that a married woman should be prevented from doing so, that she should be protected as if her will and mind were in abeyance. That doctrine, I apprehend, is clearly to be gathered even from those cases where the clause of irrevocability entered into the grounds of judgment, and there is no adverse case.

LORD ARDMILLAN and LORD MURE concurred.

LORD GIFFORD.—I am of opinion that the question put in this special case ought to be answered in the negative. It appears to me that the trustees, acting under the antenuptial contract of marriage between Captain and Mrs Murray, are not bound, and are not entitled, to denude of the trust-estate in favour of Mrs Murray, even although Captain and Mrs Murray and the whole children of the marriage concur in requiring them to do so, and although all parties offer to renounce all their respective rights in favour of Mrs Murray, and tender to the

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trustees a full and complete discharge of the trust itself, and of all their actings under it.

I do not dispute the general proposition that if all the parties who are or who may be interested in a trust, or in the purposes for which it has been created, concur in desiring to terminate the trust and to distribute the trust-funds, they are entitled to do so, provided the parties are all *sui juris* and in a position effectually to bind themselves, and also provided that there is no possibility of any other party coming into existence or coming forward who may have an interest in the trust. A trust can only subsist for behoof of beneficiaries, and if every possible beneficiary is capable of consenting, and actually consents, to its extinction, there is no reason why the trust should not come to an end.

It is essential, however, before terminating and extinguishing a trust, to make perfectly sure either that its purposes are completely fulfilled, or, if this is not so, then that every possible beneficiary, not only concurs in its extinction, but is in such circumstances and in such a position as to be capable of so concurring.

In the present case there might be questions whether all the possible children of the marriage are now in existence, and also, whether a possible contingent fee may not yet vest in the grandchildren of the marriage. It is not necessary, however, to decide these questions (indeed, I understand we are wished to assume them in favour of the second and third parties), for there is another ground which appears quite sufficient for the decision of the case, and to this the argument has been confined. It is this, that Mrs Murray, although a party to the present case, is not entitled, even with the consent of her husband and of all her children, to put an end to the trust so as to deprive herself,—I do not say of her provisions under the marriage-contract,—but of the security which the marriage-contract trust gives, that these provisions will be available at the dissolution of the marriage. This security I think she is not entitled to renounce *stante matrimonio*, and therefore the trust must continue to subsist.

By the antenuptial contract of marriage the wife, Mrs Murray, conveyed to the marriage-contract trustees her whole estate, heritable and moveable, belonging or that may belong to her at the time of her death. The purpose of this trust was the administration of the wife's separate estate and the payment of the liferent thereof to Mr and Mrs Murray and the survivor of them, and for payment of the fee of said estate to the children of the marriage. Captain Murray's *jus mariti* over the fee is excluded, but not over the liferent arising during the subsistence of the marriage. The effect of these provisions is to secure Mrs Murray, in the event of her surviving her husband, in the free liferent of her separate estate, and this provision, along with a contingent liferent in any estate her husband might leave, form Mrs Murray's jointure or rights secured by the marriage-contract. So far as the husband's estate is concerned there is no trust, and the husband is placed under no restraint whatever, and so the wife has no security for this part of her eventual liferent; but so far as regards the wife's estate a trust is interposed, the husband's right over the fee being excluded, and thus a security is given, and a very valuable security, that to this extent at least the wife's jointure shall be effectual.

Now, I am of opinion, that, according to the sound construction of this antenuptial marriage-contract, the bride intended to stipulate, and did stipulate, that at all events the liferent of her own estate should be absolutely secured to her in case of her viduity, and to make her security complete she placed her estate out of her own hands and power, and out of her intended husband's hands and

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power, into the hands and under the administration of marriage-contract trustees. I am clearly of opinion that it was competent for her to do so, and having done so, I think it also clear that she has no power during marriage—no matter with what consents—to deprive herself of the security for which she so carefully stipulated before the marriage was entered into.

It seems to me that the very condition of the marriage was that the wife's contingent liferent should be put absolutely beyond the power of both the spouses, so that there should be no risk of the wife being persuaded, either by the love or through the fear of her husband to give up her provision. I cannot doubt the lawfulness of this arrangement, and I cannot doubt that this was its true nature.

If the marriage-contract in the present case had contained a clause that the trust, so far as the wife was concerned, should be irrevocable, then, applying the principle fixed in Torry Anderson's case, effect would be given to this declaration; but I think the same result must follow wherever it can be shewn from the deed that this was the true intention of the parties. It is only in this view that a clause of irrevocability is of any importance, for it is plain that if no interests forbid, a clause of irrevocability may be itself revoked by the parties who made it. A deed in its nature revocable can never cease to be so by a clause of irrevocability if there is no interest to secure thereby.

A wife after marriage is not in the same position as the bride was before marriage, and so long as the coverture subsists she will never be in the free condition which she enjoyed before marriage. There is the strongest expediency in a rule which shall enable a woman before coverture to stipulate that during her coverture she shall not be asked to do, and shall not have power to do, certain acts which may prejudicially affect her interests. I think this is a lawful stipulation, and that it was really made in the present case. The whole cases which have been referred to seem to me to be in entire accordance with the principle upon which I rest my opinion. Any seeming inconsistency in the judgments disappears when the true construction of the particular deeds is attended to. Thus, in the case of Ramsay v. Ramsay's Trustees, 24th November 1871, the ground of the judgment was not that a wife could not secure her marriage-contract provisions by means of an irrevocable trust, but that, according to the sound construction of the marriage-contract in that special case, she did not do so except to the extent of £5000. The other cases founded on are all in favour of the irrevocable nature of a marriage-contract trust,—that is, that it is irrevocable during marriage; and I do not think any sound distinction can be taken between the cases where the wife's provisions, secured by antenuptial contract, flow from her parents or from strangers, and those in which her provisions come from the husband or from the wife herself.

If I am right in the view which I have taken of the wife's interest under the present marriage-contract it follows that the question put must, on this ground alone, be answered in the negative.

The LORD PRESIDENT was absent when the case was advised, but the Lord Justice-Clerk intimated that he concurred in the judgment.

THIS interlocutor was pronounced :—"Find and declare, in answer to the question in the said case, that the marriage-contract trustees, parties of the first part, are not bound nor entitled, under the cir-

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cumstances stated in the case, to denude of the trust-estate in favour of Mrs Murray, one of the parties of the second part, and decern."

TODS, MURRAY, & JAMIESON, W.S.—J. S. DARLING, W.S.—Agents.

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Hunter v. Kelso School Board.

GEORGE DUNCAN HUNTER, Pursuer.—*Sol.-Gen. Watson—J. P. B. Robertson.*
THE SCHOOL BOARD OF KELSO, Defenders.—*D.-F. Clark—Darling.*

School—School Board, Powers of—Schoolmaster, Tenure of Office and Emoluments—The Education (Scotland) Act, 1872, *sec.* 55.—A parochial school was divided into two departments—(1) A grammar school, in which the principal teacher or rector taught classical and modern languages and mathematics; and (2) an elementary school taught by an assistant.

In 1874 the school board of the parish resolved to unite the schools, and restricted the teaching of the higher branches previously taught in the grammar school to one hour daily.

In an action brought by the rector or schoolmaster, who had been appointed in 1858, for reduction of this resolution, and for damages, *held* that the school board were entitled to make this change, but without prejudice to any claim which the schoolmaster might afterwards be able to establish on the ground of diminished emoluments arising from the proceedings complained of.

1ST DIVISION.
Lord Young.
B.

THE parish school of Kelso, about the year 1780, was divided into two departments, known as the grammar school and the English school. The parish schoolmaster was specially charged with teaching the grammar school, in which Latin and Greek, modern languages, and mathematics were taught. The English school, in which elementary education was given, was taught by an assistant teacher. This system of teaching was continued down to 1858, when a vacancy occurred in the office of parish schoolmaster. The heritors then inserted an advertisement in the newspapers for a rector to the grammar school of Kelso. The advertisement bore,—"Besides the Latin, Greek, French, and German languages, the rector must be qualified to instruct his pupils in Grecian and Roman antiquities, and in ancient and modern geography, and mathematics."

The heritors furnished the following particulars to intending applicants:—"Grammar School of Kelso.—The rector is the parochial schoolmaster of the parish of Kelso, and will draw the maximum salary of £34. . . . The fees authorised by the heritors at their meeting upon 15th September 1855 were according to the following scale:—Latin, per quarter, 7s. 6d.," &c.

Mr Hunter, who was at that time rector of the Dumbarton Academy, having applied for the appointment, the heritors, by a minute, dated 15th October 1858, appointed him to the office of rector of Kelso grammar school, "with right to all the emoluments appertaining thereto, as enjoyed by Dr Fergusson, from and after the term of Martinmas next, when he shall open school and charge the same fees as were paid to Dr Fergusson, as specified in the minute of meeting of heritors held on the 15th September 1855; and further, it is conditioned that in the event of a vacancy occurring by the death or resignation of Mr John Simpson, the teacher in the English parochial school, during the incumbency of the said George Duncan Hunter, he shall, in the option of the then electors, be obliged to take the sole charge of that schoolroom also, and to find a suitable assistant to teach the elementary branches at present taught there, for which he, the rector, shall be entitled to the salary belonging thereto, and to the usual school-fees, and in token of his acceptance Mr George Duncan Hunter is appointed to subscribe this minute along with the presses."

In 1861 Mr Simpson, the assistant teacher of the English school, agreed

to retire. The heritors came to an arrangement with Mr Hunter,—"2d, That Mr Hunter shall, on such retirement, enter into the management of the English school, and shall teach the children who attend it the several branches hitherto taught in said school, and that at the same fees as have been charged by Mr Simpson, or at such fees as may from time to time be fixed by the heritors and minister, in terms of the powers committed to them. 3d, that for the successful conducting of said school Mr Hunter shall be obliged to have at all times an efficient assistant therein, and shall himself daily teach in it for one hour at least and oversee the details, so that the education of the children may be carefully attended to, and the whole management carried on in a proper and satisfactory manner."

These arrangements continued down to 1874, when the Kelso School Board, in whom, under the Education (Scotland) Act, 1872, the schools had become vested, came to a resolution introducing certain changes in the arrangements and fees as after-mentioned.

Mr Hunter then raised the present action against the school board. He alleged,—(Cond. 6) "In 1873 or 1874 the defenders, in whom, under the 'Education (Scotland) Act, 1872,' the said schools had become vested, formed the design of abolishing the grammar school department of the school. On January 7, 1874, they, on the motion of Mr James Brunton, seconded by the Reverend Henry Renton, adopted the following resolution:—'That all children receiving instruction in the several standards within the public school be taught together after the close of the present session.' Thereafter a committee or sub-commitee was appointed to make arrangements for the future management and conduct of the school, which committee submitted to the defenders a report recommending, *inter alia*—'(1) That the staff should consist of the principal teacher, one certificated male assistant, and one uncertificated female teacher;' and (2) That in carrying out the resolution of the board already referred to (being the foresaid resolution of 7th January 1874), the whole school should, without distinction, be arranged according to the standards in six classes only (exclusive of infants), and so taught together, according to their advancement, all subjects embraced within the standards (art. 28), Scotch code 1874, including the additional subjects under art. 19, C, and English literature and language (4 schd.), which are to be taught to the classes receiving instruction in the three highest standards.' The report also recommended that the classes receiving instruction in standards IV. V. and VI. should be taught by the pursuer. In none of these standards is included or permitted to be taught any of the higher branches of learning, as Latin, Greek, French, German, or mathematics; and only one hour, viz. from 12 to 1 daily, was to be allowed for instructing in these special branches such pupils as might desire to receive such instruction." (Cond. 7) "The defenders, on 2d September 1874, on the motion of Mr Charles Robson, the chairman, adopted the said report, and resolved accordingly. The defenders, in September 1874, caused public intimation to be made that the fees for instruction in the Kelso public school, in the session then about to commence, would be—For reading, writing, arithmetic, and all the subjects embraced within the standards, including the specific subject of English literature and language, 3s 6d. per quarter; for one extra specific subject, Latin, French, Greek, or mathematics, if such be taken, 5s.; for each additional specific subject taken, 2s. 6d. The pursuer was directed to conform to these resolutions, and the scheme therein appointed, and he, under protest against the legality of the defenders' actings, and pending the discussion thereof, agreed to comply with these instructions when the school was opened on 21st September 1874." (Cond. 8) "The

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effect of the changes thus made is to abolish Kelso grammar school, of which the pursuer was appointed rector as aforesaid. The public school of Kelso is now entirely devoted to elementary teaching; it is not now resorted to by the same class of pupils as attended Kelso grammar school, and paid the high fees above-mentioned for instruction in the higher branches of learning; and the higher course of study, and the scholastic arrangements, being now entirely different, it is certain that this defection will be permanent. The alteration in the subjects taught, and in the scale of fees, deprives the pursuer of a large part of the emoluments on the faith of which he accepted his appointment. Further, the pursuer suffers greatly in social and professional status from the said changes, and the position and duties now imposed upon him are essentially different from those which he undertook in 1858."

The conclusions of the summons were for reduction of the minutes of the heritors, "in so far as they relate to the teaching together all children receiving instruction within the said public school of Kelso, and restrict the time to be occupied in teaching Latin, Greek, modern languages, and mathematics to one hour daily, and diminish the school fees in use to be charged by the pursuer prior to the passing of the 'Education (Scotland) Act, 1872;'" and for declarator, "that the defenders are not entitled to order or insist that the whole children receiving instruction within the said public school of Kelso shall be taught together, and to abolish the grammar school of Kelso as a department of the parochial school of Kelso taught as heretofore separately from the other or English department of the said public school, or to lower the school fees heretofore payable to the pursuer: Or otherwise, that the defenders are not entitled to order or insist that the whole children receiving instruction within the said public school of Kelso shall be taught together, and to abolish the grammar school of Kelso as a department of the parochial school of Kelso taught as heretofore separately from the other or English department of the said public school, or to lower the school fees heretofore payable to the pursuer, without making due compensation to the pursuer: And that the pursuer has right to the whole salary, fees, and emoluments arising from the said grammar school of Kelso which he enjoyed at the date of the passing of the Education (Scotland) Act, 1872, and to all salary, fees, and emoluments, and to all the rights and privileges conferred upon him in virtue of his appointment as rector of the said grammar school of Kelso, and schoolmaster of the parochial school of Kelso, by the heritors and minister of the said parish of Kelso." There was also a conclusion for damages.

The pursuer pleaded;—(1) The proceedings complained of being illegal, and *ultra vires* of the defenders, the pursuer is entitled to have them reduced. (2) In any event, the pursuer has right during his incumbency to the whole salary, fees, and emoluments which he enjoyed at the date of the Education (Scotland) Act, 1872. (3) It was not within the power of the defenders so to alter the constitution of the said school as to diminish the emoluments of the pursuer, and to injure him in his status and patrimonial interest. (4) At least such alterations could only competently be made, the rights of the pursuer being preserved entire or due compensation being given to him.[1]

The defenders pleaded;—(1) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons, or any of them. (3) The action cannot be maintained, in respect that the proceedings complained of were taken by the defenders in virtue of the

[1] See Education (Scotland) Act, 1872, sec. 55.

powers, obligations, and duties vested in and incumbent upon them in terms of the Education (Scotland) Act, 1872. No. 96.

The Lord Ordinary pronounced this interlocutor:—"Sustains the defences, assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses, and remits," &c.* Mar. 5, 1875. Hunter v. Kelso School Board.

* "OPINION.—The pursuer is the schoolmaster and the defenders are the school board of the parish of Kelso. The pursuer complains of two resolutions of the board, of date 7th January 1874 and 2d September 1874 respectively, and asks that they shall be reduced as illegal and *ultra vires* of the board, 'in so far as they relate to the teaching together all children receiving instruction within the said public school (formerly the parish school) of Kelso, and restrict the time to be occupied in teaching Latin, Greek, modern languages, and mathematics, to one hour daily, and diminish the school fees in use to be charged by the pursuer prior to the passing of the Education (Scotland) Act, 1872.' There are also declaratory conclusions resting generally on the same grounds as the reductive conclusions, and finally a conclusion for damages. It appears that so long ago as 1780 (the precise date is immaterial) the managers of this parish school saw fit to divide it into two departments,—one (the higher) being devoted to Latin, Greek, and French, with which the parish schoolmaster was specially charged; and the other (the elementary) being devoted to the usual elementary teaching with which an assistant teacher appointed by the parish schoolmaster, subject to the approbation of the managers, was specially charged, but with the reasonable proviso that the parish schoolmaster should have the superintendence of the whole school. This system of separation was, with some modification of details, which need not be specially noticed, continued till the school board in the present year made the change now complained of. It subsisted when the pursuer was appointed in 1858, at which time also the school fees stood fixed by the proper authority, according to the scale set forth in condescendence 3, which subsisted till altered by the school board this year. The questions for decision are—(1st) Whether, in changing this system of separation and lowering the scale of fees, the school board acted illegally, and in excess of their powers; and (2d) whether, assuming the proceedings to be in themselves within the powers of the school board, they were, nevertheless, in violation of the pursuer's legal rights, as the existing schoolmaster appointed prior to the recent Act. Both questions are distinctly raised by the pleas on record, but as the pursuer's counsel at the debate did not maintain the affirmative of the first, but of the second only—on which he exclusively rested his case in argument—I might perhaps have passed the first without further remark. But I am inclined to think it is expedient that I should express my opinion upon it irrespective of concession, as a clear view of it will be conducive to a right apprehension of the second question, on which the case, as it was argued, turns. Parish schools (and it is unnecessary to advert to any other) are now under the management of school boards, the old management by heritors and ministers being displaced, and all jurisdiction and authority of presbyteries with respect to them being abolished. The Act of 1872, by which this change was accomplished, does not specify the particulars or details involved in the notion of school management, which would have been an idle thing, had it been possible. The management of a school by a board of managers is a simple and familiar notion, and everything which it comprehends is, by the Act, devolved upon the school board of each parish with respect to the parish school. Further, the management of the board is not subjected to the supervision or control of any superior authority. The schools are indeed subject to inspection by Government inspectors, but this is only with reference to the distribution of the annual Parliamentary grant by the proper department of the Government, and as the most available means of ascertaining that the conditions prescribed by the department are observed by each school sharing in it. The Government inspectors are not the officers of the school boards on the one hand, nor are the boards subject to any control by them on the other, except only through the indirect operation of giving or withholding the Parliamentary grant in relief of the rates according to their reports

No. 96. The pursuer reclaimed. At advising,—

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LORD DEAS.—In this case it appears that Mr Hunter, who had been classical teacher in the Dumbarton Academy, was in October 1858 appointed rector of

with reference to the fulfilment in each school of the conditions for the time in force for its distribution. The Government inspection extends equally to schools under private management which claim participation in the grant, and has the same indirect operation on their management. The only instance that occurs to me at this moment of a power on the part of school boards to require any duty to be performed by a Government inspector is to be found in section 60 of the Act, and if there is any other it is of the same character, as being specially and exceptionally enacted, the scheme of the statute being that the Government takes no concern with the management of any schools, but only informs itself, through its inspectors, that all schools (whether public or private) sharing in the grant comply with the conditions on which it is given. This, indeed, is the whole (though no doubt powerful) operation of the code, which affects school management not otherwise than this, that, subject to the limitations of section 67 of the Act, any school may obtain a share of the Parliamentary grant if the managers shall comply with the conditions therein prescribed, and otherwise not. It will be observed, on reference to the Act, that all the powers and duties of the Board of Education stand on specific enactments, and that they chiefly regard the division and conjunction of parishes, the election of school boards, making suggestions to the Government for the distribution of the grant in Scotland, the institution of new public schools to supply deficiencies in the means of education in particular parishes and districts, and do not with respect to management subject the school boards to any interference or control. Some special powers and duties are conferred or imposed on them —as, for example, by the conscience clause—but none, so far as my memory serves, enabling them to supersede or control a school board in the management of its schools. Clauses 34 and 36 are instructive illustrations of the nature of the functions and powers of the Board of Education. By the former, they are enabled to test the accuracy and completeness of the returns relating to the means of education already provided by existing schools, whether public or private. This was necessary to enable them to determine what amount of public school accommodation ought to be provided in the several parishes or districts. By the latter they are enabled to insist that every school established under the Act shall be efficiently maintained, and to prevent any school board from practically frustrating the statutory determination respecting the requirements of its district by the expedient of simple neglect or discontinuance. I have adverted to this topic of the supremacy of the school boards in the matter of school management, although no controversy is here directly raised upon it, because I think it is important to proceed to the consideration of the actual dispute with an accurate and clear view of the position of school boards in this matter. That position, in my opinion, is that with regard to everything implied in the notion of school 'management' they are supreme, and responsible only to their constituents, like other representative and popularly elected bodies. It is almost unnecessary to express, what so clearly goes without expression, that they will not be permitted to transgress the law of the land, or to violate the legal rights of others. This, indeed, is a condition of all management and conduct, even the management which every one has of his own household and private affairs. The resolutions complained of are, on the face of them, acts of school management and nothing else, and as such were, according to the views which I have expressed, within the power of the school board, unless they shall appear to involve a transgression of some public law or a violation of some legal right. And, first, Do the resolutions involve any violation of public law? It was not maintained that they do, and it is indeed very clear that they do not. The policy or expediency, with reference to the efficiency of the school and the educational requirements of the parish, of the change thereby directed to be made in the conduct of the school, is a question on which there may be difference of

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the Kelso grammar school, and that until recently the duties exacted from him were the duties usually performed by a rector,—teaching the higher branches of education along with reading, writing, and arithmetic, in which he had the aid of an assistant teacher. The school board have recently made alterations in

opinion. But it is a question for the determination of the school board as a board of management elected by the whole ratepaying population of the parish, and they having determined it, this Court has no authority to interfere with their judgment. Such interference would imply a power and therefore a duty on the part of this Court to assume a supervising or controlling power with respect to the management of all the public schools in the country, than which nothing could be more at variance with the Act of Parliament, which conferred the management on the people at large through the medium of boards popularly elected at short intervals, without a suggestion of any supervision or control by this Court. Second, Do the resolutions violate any legal right on the part of the pursuer? On this question (as on the last) I lay aside in the meantime the matter of fees, which, as depending on a distinct clause of the Act of Parliament, I shall consider separately. In regard to the other matters embraced by the resolutions, the pursuer's case is that he is thereby prejudiced with respect to his 'tenure of office' as 'by law, contract, or usage secured' to him at the passing of the Act of 1872, contrary to his rights under section 55 of the Act. He refers to the manner in which the school was conducted at the date of his appointment, maintains that the terms of his appointment implied a contract for the continuance of the arrangements then subsisting, and contends that this constituted 'tenure of office' in the sense in which that expression is used in section 55 of the Act. I cannot assent to this argument. I think it clear that the expression 'tenure of office,' as used in section 55, means simply duration of office, or the time for which it is held by law, contract, or usage. The pursuer's counsel referred to the meaning attached to the word 'tenure' as used in the feudal law, but I cannot admit the analogy. To say that a parish schoolmaster holds office by the 'tenure' of teaching Latin and Greek in a separate class-room during so many hours a-day would be an unfamiliar, not to say a strange and unnatural use of language. A parish schoolmaster held or had 'tenure' of his office *ad vitam aut culpam*, but a change in the mode of conducting the school, or in the branches taught—whether by reduction or addition—made by the managers of the school (the minister and heritors) in the due course of management, was certainly not objectionable as a change of his 'tenure' of office. It was, on the contrary, implied in the appointment of every parish schoolmaster that he should submit and conform himself to the lawful management of the managers, and I should greatly doubt whether an express contract, whereby the managers bound themselves to make no change of management, however expedient or even necessary in the interests of the parish, would have been lawful or binding. A public body is not entitled so to tie itself by contract as that it shall be incapable of duly performing its public duty. But there is here no express contract, and the pursuer's case is therefore this—that the conduct and management of the school, as subsisting at the time of his appointment, must continue during his tenure of office, unless he shall consent to a change. I think the proposition is unreasonable and untenable, for it would paralyse the action of the managing body; and certainly no such intention is expressed or implied by the language of section 55 of the statute. It is not unnatural that the pursuer should feel hurt by the action of the new managing body in confining him more than formerly to the primary and proper purposes of an elementary school supported by parish rates, and withdrawing him to a corresponding extent from the adjuncts of the higher branches. It was always considered a valuable feature of the parish schools of Scotland that, while instituted and maintained for the purpose of providing elementary instruction, their teachers were competent to give, and, compatibly with the other and more primary duties of the schools, found leisure to give, higher instruction to those (always a small percentage of the children) who desired and were able to receive

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the arrangements for teaching, the result of which will be that the higher branches will either not be taught at all, or will be superseded, to a great extent, by the elementary branches. Mr Hunter very naturally objects to the change, and he seeks to reduce the minutes of the board by which the change is made. The

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it, and this feature will no doubt be preserved under the new management. But the system pursued in the Kelso school was at least open to serious question, for according to it the parochial schoolmaster was altogether withdrawn from the elementary school, and his whole time and labour devoted to teaching, in a separate building, the higher branches to 'boys intended for professional life' (Condescendence 1), and 'pupils drawn from a different social class' than were the children attending the elementary school (Condescendence 4). The statutory managers of the school having, with their knowledge of the locality, and of all the circumstances necessary to form an intelligent judgment, determined that it is in the interest of the education under their charge to change the system, and to put the school on the same footing with board schools in general, I cannot presume to form an opinion that they have acted injudiciously. The general arguments on the one side and the other are obvious and trite enough, but to apply them to the particular case, and to strike the balance with a due regard to all the circumstances proper to be considered, is a task for which I am personally unqualified and judicially incompetent. I assume, as I think I am bound to do, that the proper authority has rightly judged of a matter which may be delicate and difficult, but is undoubtedly, in my opinion, within their province and duty to determine. And assuming this, I have no difficulty in holding that the feelings of the schoolmaster, though the furthest in the world from being reprehensible, cannot be allowed to prevail over the deliberate judgment of the board. The school board will no doubt consult, and properly attach high importance to the opinion of the teacher with reference to any contemplated change of school arrangements. But when his professional feelings appear to be in conflict with what the board regard as the true interest of the parish, it is not unreasonable that his opinion should be regarded with less confidence than it usually commands. With respect to the school fees, the pursuer's case is that the board have, by reducing the scale of 1855, which was in observance when he was appointed, prejudiced him in his emoluments, as secured to him by law or contract, contrary to section 55 of the Act. But (1st) I am not of opinion that the contract, express or implied, with the pursuer on his appointment, imported an obligation on the part of the heritors and minister to continue either the teaching or the fees on the then existing basis during his tenure of office, for such an obligation would have been in effect a renunciation for themselves and their successors of a great part of the management of the school committed to them by statute. (2d) By section 53 of the Act of 1872 the school board is directed to fix the school fees, which are ordered to be paid to the treasurer of the board. I do not know, and it is probably still uncertain, whether the revenue of the school will be increased or diminished by the reduction of the scale. If the result shall be an increase (whether by the greater gross amount of the fees themselves or by a larger share of grant earned), there will be money enough to make good the pursuer's 'emoluments,' whatever meaning shall be attached to the term, and if it shall be a decrease, the deficiency must be made good by rates under the provisions of the Act. In neither case can the pursuer complain of the reduction as a violation of his right, which is only that his 'emoluments,' as secured to him by law or contract at the date of the Act, shall not be prejudiced. I have already expressed my opinion that the continuance of the scale of fees of 1855 was not secured to him by law or contract; but assuming this opinion to be erroneous, the result would only be that his emoluments are, for the purpose of being made good to him by the board out of the school fund, to be estimated on that footing as at the passing of the Act. For I think it is impossible to maintain that section 55 overpowers section 53 to the effect of disabling the school board from fixing the school fees during the tenure of office of a teacher appointed before the Act, and entitles such teacher directly to draw

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effect certainly will be to lower the intellectual character of his duties below what his standing and acquirements fit him to perform. But although there may be hardship in that I am of opinion that the Education Act authorises the school board to make the change, and that is all I think it necessary to say in delivering my opinion.

LORD ARDMILLAN.—The action before us is at the instance of Mr Hunter, teacher of the parochial school of Kelso, who was appointed in 1858 by the heritors and minister. The conclusion of the action is for reduction of two resolutions of the school board of Kelso, acting under provisions of the statute of 1872, and for damages to the extent of £5000. The resolutions are alleged to have been illegal, and *ultra vires* of the school board, and the damages are claimed in respect of wrong done by such unlawful resolutions.

If the resolutions complained of,—the terms of which I need not again repeat,—were not illegal and *ultra vires*, then the pursuer has no right to claim reparation as for a wrong, and the conclusion for damages cannot be sustained. If his emoluments as teacher shall be ascertained to have been injuriously affected by the resolutions of the board there may arise a question in regard to compensation. No such question is, however, now before us. This action is for reduction, and for damages in respect of wrong done, and injury incurred, up to the date of action. The first resolution complained of was in January 1874, the second resolution was on 2d September 1874. The resolutions were acted on in the subsequent part of September 1874, the school being opened on the 21st September 1874. This action was raised on the 12th of October 1874. The pursuer claims £5000 for loss and damage suffered by him up to the date of the action, that is, between the beginning of September and the 12th of October—a large sum, and a short period. The claim is not put on the record, and it cannot now be fairly represented as a claim for compensation for loss of emoluments under the statute. The recognition of a right to compensation for loss of emoluments assumes the validity of the act of the board. But this action is for reduction of the act of the board as illegal and *ultra vires*, "null and void, and of no avail," and for damages in respect of such unlawful act. If the pursuer has a good claim to compensation we have no desire to prejudice it, and no decision in this action can operate to his prejudice in regard to such a claim. The most important elements in the consideration of such a claim for compensation do not yet exist. We are not informed, and I, at least, have no idea, what effect the resolutions complained of will have on the amount of school fees—whether the amount of fees will be increased or diminished by the change effected. The fact whether there is any loss to be compensated has not been ascertained.

On the question raised and argued on the construction of the 55th section of

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the fees according to the scale which was in observance at the passing of the Act. This view would of course also imply that the branches to be taught, and the time to be given to them respectively, should also be unchangeable during the teacher's tenure of office. Such a sacrifice of all other interests to those (real or supposed) of the teacher would be unreasonable, and I find nothing in the Act to countenance it. Therefore, without deciding in this case what claims the pursuer may have against the board under sec. 55, I have no doubt whatever that the board acted within their powers, and without violating any legal right of his, when they reduced the school fees. The conclusion for damages, which rests on the erroneous, as I think, assumption that the school board have done the pursuer an injury, I must of course hold to be untenable."

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the Act of 1872 I confess I have not felt any difficulty. Reading that section along with the other sections of the statute, I agree entirely in the construction adopted and explained by Lord Young. I have no doubt of the power of the school board under the Act to do all that they have done here, and no doubt of the lawfulness of what they have done. It appears to me impossible to construe the words "tenure of office" in the 55th section as conferring on the teacher of a parochial school, appointed previous to the Act of 1872, a right to insist on maintaining without change the same arrangements in the conduct and management of the school, the nature and extent of the education, and the amount of fees exacted, as subsisted at the date of his appointment. By no fair construction of the words "tenure of office" can the claim on the part of the teacher of a power to control the management, and to defeat and defy the school board, be supported. The powers of direction and management given to the school board under the Act of 1872 are necessarily wide, and the use of these powers for the introduction of elementary education is the very thing intended. The main object of that statute was to secure, to as large an extent as possible, useful elementary education. It was not indeed intended to extinguish or supersede the higher education in all schools under the statute. Provision is made for maintaining, in certain places, and under certain circumstances, that higher education. But a wide discretion is necessarily left to the school board. That discretion may sometimes be difficult to exercise. It may sometimes, in our opinion, be erroneously exercised, that is, we might be disposed to exercise it otherwise; but, if it is exercised honestly and regularly in promoting the objects of the statute, that exercise cannot be held to be illegal and *ultra vires* and wrongous, so as to subject the board to damages. On this point also I agree in the views expressed by Lord Young. The statute provides protection to teachers appointed prior to the Act against prejudice caused by the provisions of the Act in respect of "tenure of office, emoluments, or retiring allowance." In regard to the tenure of office, as I understand the words, the protection is that such previously appointed teacher shall not be liable to dismissal at pleasure, but shall be only liable to dismissal, under section 60th, for fault, or for ascertained inefficiency and unfitness. The protection in regard to emoluments, if "secured or enjoyed by law, contract, or usage," is by providing compensation; and the protection in regard to retiring allowance is given in the second sub-section of the 60th clause. But, apart from a question of compensation, which is not now raised, and cannot now be determined, there is no provision to meet such a case as that now put, of damage said to have been caused by the introduction of elementary education, and the limiting of the higher education in an ordinary parish school. The result of my consideration of the provision of the statute is, that unless the resolutions complained of were contrary to law, and beyond the power of the school board, there is no ground for the claim of damages. Accordingly, the Solicitor-General found it necessary for his argument to maintain that the question here involved is really the question of power,—of the power of the school board to introduce elementary education to the effect of limiting to some extent the amount of the higher education as given at the date of the teacher's appointment. It was even maintained that the board were bound to take the education up just as it stood at the date of the teacher's appointment, and to continue it without a change. This argument does not commend itself to my mind. There is nothing in the statute to support it, and on general principles I think it is not sound. The heritors and minister were not, in my opinion, entitled to

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bind their successors to abide, without alteration, by the arrangements which they had chosen to make with the master. There was no contract with the pursuer in 1858 in regard to the mode of conducting or distributing the teaching of the higher or of the elementary education in the school which a Court of law can hold as now binding on the present school board, or as precluding the school board from taking the steps here complained of, or as subjecting the school board to a claim of damages at the instance of the teacher.

The change effected by the introduction of elementary education was, in my opinion, within the power of the school board, and was according to the true meaning of the provisions of the statute, and was especially in accordance with the aim and spirit of the statute. To maintain that the school board was bound to continue the whole arrangements for management and teaching of the school, as existing at the date of the teacher's appointment many years ago, and was not entitled to introduce elementary education into such a school, appears to me quite extravagant. The introduction and maintenance of elementary education is one of the primary purposes of the Act of 1872. There may be cases in which, having regard to the special circumstances of the parish or district, a greater or a less proportion of the higher education may be deemed right and expedient. It may even be that in this parish of Kelso there may be reasons why the higher education, which had been previously given, ought not to have been so seriously diminished, but might well have been continued to a greater extent than has been done. But that is a question, not of power, but of discretion. With the discretion or expediency of the resolutions we have not the whole materials for decision, and are not entitled to interfere, even though we may have some sympathy with the teacher. It is only if the act of the board was illegal, *ultra vires*, and wrongous, that damages are claimed or can be claimed by the teacher.

I am therefore of opinion that we should adhere to the judgment of the Lord Ordinary assoilzieing the defenders from the conclusions of this action, but without prejudice to any claim which the pursuer may have for compensation in respect of ascertained loss of emoluments.

LORD MURE concurred.

LORD DEAS intimated that the Lord President, who was absent from the advising, concurred in the judgment.

THE COURT pronounced this interlocutor:—"Adhere to the interlocutor, and refuse the reclaiming note, but without prejudice to any claim which the pursuer may be able hereafter to establish on the ground of diminished emoluments arising from the proceedings here complained of: Find the pursuer liable in additional expenses, and remit," &c.

DAVID HUNTER, S.S.C.—J STORMONTH DARLING, W.S.—Agents.

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JAMES S. ROUGH, Pursuer.—*Rhind.*
PETER MOIR AND SON AND PATRICK BIRNIE, Defenders.—*Mair.*

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Rough v. Moir and Son, *et al.*

Sale—Warranty—Statute 19 *and* 20 *Vict., c.* 60 (*Mercantile Law Amendment Act*, 1856), *sec.* 5.—A horse, which was sold by auction, was described in the auctioneer's catalogue, by the seller's instructions, as having "been driven regularly in double and single harness." In an action for the price, after a

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proof, which was held to establish that the horse was not fit to be so driven, and that the seller was aware of its unfitness, *held* that the seller was not entitled to recover, in respect (1) of the implied warrandice at common law (the first branch of sec. 5 of the Mercantile Law Amendment Act not being applicable, as the seller was not without knowledge of the defect); and (2) of the implied warrandice under the second branch of sec. 5 of the Act, the mare having been sold as fit for a particular purpose.

1st Division. Ld. Mackenzie. B.

Messrs Peter Moir and Son sold at their auction mart in Edinburgh, on 8th July 1874, a bay mare, on the order of James S. Rough, innkeeper, Slamannan. The mare was described, by the owner's instructions, in the catalogue of the sale as having "been driven regularly in double and single harness." She was sold under the conditions contained in certain printed rules and regulations on which Messrs Moir and Son conducted their sales by auction. By these rules and regulations it is provided that a purchaser who objects to the purchase of any lot "must intimate such objection and return the lot on or before the second day after the sale, otherwise the lot shall be deemed to be as it was represented at the sale, and no objection thereafter received." It is also provided by these rules that "the seller shall be entitled to receive the purchase-money on the third day after the sale, provided no objection has been stated, and that Mr Moir has then received the price." The mare was returned within two days by the purchaser, Patrick Birnie, as not being conform to the representation in the catalogue.

The present action was brought by Rough for £36, 15s., the price of the mare, against Patrick Birnie, horse-dealer, the purchaser, and Moir and Son, the auctioneers, to whom he had paid the price.

The defenders stated that "the pursuer falsely and fraudulently represented that the mare in question had 'been driven regularly in double and single harness,' and it was in consequence so described in Messrs Moir and Sons catalogue of horses for sale. At the time the mare was consigned to Moir and Son the pursuer knew that it had not been driven regularly in single harness, and that it could not be so driven. The defender, Birnie, immediately after the sale of the mare to him had her tried by his breaksman, and he found that she would not go in single harness at all, and the mare was accordingly returned to Messrs Moir and Son as being disconform to the representation and description in the catalogue. The price of the mare was afterwards accounted for by Moir and Son to the defender Birnie in settling up their transactions. Intimation was made to the pursuer on the 10th July 1874 by the defenders, Moir and Son, that the mare had been returned to them, and after standing at livery at their stables for five weeks at a cost of about £6, it was, with the consent of the pursuer and the defender Birnie (saving the rights and pleas of both parties), sold by public auction on 26th August 1874 for £33, 12s."

The defenders pleaded;—(1) The pursuer having falsely and fraudulently represented the mare in question as one "driven regularly in double and single harness," and the same having been found to be disconform to this representation, the defender Birnie was entitled to return the same.

The Lord Ordinary allowed both parties a proof of their averments, the result of which was to establish that the mare had never been properly broken to harness, and could not be driven with safety either in double or single harness, and that the pursuer had sold her in the full knowledge of these facts. The import of the proof will appear more fully from the opinion of Lord Deas.

The Lord Ordinary, on 16th December 1874, pronounced this interlocutor:—"Assoilzies the defenders from the conclusions of the summons, and decerns: Reserves right to the pursuer to receive payment from the

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defenders, Messrs Peter Moir and Son, of the net proceeds received by the re-sale of the horse, which took place on 26th August 1874, with consent of parties, saving their rights and pleas in this process: Finds the defenders entitled to expenses," &c.*

The pursuer reclaimed, and argued;—The words printed in the auctioneer's catalogue, as descriptive of the mare, did not amount to a warranty. They were but a statement of a past fact, not a warranty of future condition or behaviour. As such, there was nothing in the proof inconsistent with their truth.[1]

The defenders argued that the representation made on the pursuer's instructions in the published catalogue of the sale amounted to an express warranty.[2] If this was not the case, and it must be treated as a representation merely, then it was a false representation, and the seller at the time of making it knew it was false, and sold the mare, knowing that the same was defective or of bad quality. The effect must be held equivalent to that of an express warranty.†

LORD DEAS.—This action is brought at the instance of James Rough, innkeeper, Slamannan, against Peter Moir and Son, auctioneers, and Patrick Birnie, horse-dealer, for £36, 15s., as the price of a mare sold to Birnie at Peter Moir and Son's auction mart on 8th July 1874.

The mare had been entered in the sale catalogue, by Rough's instructions, as having "been driven regularly in double and single harness." It was a condition of the sale that lots objected to must be returned on or before the second day after the sale. Birnie returned the mare within the time limited, as not answering the above description; and Messrs Moir, being satisfied that such was the fact, received her back, and intimated the objection to Rough, the seller, who refused to acknowledge its validity, but agreed with Messrs Moir and Birnie

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* "NOTE.— . . . . The question raised for decision is, whether the defenders are liable in payment of the price which the mare fetched at the sale of 8th July 1874.

"The Lord Ordinary is of opinion that the statement in the catalogue that the mare 'had been driven regularly in double and single harness' was a warranty. It formed part of the contract of sale. It was an essential element in that contract, and the defender Birnie bought the mare on the faith thereof. (Scott v. Steel, 9th Dec. 1857, 20 D. 253.) The Lord Ordinary is also of opinion that there is implied in such a warranty that the mare was free from such bad habits as prevented her from being driven regularly in harness. In short, that she ordinarily had been steady in harness.

"The question then is, had the mare been driven regularly in double and single harness? After careful consideration of the proof the Lord Ordinary considers that this question must be answered in the negative. . . . ."

[1] Young v. Giffen, Dec. 4, 1858, 21 D. 87, 31 Scot. Jur. 60; Hardie v. Austin, May 25, 1870, 8 Macph. 798, 42 Scot. Jur. 450.

[2] Scott v. Steel, Dec. 9, 1857, 20 D. 253, 30 Scot. Jur. 129; Oliphant's Law of Horses, 3d ed. p. 113.

† The Mercantile Law Amendment Act, 1856, sec. 5, enacts,—"Where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose."

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to the mare being sold in the meantime, which was done at a reduced price, and then he (Rough) brought this action against these other parties, as being, one or other of them, liable to him for the full price.

When tried immediately after the sale it was found, according to the evidence of the defenders' witnesses, that the mare would not go quietly either in double or single harness, and that, on the contrary, she could not be driven in either way consistently with safety.

Dickson, who appears to have had great experience both as groom and driver, tried her in both ways, by Birnie's instructions, the day after the sale, accompanied by Pearce, one of Birnie's grooms. Dickson depones that both in single and double harness, so soon as the mare was not led by the head, she plunged, reared, and rebelled, and would not go. In single harness she got upon the street foot-pavement, and upon the foot-path in the country, and tried to crush the machine against the wall, and in double harness she behaved still worse, and tried to jib (that is, to run back), but could not, as the other horse was too strong for her,—that they saw she was dangerous to them, herself, and the passers by, and the opinion he (Dickson) formed was that "she was an old hand at bad behaviour, and could not have been regularly driven either in single or double harness." The groom who accompanied Dickson depones substantially to the same effect.

Henry M'Donald, who was at the time in the employment of Messrs Moir and Son, says:—"I was ordered to put the mare in harness to try her myself, which I did both in double and single harness. The utmost care was taken in harnessing her on both occasions. In single harness Mr Moir got into the gig beside me. He was going to Leith on business. She stopped half-way down Leith Walk, and ran us both on the pavement. Mr Moir jumped out, and pulled her off the pavement, else I do not know what might have happened with her. I then took her down to Constitution Street, where Mr Moir had to make a call to transact some business. The time he was in she pulled me on to the pavement again. I had to pull her up, else I would have been against the railings on the off side. When Mr Moir came out he said to go up the Easter Road, which we did. There was a carriage coming down there, and she wheeled there, and nearly got into the carriage." . . . . "From her performance on that occasion I formed an opinion that she had never been a properly broken mare, and that she had never been driven in single harness, and that she would not go quietly. She was not a safe mare to drive. I tried her in double harness. We tried her alongside the steady old horse we used in the breaking business. She ran all on one side. Her mouth was hard on the one side, and soft on the other. From what I saw of her in double harness it is my opinion that she had not been driven regularly in double harness previously. . . . . If she had been a horse that had been driven regularly in single harness there would have been no difficulty in driving her. . . . . I formed the opinion that she was a very bad broke mare, and was quite satisfied she had not been driven regularly."

Then we have, amongst other witnesses, Mr Moir himself, who says,—"I saw her put into double harness by M'Donald, a previous witness. He is an experienced and skilled breaksman. I did not go along with him in double harness. When she was put into single harness I accompanied him. We went down to Leith with her. She behaved awkwardly. She would not draw right. She got on the pavement in the middle of Leith Walk, and very nearly capsized the

vehicle, and I had to get out and take her by the head. I led her off the pavement. We drove on then through Constitution Street to Quality Street, Leith. I made a call, leaving M'Donald with the mare outside. When I was in she had run on the pavement again. I went out and took her by the head, and got her off the pavement. We then drove back to Edinburgh by the Easter Road. She behaved very dangerously indeed. She nearly ran into a carriage there, and I had to get out and lead her on. (Q.) From the trial which you made of her upon that occasion in single harness what opinion did you form of her? (A.) I formed a very bad opinion. I thought she was a very dangerous animal, and not to be trusted into anyone's care. I am satisfied from the trial made that she had not been driven regularly in single harness. I came to be satisfied of that, because she went so very unsteadily. She pulled all to one side, and would neither trot nor canter. She did not go straightforward like a horse that had been regularly driven. She went like an untrained horse that had never been in harness before. In consequence of this I was quite satisfied that she did not come up to the representation in the catalogue. The fact was immediately intimated to Mr Rough." It is obvious to remark that if Mr Moir had not had good grounds for the opinion he formed of the mare he was not likely to have taken her back, and subjected himself in whatever might be the consequences to Rough, his employer.

The evidence for the pursuer appears to me, as it did to the Lord Ordinary, who saw the witnesses, to be less reliable than the evidence for the defenders. With reference, however, to the law of the case—of which afterwards—there are two questions of fact to be distinguished from each other:—1st, Had the mare, prior to the sale, "been driven regularly in double and single harness"? 2d, What was the pursuer's state of knowledge on that subject?

As regards the first of these questions, the earliest account we have of the mare is from the witness Dolan, who bought her at Armagh Fair in Ireland on 5th February, and sold her to O'Neil on 19th March. Consequently he had her in his possession six weeks. Dolan at first says he drove the mare during that time both in single and double harness, but on the cross-examination he does not positively affirm that she was out more than once in double harness, when he drove her at a funeral (which generally goes at a walking pace); and, in answer to the question, how often he had driven her himself, all he says is, he cannot tell. "I have driven her more than once in single harness. She behaved well." No doubt, he says, he believes she was driven regularly the most of the time she was about his place, but none of the persons in his employment at Bothwell (which is not a remote locality) are brought to speak to their driving the mare, or to corroborate his account of her behaviour.

O'Neil had not the mare more than three hours in his possession, and speaks only to her being driven in single harness two hundred yards and back (it is not said at what pace) on a level road, on the occasion when he re-sold her to Rough. It is probable enough that the mare had not betrayed her faults during that short experiment.

From 19th March to 8th July, when the mare was sold at Moir and Son's auction, she belonged to the pursuer. The pursuer says she was left with the witness Findlay for some days, and that he then had her himself at Slamannan for about a fortnight. During that time, he says, he drove her two or three times himself, and she went quite steadily. He specifies an instance of driving her to Glasgow, on 30th March, along with Mr Fraser, but he says Fraser is believed

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to have left the country, and consequently he is not a witness. The pursuer also says that his groom drove her at other times, but he cannot tell where the groom is now, and, as the Lord Ordinary remarks, it does not appear that he made any effort to find him. The pursuer represents the mare, while in his possession, as having been driven in single harness only. The only corroboration of his evidence as to the driving and behaviour of the mare, while in his own custody, is the testimony of his servant girl Martha Quin, who says she saw the mare leaving the door three or four times, and observed nothing wrong in her starting, and did not hear any complaints. One would think better corroboration than this might easily have been got, if the pursuer's statements were accurate.

What subsequently took place is not of a confirmatory nature. On 14th April the mare was sent to Fraser's stables in Glasgow, where she stood at livery till 2d June at 17s. 6d. a week. The pursuer says the object of this was that the witness Findlay might attend her as a veterinary surgeon for what is called "speedy cut," produced by the one foot coming against the other leg. This period of seven weeks is consequently a blank as to the behaviour of the mare. At the end of that time she was sent to Findlay's stables, where she remained for five weeks—that is, till 8th July—when she was sent by train to Messrs Moir's repository to be sold by auction. The "speedy cut" was cured in the course of the first week (Findlay, p. 22, C), and the question is important, why did she remain at livery with Findlay for four weeks thereafter? Findlay's account of the charge he made for her supplies the answer to that question. He was attempting to break the mare to go in harness. His account contains a slump charge for £7, 15s. for keeping and breaking-in the mare. She was taken out during the four weeks ten or twelve times in all—always by himself, and always in the break (p. 24, B C, and 25, F). Findlay's groom (William Boyd) says he saw her start and return, and saw nothing wrong, but he never drove her. Findlay refuses to admit that the mare was sent to him to be broken, but he shuffles as to the whole matter in a way which discredits his testimony, and the truth shines through, with sufficient clearness, that the driving of the mare while in his custody was simply an attempting to break her, and in which he was by no means successful.

Coupling all this with the evidence of the defenders' witnesses, I come to the conclusion that, prior to the sale on 8th July 1874, the mare had not "been driven regularly in double and single harness" in the only sense in which purchasers could be reasonably expected to understand those words in Messrs Moir and Son's sale catalogue. It is a remarkable confirmation of this, if such were required, that the pursuer did not venture to adduce Miller, the last purchaser of the mare, as a witness to her character, although reminded, through his counsel, by the Lord Ordinary, that this would naturally be expected if Miller could give favourable testimony.

Assuming then that, in point of fact, the mare had not "been driven regularly in double and single harness," the remaining fact to be inquired into is, what was the state of the pursuer's knowledge on that subject?

Now, this can only be gathered from the real evidence of facts and circumstances. We cannot see otherwise into the pursuer's mind. Was the state of his knowlege such as to warrant the representation in the catalogue that the mare had "been driven regularly in double and single harness?" I humbly think not. Making all due allowance for the assurances said to have been given

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to the pursuer by Dolan, with the usual reliability of a horse-dealer declining to give a guarantee, and which the pursuer, no doubt, knew how to appreciate, the fact remains that the pursuer saw enough of her to lead him to place her for five weeks, at considerable expense, in the hands of a breaker, and then to send her to be disposed of by public auction.

This might have been all well enough if the pursuer had made no representation of her qualities or habits. But did his state of knowledge entitle him to represent her as having been driven regularly in double and single harness? Can he be held to have been without knowledge that this was inconsistent with her actual history during the period immediately preceding the sale? I think these questions must be answered in the negative; and if so, the case comes within the class of cases in which the Mercantile Law Amendment Act (19 and 20 Vict., c. 60, sec. 5) does not require an express guarantee, and the common law of Scotland holds a seller not entitled to enforce payment of the price. The pursuer was not without knowledge that, as compared with the representation in the catalogue, the mare was defective. Her training for double and single harness was there represented as having been successful. He knew that it had not been successful, otherwise he would not have been at the expense of sending her to a breaker to get her so trained. In other words, he knew that she had not been driven regularly in double and single harness after having been properly broken, which was obviously the meaning in which the representation was calculated and intended to be understood. That I take to be a sale which the law holds to have been made on a false representation, known to be false, in a matter *in essentialibus* of the contract.

Another view, which I consider also well founded (although opening up somewhat of a different discussion), is that the mare was expressly sold "for a specified and particular purpose," and so comes within a subsequent clause of the same section of the Act to that just referred to. The representation, it is true, was in the past tense. But what was the object of making it, except to convey to a purchaser that what the mare had regularly done hitherto she was fit to continue to do? In other words, that she was fit for the purpose of being driven in double and single harness. The sale being by public auction, and the seller himself not appearing on the scene, so as to be talked to by an intending purchaser, who wanted an animal fit to be driven in double and single harness, what could the latter proceed upon except the deliberate written representation, which, I think, the words naturally imported, that this was a mare fit for the particular purpose for which, it is not disputed, the purchase was made. The pursuer placed, and left the matter upon that footing, and the purchaser was entitled so to act upon it.

With the exception of the paragraph, in which the Lord Ordinary says he is of opinion that the statement in the catalogue was a warranty, the whole of his note is an able and accurate analysis of the evidence, directly supporting both and each of the above two grounds of judgment, although it were to be held that there was not "an express guarantee" in the sense in which these words are used in the Mercantile Law Amendment Act. This last is a nice, and, in the particular circumstances of a written representation at a public sale, a somewhat novel question, into which I do not think it necessary to enter, because either of the two grounds I have assigned is sufficient to entitle the defenders to absolvitor, and I am of opinion that the Lord Ordinary's interlocutor should be adhered to accordingly.

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LORD ARDMILLAN.—Most cases of the kind are attended with difficulty, and this is not an exception. There are conflicting interests, and there is a conflict of evidence. The Lord Ordinary had the advantage of seeing and hearing the witnesses, and had the opportunity of estimating more accurately than we can do the weight and credit due to their testimony.

There are two views of the case, which have both been argued. In the first place, I am, after some hesitation and difficulty, disposed to hold that, having regard to the Mercantile Law Amendment Act, the description proved and admitted to have been given of this mare in the sale catalogue as having "been driven regularly in double and single harness," does amount to an express warranty of the fact so stated, and of the quality and sufficiency of the mare in so far as within that statement. Of the words there is no doubt. Of the meaning there is no doubt. Of the importance of the statement, seeing the mare was thus sold as fit for harness, and of the importance of the fact that the purchase was made on the faith of the truth of that statement, there is no doubt. The defender, the purchaser, founds on these words as express warranty—as an assured description, and as a statement inducing him to purchase. There is no attempt to infer or imply warranty. This is not, and cannot be, a case of implied warranty. The words are published and are sufficient. The recent case of Robeson v. Waugh[1] was different, but it was not on facts like those in the present case. Warranty had in that case not been given, nay, I think it had been refused. A statement made after the refusal to warrant, and made in place of warranty, was viewed as not a warranty. But here the description of the mare in very plain language was given and published in order to attract purchasers, and the purchase was induced by that description, and was made on the faith of that description. That, I think, was an assured description, of the nature of a warranty, not a general warranty of soundness, but a warranty, special and express, that she had "been driven regularly in double and single harness." The description was meant to induce purchase on the footing of fitness for harness, and was so understood; and the purchase made on that footing. Then, I have no doubt, that, on being well and judiciously tried by most competent persons very soon after the sale, this mare was found to be quite unfit for harness,—unsafe and unsuitable, unmanageable, and even dangerous. It is proved, as matter of opinion, by four or five witnesses of skill and experience perfectly competent to judge, that she could not have been "driven regularly in harness." The testimony of the pursuer's witnesses adduced in opposition to those of the defender has been carefully considered by me. The result is, that I come to the conclusion that the description in the catalogue,—the statement to attract purchasers,—was not according to the truth. I cannot believe that this mare had "been driven regularly in double and single harness." The witnesses for the purchaser negative that altogether, and the witnesses for the seller have not by any means proved it to my satisfaction.

If the driving spoken of as taking place in Glasgow was in the course of breaking the mare, that driving was not within the fair and honest meaning of the words "driven regularly in double and single harness." That is not what was proclaimed by the description given. The Lord Ordinary is of opinion that she was sent to Findlay's to be broken; and that is very probable—the more so that there is a charge for breaking in Findlay's account. But whether that was

[1] Oct. 30, 1874, *supra*, p. 63.

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the case or not, no such regular driving in double and single harness as was stated in the description has been proved as to support the description given of the mare. She certainly did not answer the description.

On the other view of the case, and treating the description in the catalogue not as a warranty but as a representation of fact with a view to a sale, I agree with Lord Deas. Looking to all the proof, I am compelled to the conclusion that the pursuer did not and could not really believe that the description in the catalogue was according to the truth. That she was driven by a breaker, or in the course of breaking, does not satisfy the description. That is not what was meant to be proclaimed in the catalogue as an inducement to purchase. What was so stated was misleading, contrary to the fact, and inducing the contract.

LORD MURE.—The question whether this mare was sold under a warranty is one which presents considerable difficulty and nicety. Undoubtedly the mare was sold by auction on the representation contained in the catalogue, that she had "been driven regularly in double and single harness." But it is very clearly proved that she was unfit to go safely in either. And one question here raised is, whether that representation amounts to an express warranty in the sense of the Mercantile Law Amendment Act.

The inclination of my mind is to hold that it amounts to a representation merely, but to a representation of such a nature as may be held to entitle a purchaser to reject an article, in respect of the alternative in the latter part of the 5th section of the Act relative to goods sold for a specified purpose, and that whether the seller was *in bona fide* or not in making the representation.

The 5th section provides that when "goods have been expressly sold for a specified and particular purpose, the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose." Now, dealing with the matter under this branch of the section I should be inclined to hold that a horse advertised, as here, in an auction catalogue as having "been driven regularly in double and single harness," and sold upon that representation, is expressly sold for a specified and particular purpose; and if bought for that purpose, and found on trial to be unfit, that the seller cannot recover the price, or must refund it if paid. In the present case it is proved that the mare in question was bought with a view to harness; and if the above is a correct construction of the alternative clause of the statute, as bearing upon the evidence in this case, the defenders, in respect of that provision, are, I think, entitled to prevail.

But taking the case apart from the provisions of the Mercantile Law Amendment Act, and dealing with it according to the ordinary rules of law applicable to representations, I agree with your Lordships that it is proved that the mare was sold upon a representation which was not in point of fact true; and that the pursuer cannot, in the circumstances disclosed in evidence, be held to have been *in bona fide* in making it, and is not, therefore, entitled to recover against the defenders.

The LORD PRESIDENT was absent.

THE COURT pronounced this interlocutor:—"Adhere to the said interlocutor, and refuse the reclaiming note: Find," &c.

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and of tailzie, in any future time, to alter the order of succession, nor to sell, alienate, or dispone any of the said lands and others, either irredeemably or under reversion, or to contract debt in manner therein specified; (2), a clause irritating and resolving the right of any of the heirs of entail who should commit treason, or other crime by which the estates might be forfeited; and (3), clauses irritant and resolutive applicable to the prohibitory clauses in the said charter, and providing that the person next in succession might obtain a declarator of his right as heir-male of provision, ordaining superiors to infeft him in said lands, or have himself declared and retoured heir to the person last vest and seized before the contravention. By the said charter of novodamus it is also provided and declared that should the said James Lord Drummond, or his foresaids, be guilty of treason or other crime inferring forfeiture, the right thereby granted so far as it concerned the contravener should cease *ipso facto*, and be void and null, and the lands and others therein contained belong to the next person and his heirs-male, who should succeed immediately after the contravener and the descendants *of his body*. . . . Upon this charter infeftment followed in favour of James Lord Drummond, the institute in the entail, conform to instrument of sasine in his favour dated the 12th and recorded the 17th September 1688."*

The pursuer pleaded, *inter alia*;—(1) The said lands and estate of Perth being held under royal and parliamentary titles prescribing and limiting the course of succession thereto, and the pursuer being the nearest heir of provision in terms thereof, he is entitled to decree as concluded for. (2) The royal charters, investitures, and Acts of Parliament founded on, or one or more of them, constitute an effectual taillie at common law, and the pursuer, as nearest heir of taillie and provision under the destinations thereof, is entitled to decree declaring his right to the lands and estates thereby conveyed. (3) The deeds founded on at all events effectually prohibit the alteration of the succession, and are binding and obligatory *inter hæredes*; and Baron Perth was not entitled to use the title made up by him under the Restoration Act otherwise than for supporting his radical title to the estate under the taillie destination foresaid, and the titles made up by him, in so far as in fee-simple and inconsistent with the said taillie destination, are null and reducible at the pursuer's instance. (4) By the terms of the royal charter of 1687 all right of escheat competent to the Crown in relation to the said estates was effectually limited to the liferent interests of the heir actually attainted, and the heirs-male of his body, and such limitation was and is binding in a question with the Crown and its assigns, in respect of the consent of the Crown to the conditions of said charter. (5) In respect of the foresaid limitation, when the Chancellor's son was attainted in 1715, the interests thereby forfeited were limited to the interests of himself and the heirs-male of his body, and the said heirs-male of his body having failed, the pursuer, as his heir-male whomsoever, is entitled to succeed to the said estates. (6) The pursuer, as heir-male duly served of Baron Perth, Baron Perth's father, the Chancellor, his son, and grandson, all as condescended on, has, under one or other of these titles, the character of heir-male of taillie or of provision entitled to succeed to the said lands and estate, and has thus a right and interest to reduce all titles which are adverse to his right. (7) Under the

* In his condescendence in the former action the pursuer did not found upon the charter of 24th September 1679, nor the Act of Parliament of 6th September 1681. The crown charter of 17th November 1687 was only mentioned *narrativé* as a step in the progress of titles, the procuratory of resignation of 11th October 1687 (which was not recorded in the Register of Tailzies) being founded on as the deed constituting the entail.

Act 7 Anne, cap. 21, as interpreted by judicial decisions, the interests of heirs-substitute of entail are not affected by the forfeiture of the heir in possession, upon conviction or attainder, provided the entail is conceived in such a form as to be binding on the Crown. (8) The foresaid taillied destination being constituted by charters under the royal sign manual, and ratified by Act of Parliament, was binding on the Crown as well as *inter hæredes*, and therefore nothing was forfeited to the Crown by the attainder of Lord John Drummond except his life-interest as an heir-male of entail in the said lands and estate. (9) Baron Perth having died without male issue, any right or interest which he may have possessed to or in the said lands and estates terminated at his death. (23) The grounds of action and pleas in law maintained in the present action are different in substance from those disposed of by the judgments referred to in the defender's fourth plea, and the conclusions of the action are not *res judicatæ*.

The defenders pleaded;—The defenders are not bound to satisfy the production, and they ought to be assoilzied, or the action should be dismissed, because, ... (4) it is *res judicata* that the pursuer has no title to sue or to call for production of the writs sought to be reduced, in respect—1, of the action and decree set forth in articles 1 and 2 of the defenders' statement;[1] and, 2, in respect of the action and decree set forth in the remaining articles of that statement.[2] They also substantially repeated their pleas in the former action.

The Lord Ordinary, on 3d December 1874, pronounced the following interlocutor:—"Finds that, by judgment of this Court in the action of reduction and declarator raised in 1868, at the instance of the present pursuer against the present defenders, and affirmed by the House of Lords, it stands decided, and is *res judicata* between these parties, that the lands and estates claimed by the pursuer in the present action were taken out of the *hæreditas jacens* of James Drummond (designed third Duke of Perth) by means of the attainder of John Drummond, apparent heir to the said James Drummond, and that the same became vested in the Crown, and formed the subject of enactments under the statutes 20 Geo. II., c. 41, 25 Geo. II., c. 41, and 24 Geo. III., c. 57; and that these statutes confer no right on the pursuer in reference to the said lands and estates: Finds that the pursuer has not libelled or condescended on any right or title to the said lands and estates entitling him, consistently with the said judgment, to insist in the conclusions of the present action: Therefore dismisses the action, and decerns: Finds the pursuer liable in expenses," &c.*

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[1] Lundin v. The King's Advocate, Dec. 13, 1750, M. 9605.

[2] Earl of Perth v. Lady Willoughby de Eresby's Trustees, *supra*, p. 538.

* "OPINION.—It is admitted, and is clear, that the pursuer by this action again claims the same estates which he claimed unsuccessfully by his action of 1868, directed against the same defenders. The questions now raised are therefore—1st, whether the present action is rested on grounds which were not put forward or adjudicated upon in the prior action; and 2d, whether the grounds of action now relied on, in so far as they may be regarded as new, can be otherwise dealt with than those formerly urged—having regard, of course, to the principles established by the former decision considered as a precedent.

"In the former action the pursuer sued only in the capacity of heir-male general to James third Duke of Perth. He now sues in the further capacities of heir-male in general to—1st, James first Duke and Lord Chancellor of Scotland; 2d, James second Duke and eldest son of the first Duke; 3d, James Drummond of Lundin; and 4th, Baron Perth in the peerage of Great Britain. It does not, however, follow that the present action differs so materially from the former as even to avoid the plea of *res judicata*, and still less to escape the application of the former decision as a precedent.

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[1] Lundin v. The King's Advocate, Dec. 13, 1750, M. 9605.

[2] Earl of Perth v. Lady Willoughby de Eresby's Trustees, *supra*, p. 538.

* "OPINION.—It is admitted, and is clear, that the pursuer by this action again claims the same estates which he claimed unsuccessfully by his action of 1868, directed against the same defenders. The questions now raised are therefore—1st, whether the present action is rested on grounds which were not put forward or adjudicated upon in the prior action; and 2d, whether the grounds of action now relied on, in so far as they may be regarded as new, can be otherwise dealt with than those formerly urged—having regard, of course, to the principles established by the former decision considered as a precedent.

"In the former action the pursuer sued only in the capacity of heir-male general to James third Duke of Perth. He now sues in the further capacities of heir-male in general to—1st, James first Duke and Lord Chancellor of Scotland; 2d, James second Duke and eldest son of the first Duke; 3d, James Drummond of Lundin; and 4th, Baron Perth in the peerage of Great Britain. It does not, however, follow that the present action differs so materially from the former as even to avoid the plea of *res judicata*, and still less to escape the application of the former decision as a precedent.

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The pursuer reclaimed. The points raised in the argument sufficiently appear from the opinions of the Judges.

"While suing as heir-male general of James third Duke, the pursuer necessarily not only admitted but contended that the estates were vested in him at his death in 1746. In the present record he founds upon his services recently expede as heir-male general of the Chancellor and his son (first and second Dukes), apparently with a view to the statement (or rather plea in law) at the end of condescendence 25 (repeated in the 5th plea in law)—that 'when his (James third Duke's) father was attainted in 1715, the estates and honours passed from him and the heirs-male of his body to his heirs-male whomsoever, in terms of the charter of 1687.' But this plea (which is, in my opinion, otherwise bad on grounds which I need not now enter on) altogether overlooks the fact which the pursuer himself sets forth—that the party attainted in 1715 (the son of the Chancellor) had in 1713 conveyed the estates to his son, afterward James third Duke, and that they consequently escaped forfeiture altogether, and passed to his son, whose claim to them was sustained accordingly. In the pursuer's appeal case in the former action (p. 44), it is said to have been so decided by this Court on 13th August 1719, and by the House of Lords affirming the judgment on 22d March 1720. The pursuer's services to the Chancellor and his son (an attainted traitor), are therefore manifestly worthless.

"In the former action the pursuer conclusively established his contention that James third Duke died in 1746 well infeft in the estates. In the present action he has again, in my opinion, conclusively established this proposition, although he seems now to think that he may take some advantage by disputing it. The infeftment is recorded of date 16th October 1713 (cond. 14.) The purpose of the service and charter expede in 1731 after the judgments affirming his right to the estates, notwithstanding the attainder of his father in 1715, is not apparent, and need not be inquired into, as his right could not thereby be weakened. It is admitted that he possessed the estates till his death in 1746.

"Accordingly, by the interlocutor of 22d January 1869, in the former action, it was in substance and effect found that James third Duke died well infeft in the estates—for this is necessarily implied in the finding that they were taken out of his *hæreditas jacens* and vested in the Crown by the attainder of his brother and heir John Drummond. I should think this not the less *res judicata* because the pursuer admitted and contended for it, and was at pains to establish it. But it is unnecessary, in my view, to dwell on this—for, *res judicata* apart, the matter is clear, and must have the same effect now as formerly.

"With respect to the pursuer's services as heir-male general to the late Baron Perth and his father, I can discover no virtue in them, and the pursuer's counsel did not attempt to point out any. Neither of these persons had any right to the estates except under the Restoration Act, and cannot be held to have had any other right consistently with what has been decided between the pursuer and defenders, viz., that the fee-simple of the estates was vested in the Crown by the attainder of John Drummond in 1746. Again, it is matter of decision as between the parties that the purpose and effect of the Restoration Act was to give the estates in fee-simple, unaffected by the limitations of any entail. This, indeed, was one of the principal subjects of controversy and judgment in the former action. I am clearly of opinion that it is *res judicata*, and, if it were not, I could not hesitate to decide according to the former judgment as authoritative precedent. These services are, therefore, in my opinion, plainly worthless.

"The view on which the pursuer chiefly relies in order to distinguish the case from the last, so far as I can make it out, is to this effect—that by no founding on the charters of 1588 and 1679, and the Act of 6th September 1695 (8 Thomp. 259), which he formerly omitted to do, he can now maintain with more effect the argument that, for all the purposes of the law of forfeiture and attainder, the estates in question are to be regarded precisely as if the tailzie

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destination had been prescribed by a deed made and registered under the Act of 1685.

"But the argument itself was maintained in the former case, and I cannot deny the effect of *res judicata* to the judgment following on it, because the pursuer might, by referring to certain deeds and a certain statute, have made it stronger. But indeed the pursuer need not, so far as I can judge, reproach himself or his advisers for any failure in this respect, for the entail derives no additional strength from the charters and Act in question. An entail by crown charter is of no more validity or power than any other entail in the same terms, and besides, the entail of 1687 was by crown charter. The charter of 1679 is exceptionally loose, and was very short-lived as an entail, for the most material and striking feature of it is that the fourth Earl (though a liferenter in form) is thereby empowered to deal with the estates at his pleasure as a fee-simple proprietor. In truth, he prescribed the terms of the charter, which proceeded on his procuratory as vassal and proprietor. This is the charter which was ratified by Parliament in 1681. With regard to this ratification, I have only to observe that it had and could have no other effect than to validate the deed, and place it beyond question by the Estates of Parliament as a deed dealing with Crown lands, or lands of which the Crown was superior. Such Acts were common at that period, but were never supposed to affect the construction or legal effect according to its terms of any deed so ratified, considered as a valid deed.

"The fourth Earl exercised the absolute freedom which he had under the charter of 1679 by making the entail of 1687, and this entail accordingly was (I think properly) referred to in the former action as the first or leading entail which governed the succession at the date of the forfeiture. It is not to be doubted that this matter was well considered in the former case, when it was determined (as it must have been) that the pursuer could take no advantage by founding on the prior charters, or on the Act of 1681. Indeed, when a man with unlimited power of disposal, which the fourth Earl unquestionably had, exercises his power by making an entail in the apt and common manner of executing a procuratory of resignation, and taking a charter from his superior in the terms he desires, it seems very clear that no additional virtue can be given to such entail by reference to prior charters. It is a complete new investiture, and must govern the succession until it is altered. If there were anything in the pursuer's argument regarding the effect of the Act of 1681, it would render very clear and certain the fourth Earl's power to make the entail of 1687, for his power by the charter of 1679 to sell, alienate, and dispose of the estates at pleasure, is thereby ratified by Parliament. But, in truth, his power is clear on the prior titles.

"The pursuer particularly founded on the clause in the charter of 1679, which immediately precedes the reddendo, whereby alienations without consent of the superior are prohibited under the penalty of forfeiture of the feu. This is a common though superfluous clause in charters from the Crown and other superiors of lands held ward, as those in question were. It is merely an expression of the casualty or forfeiture of 'recognition' which the law, while ward subsisted, implied and attached to every feu in wardholding, although not expressed. The clause plainly cannot affect the validity of an entail or the law of forfeiture for treason. That it is a clause of mere style, frequently though not invariably used, is clear enough in this case, from the fact that it follows a clause giving absolute power of disposal to the fourth Earl. I have already noticed and dwelt upon the circumstance that he exercised the power by making the entail of 1687, necessarily with the superior's consent, for it was made by procuratory of resignation followed by charter from the superior. In no view, therefore, can the clause in question, which only prohibits alienations without the superior's consent, avail the pursuer. It can hardly be maintained

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that the casualty of recognition, or a clause in a crown charter prohibiting alienation of ward lands, without the consent of the Crown as superior, was pleadable against the Crown to the effect of preventing forfeiture by the vassal's treason.

"Lastly, the pursuer relies, and founds a plea in law (the 4th) on the clause in the charter of 1687, which determines the right of an heir in possession on committing treason or other crime inferring forfeiture, and passes the estate to the next heir-male entitled to succeed after the contravener and the descendants of his body. The first remark, of course, is, that this argument, if there is anything in it, ought to have been stated in the former action, where it had exactly the same pertinency which it has here as an argument to support the proposition, which was urged before as distinctly as it is now, that John Drummond (or any other attainted heir) forfeited only for himself and his issue. The fact that it never occurred to anybody between 1747 and 1874, and escaped the vigilance of the pursuer's counsel in the former action, if indeed they did not deliberately reject it as not worth stating, is unfavourable, but not of course conclusive on the merits of this new argument, if it may still be brought forward. My opinion, however, is very clearly against it. The terms of a clause in a crown charter of resignation following on a procuratory executed by a proprietor having absolute power of disposal, cannot, in my opinion, control or affect the public law of treason, or limit the penalty attaching to that crime.

"The case, in the view which I take of it, derives any importance it has from the mere magnitude of the pursuer's claim, and none whatever from any difficulty or legal interest attending it. The only arguable points in the pursuer's favour were very fully discussed and deliberately decided against him in the former action. Those now brought forward as making a new case are all of them such as might have been brought forward in the former action, and no doubt would have been had they then been thought worthy of serious consideration. It is impossible to represent the present claim as a new one, or otherwise than as a restatement of the old one, with more or less of variety in the arguments, or mode of putting them, in support of it. Now, as formerly, the pursuer claims as the heir of the investiture subsisting in 1746 when John Drummond was attainted. Now, as formerly, his *media concludendi*, by whatever arguments or references supported, are, first, that the succession under that investiture was disturbed by the forfeiture of the traitor only with respect to the traitor himself and his issue, and, second, that at all events this succession was, by the Restoration Act, restored as a tailzied succession, and has never since been validly altered. These are the *media* which the former judgment disposes of in terms, and I should find it impossible, consistently with that judgment, to entertain an action claiming the same estates on the same *media*, even if I thought that they were now supported by stronger arguments, and a more enlarged or skilful reference to deeds or documents.

"A multiplication of services cannot avail the pursuer, for were he served heir-male in general to every member of the Drummond family that ever lived and died, he would be no nearer the estates, while it stands decided between him and the defenders that the fee-simple was vested in the Crown by the forfeiture of John Drummond in 1746, and that under the Restoration Act the fee-simple was by the Crown conferred on the late Baron Perth; and as this decision cannot be reversed or disregarded, it must for ever stand as an irremovable and insurmountable obstacle to a claim by the pursuer as heir of any investiture before the Restoration.

"I shall endeavour so to frame the interlocutor as to express distinctly what I hold to be *res judicata*, while I decide (what cannot of course be involved in the former judgment) that the pursuer has not in this case relevantly alleged any right or title to the estates entitling him to insist in the present action consistently with the judgment standing against him."

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ceived from us all the attention in our power. The aspect which it has now assumed is, substantially, whether the plea of *res judicata* is available to the defenders.

By the law of Scotland—whether equitable or not I do not say, it is difficult to see how it could be otherwise—there is a distinction between the position of a pursuer and that of a defender. The pursuer who attacks a party in his rights has his option to raise his action in the first instance upon any ground he pleases out of several that may be competent to him, and if he fails in that he can resort to another and different ground, because as against a pursuer the plea of competent and omitted can never be maintained. A defender, on the other hand, is bound, for his own protection, to state all his defences, and if he omits anything, and judgment has gone against him, he has lost his opportunity: that judgment must take effect, although he may have had a relevant, competent, and well-founded plea, which he has not chosen or has omitted to state. Competent and omitted is not a plea that can be stated against a pursuer, because the judgment in favour of a defender is not an absolute affirmation of his rights, but is merely negative of the grounds put forward by the pursuer, and it cannot extend beyond those grounds. A pursuer may thus maintain his rights on different grounds, one after another, until he has exhausted the whole that he can adduce. But it is not a new argument that will entitle a pursuer to bring a second action when he has failed in his first, or a new authority in support of his argument. The privilege is given to a pursuer, when he has brought his action upon one category or head, to resort to any other head or category of law that is not identical with or involved in the other which has been disposed of. For instance, the fact that a reduction *ex capite lecti* has been brought unsuccessfully is of no avail against a reduction on the ground of force and fear, or want of due attestation.

The Lord Ordinary has proceeded mainly on the ground that the present action is entirely met by the plea of *res judicata*, although his interlocutor is framed so as to admit of some other views. If that were quite clear there would be an end to the case. I am not, however, satisfied that this action is founded precisely upon the same grounds as the former one. I think there is a difference in the grounds, of such materiality as to entitle the pursuer to be heard upon the new and different grounds. It is a totally different question whether the new ground is a well-founded one. But it is no reason for excluding, upon the plea of *res judicata*, a new ground, because it may be bad. It is to be disposed of not in respect of the former decision, but in respect of its own sufficiency or insufficiency.

The object of the pursuer in the former action was, if possible, to confine the forfeiture that followed on the family of Drummond to the person attainted, and with that view there were circumstances stated and pleas urged that deserved consideration. The same result is now sought to be arrived at, but to a material extent upon different *media*. This is illustrated by one point of the case which was urged, and to which I think it would be difficult to say that *res judicata* applies.

In the former action this was the state of the record,—(Cond. 3) "On 11th October 1687 James fourth Earl of Perth, who was at the time Chancellor of Scotland, executed a deed of strict entail, duly fenced by prohibitory, irritant, and resolutive clauses, whereby, under a reservation of his own liferent, he disponed his lands and estates of Perth, as therein particularly described, to and in

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favour of his eldest son, Lord James Drummond, and the heirs-male of his body, whom failing to his other heirs-male whatsoever, whom all failing, to his own heirs and assignees whomsoever." (Cond. 4) "Under this entail a regular feudal title was completed by a crown charter of resignation and novodamus of the said lands and estate in favour of the said James Lord Drummond, and the series of heirs mentioned in the said deed of entail, and subject to the fetters thereof, which crown charter is dated 17th November (in the record September) 1687, written to the Privy Seal and registered the 11th and sealed the 13th July 1688. Upon the said crown charter infeftment followed in favour of James Lord Drummond, the institute in the entail, conform to instrument of sasine in his favour dated the 12th and recorded the 17th September 1688." Now, this was an explicit statement that the limitation of heirs in these deeds rested upon the first deed mentioned, which is described as a deed of strict entail executed by the Chancellor of Scotland; and reference is made to the subsequent taking of the charter as a mere form, though an essential form, of feudalising the entail. Upon that view it was urged that the forfeiture which ultimately took place could not go beyond the rebel actually attainted, or at least beyond himself and his descendants. Reference was made to the Act 1690, cap. 33, as introducing a privilege in favour of heirs of entail, whereby forfeiture was not to go beyond the person that was attainted; but the answer made to that, and held to be conclusive, was that by the very words of the Act it was an essential condition that the entail, of which the benefit was thus to be given to heirs-substitute, should be recorded in the register of entails, in terms of the Act of 1685. And then, what this Court and the House of Lords did was this—they held that in order to get the benefit of that Act, the recording being necessary, it was the duty of the pursuer to set forth that the entail was recorded; and not having done so,—for a very good reason, because it was not recorded,—he could not claim the benefit of that Act. That was held to be a matter not requiring probation of the negative on the part of the defenders, but requiring averment and probation on the part of the pursuer, and there was neither.

Now, I do not think that the present case is quite rested on the same ground, for there is a studious desire, legitimately put forward, to try the question on another ground, by overlooking, or, at least, not founding on the Chancellor's own deed of 11th October 1687 as the deed of entail. In the former action the Chancellor's deed was founded upon as the entail, and according to the statement there made it would require to have been recorded, because it was a deed made by a subject entailing his land, and so fell under the operation of the Act 1685. But in the 11th article of the present condescendence, although reference is made to the procuratory of resignation, the deed founded upon as constituting the destination of the lands is the charter that followed on that procuratory, dated 17th November 1687; and that is not treated as a mere feudalising of the entail by the Chancellor himself, but as a deed flowing from the Crown, and standing independent. It has been argued, and one of the pleas in law states distinctly and clearly, that this deed—a royal, or in part a royal and in part a Parliamentary, entail—does not fall under the Entail Act at all, but is a grant by the Crown requiring no registration, nor anything but the mere issuing of it, and which, by the voluntary and spontaneous limitation of the rights of the Sovereign in the event of forfeiture, excludes the Sovereign from availing himself at any subsequent period of any forfeiture beyond the interests of the heir of entail involved in the Rebellion and his descendants. The argument is this,—Apart from the

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subject entailing his lands, and merely getting the Crown to feudalise the right, here is the Sovereign himself giving out these lands in favour of heirs-male, and at the same time conferring upon the successive heirs-substitute the benefit that arises from a clause of forfeiture in the event of rebellion. The rebellion constitutes a forfeiture of the estate, but is to operate in favour of the next heir; and it is assumed that the Sovereign had the power so to qualify his rights, and having done so spontaneously, was precluded, upon the subsequent rebellion that took place, from taking away from the substitutes the right that had thus been conferred upon them by the terms of the charter.

This is a plea that would be well worthy of consideration, if it were well-founded in point of conveyancing. It is quite intelligible that the Crown should be able to confer a right or dignity which the subject could not demand. In the case of a peerage, which is a precedence or rank created entirely by the Sovereign, I can conceive that a title so limited and destined might only be forfeited to the rebel, and go to the next heir in the destination,—though I am not so well versed in peerage law as to be able to dogmatise on the subject. Lands, however, are in our practice very seldom given out, in the first instance, by the Sovereign. Society is too far advanced for that often happening. When lands come to be once in the person of a subject, no entail, in my opinion, can be completed of these lands except with the consent or at the instigation of the subject who holds them in fee-simple. The Sovereign might arbitrarily refuse to confirm a progress of that kind, but no Sovereign of this country would do that. We have not here the case of lands given out for the first time, which might give rise to a nice question, whether it was or was not within the constitutional rights of one Sovereign to limit the rights of other Sovereigns, his successors, and in this way to protect an estate from ever coming to the Crown under forfeiture so long as there was an heir of investiture or entail to take it up. We have not that here, because, although the pursuer in the present action ignores the procuratory of resignation, which he held as the deed of entail in the former action, and now proceeds upon the crown charter of November 1687, he does not get there an original grant by the Crown, because the lands had been already given out. There was a grant of novodamus too, which is also a writ by progress. Under such a deed, I take it, that, if the previous proprietor either asks or obtains a charter of resignation, or any other deed that imposes fetters upon the lands, that deed must be held to be an entail by a subject and not by the Crown, the Crown consenting merely as superior, the *dominium utile* having already been separated from the *dominium directum*.

Thus, while I think that the plea of the procuratory being no deed of entail by the subject, and of the deed of entail having originated with the Crown, is a new plea, yet I do not think, when we come to examine the titles, that it is a well-founded plea, because I think the true view of the titles is that which was taken by the pursuer and his counsel in the former action—viz., that the entail was contained in the procuratory of resignation, and that what followed from the Crown was a mere feudalising of that entail. These titles enable us to see that now by changing his ground of action the pursuer gets rid of the plea of *res judicata*, but the new ground is not supported by correct notions of feudal right and conveyancing, and therefore cannot be sustained upon its own merits. That is the general view I take of the case in its present aspect. There are other points of diversity of pleadings in the two cases of the same kind, but this is the best illustration of the change of ground which I think there is. While

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there is a change of ground, it is a change that does the pursuer no good, because it is not stable in itself as a hypothesis for the rest of his argument, and because the true state of the case upon its merits was that which was libelled in the former action, and which has been adjudicated upon, and decided against him.

The result is that I am under the necessity of holding that this action cannot be sustained, not entirely upon the ground of *res judicata*, but upon the ground that any *medium concludendi* now set forth which was not included in the other action is in itself inapplicable to the facts of the case as disclosed by what we have before us. We have in the former action and in this quite enough evidence before us to shew that the charter of resignation and novodamus was just the echo of the terms in which the subject resigned the lands into the Sovereign's hands. I do not see anything coming from the Sovereign that was not prayed for and accepted by the subject. It comes, therefore, to be an entail by a subject, no doubt ratified and confirmed feudally by the Sovereign, but still an entail by a subject, which comes under the Scotch Act of Parliament of 1685, and is therefore subject to the limitations that are contained in the Act, and which are kept up by the Act of 1690, whereby it is made a condition of the privilege of heirs of entail that the entail should be recorded. There is no room for arguing that this can be got rid of on any ground of common law.

I propose, therefore, that the form of our interlocutor should be, that in so far as this action sets out any *media concludendi* that are not identical with those formerly decided, they are irrelevant and insufficient to support the action, and that, in other respects, the interlocutor of the Lord Ordinary should be adhered to.

LORD ORMIDALE.—As this case not only involves interests of great magnitude but also raises some questions of law of considerable importance, I think it right to state for myself the reasons which have chiefly influenced me in forming my judgment.

The Lord Ordinary has, by his interlocutor under review, in effect held that the pursuer is not entitled to insist in the present action, in respect that the grounds upon which he founds have either been already decided to be invalid and insufficient in the former action at his instance against the same defenders, and in reference to the same claims, or, in so far as it can be said that these grounds are new or different from those disposed of, adversely to him, in the former action, they are also invalid and insufficient to support his alleged right and title in the present.

It is essential, therefore, to discriminate between what was decided in the former action and must now be held to be *res judicata*, and what may be fairly considered to be new or different grounds, on which the pursuer founds as entitling him to sue and insist in the present action. This does not appear to me to be a matter of much difficulty. And, as the most convenient mode of making the discrimination, I propose to deal, in their order, with the grounds of action which I understand the pursuer now puts forward as new, and, having done so, all else in the case may be taken either as *res judicata* in the former suit, or of no materiality.

The nature and effect of *res judicata* has been so fully, and, to my mind, so satisfactorily explained by my learned brother who has just delivered his opinion, as to leave it unnecessary for me to enter on that subject. I shall proceed at

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once, therefore, to notice the various points relied on by the pursuer as new in the present action.

The first point the pursuer endeavoured to make as not covered and precluded by the plea of *res judicata* had relation to the royal charter of 24th September 1679 referred to in article 9, and the Act of Ratification thereof, referred to in article 10 of his condescendence. It is quite true, as was urged by the pursuer, that the royal charter and Act of Ratification so referred to were not founded on by him in the former action, and therefore must be taken as new matter in the present. But although the royal charter and relative Act of Ratification are thus brought forward for the first time as a ground of action, it does not follow that they afford any material aid to the pursuer in the present, any more than they could have done in the former action, if they had been there founded on. I have had some difficulty, indeed, in understanding to what effect the charter of 1679 and relative Act of Ratification are now appealed to by the pursuer. That they are founded on by him in the present, and were not founded on in the former action, is true, and I am not sure that in reality any more can well be said about them. The Act of Ratification does not extend beyond the charter, or give it any further scope or effect than it had in itself. And although the charter emanates from the Sovereign, and bears to be in favour of James Earl of Perth, in liferent, whom failing to James Lord Drummond, his eldest son, and the heirs-male of his body to be lawfully begotten, in fee, whom failing to return to the said James Earl of Perth, and his heirs-male and assignees whomsoever, this destination is not fenced, as in an entail, by prohibitory, irritant, or resolutive clauses. On the contrary it is provided, as stated by the pursuer in the 9th article of his condescendence, that it should be in the power of the said James Earl of Perth, without the consent of his son, James Lord Drummond, to sell, alienate, and dispone the estates, or part thereof, irredeemably or under reversion, as he saw proper. Keeping this in view, and also that the said James Earl of Perth did soon thereafter, in virtue of the power he undoubtedly possessed, reconstitute, as set out in the 11th article of the pursuer's condescendence, the title to his estates, and create a new investiture of them, I fail to see how the charter of 1679 can now be of any avail to the pursuer.

But supposing that the charter of 1679 could be treated as an entail according to the law of Scotland prior to the passing of the Act of 1685, cap. 22, as seemed to be argued for the pursuer in the earlier part of the discussion, and supposing also that it had not been evacuated and put an end to by the new investiture which afterwards followed, it would still be exposed to the fatal objection of never having been recorded in the Register of Tailzies in conformity with the statute 1685, cap. 22. It was suggested, however, that that Act did not apply to an entail made prior to the Act; but unfortunately for the pursuer the contrary has long since been settled to be the law in the cases, among others, of Philp v. The Earl of Rothes, 14th December 1758, affirmed on appeal, Mor. 15,609, and Lord Kinnaird v. Hunter (where infeftment had followed upon the entail), 26th November 1771, also affirmed on appeal.

Nor do I see how the clause in the charter of 1679 to the effect of forbidding James Earl of Perth and his son from selling the estates in whole or in part to any person or persons without the consent of the King or his successors under the sanction of forfeiture affords the pursuer any assistance. That clause is, I think, very well described by the Lord Ordinary as in reality merely an expression of the casualty of recognition applicable to wardholdings while

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they existed, but it cannot affect either the validity of an entail or the law of forfeiture for treason. No question of any such forfeiture has been raised in this case; and I do not understand how it could possibly be raised in the face of the new investiture, to be afterwards noticed, consented to and approved of by the Sovereign.

I must, for these reasons, own my inability to understand how the charter of 1679 and relative Act of Ratification made such a settlement of the estates in question as to be of the slightest effect in the present controversy. I was not, therefore, surprised to find that the charter of 1679 came ultimately in the discussion to be, as I thought, in a great measure, if not wholly, laid aside, to make room for the argument rested on the charter of 1687. And this leads me to a consideration of the second, and, as it appears to me, the chief of what the pursuer represented as his new grounds of action.

The charter of 17th November 1687 is one of resignation and novodamus, proceeding upon a procuratory of resignation *in favorem*, by James fourth Earl of Perth, of 11th October preceding, containing the requisite clauses of a strict entail. Both the charter and the procuratory are referred to and founded on by the pursuer in the 11th article of his condescendence in the present action, and they were also referred to and founded on by him in the former action. So far, therefore, they do not introduce any new feature into the discussion. But although this is so, it was argued for the pursuer that, as these instruments are founded on in the present action to a different effect and for a different purpose now than formerly, the judgment in the former suit cannot, so far as they are concerned, be *res judicata* in regard to them in the present. Although I think the soundness of this view might well be questioned, I am willing to take it that the pleas now advanced by the pursuer as founded on the charter of 1687 are not covered or precluded by the judgment in the former suit, and to deal with them on this footing.

In the former suit the pursuer referred to and founded on the procuratory of resignation of 11th October 1687 as the deed by which James, the fourth Earl of Perth, entailed the estates in question, and under which they were subsequently held when forfeited after the Rebellion of 1745. In the present suit, however, the pursuer, very inconsistently as it appears to me, refers to and founds, not on the procuratory, but on the charter of resignation and novodamus which followed on it, as the true deed of entail, and in this way he seeks to escape from the effect of the plea of *res judicata*. But supposing that the plea of *res judicata* is not to be held to apply, the question remains whether the pursuer has so improved his position by founding on the charter, and not the procuratory of 1687, as the deed of entail, as to be entitled to sue and maintain the present, although not the former action. There are various reasons which satisfy me that this question must be answered in the negative.

(1) The procuratory of resignation of 11th October 1687, a deed which was executed by James, the fourth Earl of Perth, himself, must, I think, be held to be in reality the deed of entail, and not the charter of 17th November 1687, which followed upon it, for the purpose of feudalising the title. It was so represented by all parties—the pursuer as well as the defenders—in the former action, and the judgment of this Court, affirmed as it was by the House of Lords, proceeded on that footing. Nor can there be any doubt that it is quite a usual and competent mode of entailing estates to do so by procuratory of resignation.

(2) But supposing the charter of 1687, and not the procuratory, were held to

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be the entail, it would be exposed to the same objection which was fatal to the procuratory in the former action, viz., that it has never been recorded in the Register of Tailzies, in terms of the statute 1685, cap. 22. That this is a fatal barrier to the pursuer prevailing, whether the procuratory of 11th October or the consequent charter of 17th November is to be taken as the deed of entail, I apprehend to be free from doubt. It was so decided in the former action in reference to the procuratory, which both parties there represented to be the entail, and although it may be open to the pursuer to maintain that the point is not *res judicata* in reference to the charter which he now says is the deed of entail, the principle of decision must be equally applicable, unless, indeed, the pursuer be right in maintaining, as I understood him to do, that an entail constituted by charter granted by the Sovereign does not require to be recorded in the Register of Tailzies. The pursuer argued that the leading words of the statute 1685, cap. 22, to the effect "that it shall be lawful to his Majesty's subjects to tailzie their lands and estates," shew that it is only deeds executed by subjects which require to be recorded in the Register of Tailzies. But I cannot concur in this construction of the statute, and no authority was cited in support of it. I think it unsound, for two reasons,—1st, The words of the statute merely make it lawful to his Majesty's subjects to tailzie their lands and estates, but it nowhere prescribes that this can be done only by a deed which has been executed, that is subscribed, by a subject, and not by a deed, such as a charter, emanating from the Crown. The provision in the statute as to the recording of entails is quite general, to the effect of requiring "the original entail to be produced before the Lords of Session judicially, who are hereby ordained to interpone their authority thereto, and that a record be made in a particular register book to be kept for that effect, wherein shall be recorded the names of the maker of the entail and of the heirs of entail, and the general designations of the lordships and baronies, and the provisions and conditions contained in the tailzie, with the foresaid irritant and resolutive clauses subjoined thereto, to remain in the said register *ad perpetuam rei memoriam.*" It appears to me that this clause of the statute, while it very plainly denotes that in the present case it was the procuratory as the "original entail," and not the charter which followed on it, which required to be entered in the register, does not either expressly or impliedly exempt a royal charter, if it is to be taken as an entail, from the necessity of being recorded in the Register of Tailzies. Besides, the entail in this case, although held as embodied in a charter emanating from the Crown, must, I think, be treated as an entail made not by the Sovereign but by a subject, for it was undoubtedly applied for and accepted by James, the fourth Earl of Perth, as his writ and to serve his purposes. The procuratory on which it proceeded was executed by the Earl, and it was a procuratory of resignation *in favorem* and not one *ad remanentiam.* It was the warrant of the charter, and contained the names of the maker of the entail and of the heirs of tailzie, the description of the lordships and baronies desired to be entailed, as also the provisions and conditions of the entail. Neither could the charter of resignation have been granted without being preceded by the procuratory as its warrant. In these circumstances, and supposing the charter is to be dealt with as the entail, I think it must be held to be in truth and substance an entail made by a subject, viz., James, the fourth Earl of Perth. In every view, therefore, that can be taken of this matter, the non-recording of the charter in the Register of Tailzies constitutes, in my opinion, a fatal barrier to the pursuer's title to insist in the present, as it did to his title

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to insist in the former action, where the procuratory, and not the charter, was put forward and founded on by him as the entail.

(3) If, then, the non-recording of the charter of 1687 is fatal to it, viewed as the deed of entail, it may be unnecessary to notice the argument of the pursuer on the clause which it contains, to the effect, as I understood, that the right of the heir in possession should determine and cease on committing treason or any other crime by which the estates might be forfeited, and should pass in that case to the next heir-male who is entitled to succeed after the contravener and the descendants of his body. The pursuer argued that, in accordance with this clause, the forfeiture in 1746 must be limited to the contravener as the heir in possession at the time, and that the right to the estates now belongs to him in virtue of his services condescended on. It appears to me that this reasoning is plainly untenable, and may be satisfactorily met with more than one answer. The charter, while it contains all the necessary prohibitions and irritant and resolutive clauses as against the heirs of entail, following the institute Lord Drummond, expressly leaves him quite unfettered to dispone and contract debt as he saw proper. Accordingly, availing himself of this liberty, he in 1713 executed a disposition of the estates in favour of his son James, reserving his own liferent, and in the disposition so executed by him, which has been produced, and is referred to in article 7 of the condescendence, all the restrictions and fetters contained in the charter of 1687, including the clause as to forfeiture for treason, were entirely omitted. So again, in 1731, James, the third Duke of Perth, who was then in right and possession of the estates, expede a crown charter of resignation and novodamus, which has been also produced, and is referred to in article 10 of the condescendence, in favour of himself and the heirs-male of his body, whom failing, his other heirs and assignees whomsoever. In this charter, on which infeftment duly followed, just as in the disposition of 1713, all the restrictive and fettering clauses, including the clause as to forfeiture for treason, were omitted.

Such was the state of the titles when the estates were forfeited to the Crown after the Rebellion of 1745, and I think it clear that they were then held in fee-simple. And if so, not only the forfeiture of the estates must have been complete, but also the vesting of them in and restoration of them by the Crown, in virtue of the statutes to that effect, must be held to be free from any well founded objection.

Besides his pleas which have now been adverted to, founded on the crown charters of 1679 and 1687, the pursuer also seemed to think that the various services on which he has for the first time condescended in the present action afford him some aid which he had not the benefit of in the former. I cannot think so. It is, indeed, too plain to require argument or illustration that if the fee-simple of the estates came to be vested in the Crown by the forfeiture of John Drummond in 1746, as I think they did, none of the services to which the pursuer refers can be of the slightest use to him, for the obvious reason that all claim by him as heir of any and every investiture existing prior to the forfeiture has been entirely and for ever cut off. If I am right in this it also follows that any plea the pursuer could raise,—and supposing it to be a new one,—on the saving clause of the Restoration Act, as referred to by him in the 34th article of his condescendence, would be clearly of no avail to him.

Having now adverted to all the pursuer's pleas or grounds of action which, as I understood the argument, were advanced for him as new or different from his

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pleas or grounds of action in the former suit, it is unnecessary to do more than repeat what I stated at the outset, that all else must be taken either as *res judicata* or of no materiality. But it may be well, at the same time, to keep in view that it is not indispensable for the defenders, in resisting as they are doing the call upon them to satisfy the production in this case, to establish that the pursuer's pleas or grounds of action are *res judicata*, or that they have a title to exclude. By the Court of Session Act of 1850 (13 and 14 Vict. cap. 36, sec. 7) it is provided "that where in a reduction the defender is to object to the title of the pursuer, or to plead an exclusive title, or to state any other objection against satisfying the production, he shall, in the first instance, lodge defences confined to these points." It is a perfectly good preliminary defence, therefore, that the grounds and pleas upon which the pursuer relies are *res judicata*, or, in so far as they are not so, that they are in themselves irrelevant and insufficient to support the alleged right and title. In my opinion they are partly *res judicata*, and, in so far as not so, they are irrelevant and insufficient. By the judgment of this Court in the former action, which was affirmed in the House of Lords without alteration or variance, it was expressly found that "the lands and estates claimed by the pursuer, and all rights connected therewith, were taken out of the *hæreditas jacens* of James Drummond (designed third Duke of Perth), to whom the pursuer has served heir, by means of the attainder of John Drummond, apparent heir of the said James Drummond, and that the same became vested in the Crown." And by that judgment it was also found that "the said estates formed the subject of enactments under the statutes 20 Geo. II. cap. 41, 25 Geo. II. cap. 41, and 24 Geo. III. cap. 57, set forth in the summons, but that these statutes confer no right on the pursuer in reference to these lands and estates." That judgment in the previous action must, I think, be held to interpose a formidable barrier to the success of the pursuer in the present action, a barrier which anything of the nature of new matter advanced by him is, for the reasons already stated, quite insufficient to overcome.

I am, therefore, of opinion that the interlocutor of the Lord Ordinary reclaimed against is substantially well founded, and that it ought to be adhered to, with such addition or variance as may be thought right in the adjustment of the terms of the interlocutor which will now fall to be pronounced.

LORD GIFFORD.—After the fullest and most anxious consideration which I have been able to give I have come to the same conclusion as the Lord Ordinary, that the action must be dismissed, although the grounds on which I have reached that conclusion are in some respects not identical with those on which the Lord Ordinary has proceeded.

The pursuer, the Earl of Perth, and who is beyond all question in the full possession and enjoyment of all the ancient dignities of the earldom of Perth, has brought this action for the purpose of vindicating his right to and recovering the whole lands and estates of the earldom of Perth, and of the regality of Drummond, situated in the counties of Perth and Forfar, and now in the possession of the defenders, as trustees of the now deceased Right Honourable Clementina Sarah Drummond Lady Willoughby de Eresby.

The first conclusion of the action is a conclusion for declarator that the pursuer, under certain writs, charters, and Acts of Parliament, is now entitled to the said whole estates as the nearest heir-male of tailzie and provision thereto now living, that he is in a position to make up titles thereto, and that the de-

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fenders are bound to give up to the pursuer possession and enjoyment of the whole estates. But in order to reach this conclusion, and as a preliminary thereto, it is necessary for the pursuer to cut down, reduce, and set aside a variety of titles made up in favour of the defenders and their predecessors and authors, in virtue of which titles the estates are at present held and possessed by the defenders. The titles of the defenders must be reduced and set aside before the right of the pursuer can be admitted and declared.

To effect this purpose,—that is, to set aside the existing titles in favour of the defenders,—the summons contains appropriate reductive conclusions, which, although not placed first in order in the summons, yet fall first to be considered, for unless the defenders' titles be cleared away they will exclude for ever the pursuer's alleged right to the lands and estates.

The form of an action of reduction is this,—that the pursuer calls upon the defenders to exhibit and produce the writs, charters, and titles which the pursuer seeks to set aside in order that these challenged titles may be examined by the Court, and in order that upon their production, or if the defenders fail to produce them, they may be cut down, set aside, and declared null and void. In the present case the writs called for, in the first place, commence with a retour in favour of the late Honourable Clementina Sarah Drummond (Lady Willoughby de Eresby) as heir of James Drummond, Baron Perth, her father, dated 19th October 1807, and they end with a notarial instrument in favour of her trustees, dated 3d March 1865. Under these deeds the defenders, Lady Willoughby de Eresby's trustees, stand at present vested in the whole estates. There is also a farther reductive conclusion seeking to set aside, "if necessary," a great variety of writs, charters, sasines, and decrees, beginning with a decree of the Lords of Council and Session, dated 8th March 1785, and ending with the titles in favour of the defenders. It is upon these reductive conclusions that the parties have joined issue and made up the present record upon what is called the preliminary question, whether the defenders are or are not bound to produce the writs called for, or as it is said technically, "to satisfy the production." The defenders maintain that they cannot be called upon to satisfy the production, that is, to produce the writs which the pursuer seeks to set aside, and they demand that the action shall be at once dismissed without entering farther upon its merits.

In actions of reduction objections to satisfy the production and to produce the writs called for generally resolve themselves into two, first, that the pursuer has no title to sue,—that is, that he has no right and no interest to cut down the deeds called for; or second, that the defenders have a sufficient title to exclude the pursuer,—that is, that the defenders possess upon separate grounds or titles not sought to be reduced, and which are sufficient to exclude the pursuer, even supposing all the writs called for to be set aside. In the present case although the defenders state ten separate pleas in law they all resolve into one or other of the above grounds of defence, either that the pursuer has no title to sue, or that the defenders have sufficient separate titles to exclude him. The defenders maintain, in addition, that it is *res judicata*, that the defenders are not bound to produce the writs called for, this having been decided both in this Court and in the House of Lords in a previous action at the pursuer's instance against the defenders.

The question as to the title of the pursuer to insist in the reduction, and the other question of the sufficiency of the defenders' unchallenged title to exclude

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the pursuer, are very much mixed up in the present case, and it is difficult to consider these questions apart. In the former action also between the same parties, both as decided in this Court and in the House of Lords, the two questions, that is the two objections to satisfying the production, were considered together, and I do not think it would serve any good purpose to attempt in the present case sharply to distinguish between them. The question may be taken quite generally, is the pursuer, either by reason of his own position, or by reason of the unchallenged and undisputed rights and titles of the defenders, entitled to call for exhibition and production of the deeds he now seeks to reduce? If the pursuer is entitled to such production the deeds must be laid upon the table of the Court, which will then proceed to consider the question of their validity. If the pursuer is not entitled to production of the writs complained of then the action will be dismissed, and the effect of dismissal will be, not to affirm the validity of the writs challenged, for they have not been seen nor considered at all, but merely to affirm that the pursuer has no right or interest to challenge them. This form of process in actions of reduction may appear a little cumbrous and circuitous, and it very often is so, but it is a completely established form, and can only be altered by an Act of the Legislature. In the present case the true merits of the question between the parties are sufficiently raised on this preliminary record without production of the writings called for. I think there are sufficient materials in process and in the admissions on record to enable the Court, without seeing any of the writs called for (none of which of course have been produced), to decide whether the pursuer has any right to challenge the defenders' titles, or whether he is not barred from attempting to set aside any or all of these titles.

In the whole circumstances and on an examination of the ancient writs and titles founded on, and of the public statutes 20 Geo. II. cap. 41, 25 Geo. II. cap. 41, and 24 Geo. III. cap. 57, I am of opinion that the pursuer is in law entirely barred from challenging or attempting to set aside any of the deeds for which he calls, and therefore that the present action should be dismissed in the same way as the pursuer's former action was dismissed by the judgments of 22d January 1869 and 19th June 1871.

The question of *res judicata* falls naturally first to be considered, for if the points now in dispute have been already determined by the judgments of this Court and of the House of Lords these judgments are binding, and there is no necessity and no room for going farther or for entering upon the merits at all. I do not think, however, that it is possible or safe to rest the decision of the present case solely or exclusively upon the judgments pronounced in the former case in 1869 and 1871. To support the plea of *res judicata* three separate elements must concur. First, the parties to the two litigations must be the same or substantially the same; the parties to the second action, if not the same as those to the first, must be bound as their representatives or otherwise. If the new parties do not represent the former litigants there will be no *res judicata*, and the first judgment will be merely an authority, which may be more or less binding on the Court, but which will not be binding upon the parties. The second requisite to support a plea of *res judicata* is, that the subject-matter of the two litigations must be the same. A dispute about one subject or estate will not found the plea of *res judicata* in a question as to another or a different estate. Now, these two first requisites concur in the case before us,—the parties are the same, the Earl of Perth on the one hand, and Lady Willoughby De Eresby's trustees on

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the other hand,—and the subject-matter of the two actions is the same, the estates of the earldom of Perth.

But the third requisite necessary to support a plea of *res judicata* is, that the question decided, the real point or points in controversy between the parties, shall be the same, for if a pursuer brings an action or claim upon one ground and is defeated, this will not prevent him from making the same claim upon a new, separate, and different ground. The rule is sometimes expressed by saying that the *media concludendi* in the two actions must be the same,—that is, if the pursuer brings forward new grounds of action he will not be barred or stopped by a decision against him, pronounced in an action laid upon other and different grounds.

In the present case, I think the pursuer has succeeded in shewing that his present action is to some extent and in several particulars of more or less importance, founded upon grounds different from those maintained and decided upon in the former action. New questions are raised, and new pleas are maintained, which, so far as appears, were not urged by the pursuer, and were not decided upon by the Judges in the former case, either in this Court or in the House of Lords. In short, it appears to me that in several respects the questions now raised by the pursuer are new questions, which were not raised and were not adjudicated upon in the former action, and to this extent I am of opinion that the present action is not excluded by the plea of *res judicata*. It may be true that some of the points now relied upon by the pursuer might have been raised and urged under his former action, but I think this is not enough to create against the pursuer the technical plea of *res judicata*. The pleas were not, in point of fact, stated or argued. They were competent, but omitted, and although "competent and omitted" will bar a defender in general from reducing a decree against him, and stating a new defence, it will not bar a pursuer from bringing a new action upon a new and different ground.

While, however, I cannot sustain the plea of *res judicata* to the effect of at once and wholly dismissing the present action, still I think that the plea is well founded in so far as in the present action the pursuer repeats and states over again pleas which were actually urged and disposed of in the former litigation, and this even although the pursuer may allege that he is prepared to support these old pleas by a better or a different argument than that stated for him in the former litigation.

Applying these principles, I think the Court is not entitled at once to dismiss the present action on the ground of *res judicata*, but that while bound by the former decision, in reference to all questions really decided, it must take up and consider upon their merits all new questions and all new pleas which were not stated and not decided upon in 1869 and 1871.

In the following observations I shall confine myself to the pleas relied upon by the pursuer in so far as they are different from those disposed of in the former action. In other respects, that is, in so far as the pursuer's pleas are merely repeated or are substantially the same as formerly, the plea of *res judicata* is conclusive against the pursuer. Of course I need not say that in both actions it is the preliminary defences alone which are in question, for in neither action has the production been satisfied or the challenged writs produced to the Court. Accordingly, as none of the writs called for and sought to be set aside have been exhibited by the defenders, the present judgment must proceed upon

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the assumption that all these writs are invalid. In considering a preliminary defence in an action of reduction this is the condition of the argument, and the defenders must shew, independently of any of the writs challenged, either that the pursuer has no title to make the challenge, or that he is excluded by other and unchallenged deeds. My opinion, therefore, is founded, and necessarily so, upon deeds and writings about which there is no dispute. I lay entirely out of view the whole writings which the pursuer seeks to reduce, which are in all twenty-eight in number. All these I assume to be bad and invalid.

Shortly stated, and in its essence, the pursuer's case is this, that the Perth estates are now, and have been, at least since 1679, held under conditions of strict entail—that the entail, which is constituted by a variety of writs and charters, is still in force, and cannot be defeated by the acts of any of the individual successive heirs of entail—that all acts in contravention of the entail are void and null, and that the pursuer is now the nearest and lawful heir of entail entitled as such to succeed to the estates and to vindicate them against all others whomsoever. This is the pursuer's whole case, and I purposely state it in the most general terms possible.

If the estate is not entailed, or not validly entailed, or if any of the essential requisites to a valid and strict entail are awanting, then the acts of alienation, or of forfeiture of successive heirs in possession will be effectual, and the pursuer's right will be excluded. For example, if the late Baron Perth, the first and last Baron Perth, the father of the late Lady Willoughby de Eresby, was not heir of entail under a strict entail, but if he was fee-simple proprietor and entitled to convey the estates as such at pleasure, then he could and did defeat the mere *spes successionis* of remoter heirs-male. If the tailzie was at an end, then Baron Perth's heir was his only daughter, the late Lady Willoughby de Eresby. The pursuer is not Baron Perth's heir in general, and so has no right to reduce or set aside Lady Willoughby de Eresby's title to the estates, or to call for and set aside Baron Perth's trust-deed and settlement, and relative deed of instructions. In short, if the pursuer is not heir of entail under the unchallenged investitures, there is an end of his case, and he cannot challenge the alienations which have been made either by Baron Perth or by previous heirs who successively possessed and enjoyed the lands.

The real question, therefore, is, were the lands held under the fetters of a strict and valid entail, indefeasible by the successive heirs of tailzie and provision; and the important and the final point of time at which this question is to be decided is at the death of Baron Perth on 2d July 1800. Admittedly Baron Perth was the heir entitled to possess and enjoy the lands, and the pursuer does not maintain that Baron Perth was a wrongous possessor, but merely that he possessed under a strict entail and was not entitled to defeat the order of succession. It is important to observe that the pursuer does not call for and does not challenge any of the writs or titles of the lands prior to those made up in the person of the late Baron Perth.

In the aspect of the case which I am now taking, therefore, the whole question is, was the late Baron Perth at the time of his death in 1800 fee-simple proprietor of the estates, or was he merely heir in possession under a strict and indefeasible entail, and this question in its turn depends upon the nature and effect of the deeds on which the pursuer founds as constituting a strict and valid entail.

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What, then, are the deeds upon which the pursuer relies as constituting as at Baron Perth's death in 1800 a strict and indefeasible entail?

In the pursuer's first action the deed chiefly relied upon as constituting the entail was the procuratory of resignation or deed of entail by James fourth Earl of Perth and Chancellor of Scotland, dated 11th October 1687, upon which deed a title was completed by charter of novodamus from the Crown, and instrument of sasine following thereon, but it was finally decided in the House of Lords, among many other points, that this deed of entail, never having been recorded, was ineffectual, and did not prevent the estate from being forfeited absolutely, that is, the fee of the estate from passing to the Crown upon the attainder of the heir of entail in possession at the time, even although such heir had not made up his title to the lands. This judgment, of course, is final and binding upon the pursuer as *res judicata*, and I understood that this is not disputed by the pursuer. The pursuer can no longer found upon the deed of entail of 11th October 1687.

But the pursuer now betakes himself to various other deeds upon which he relies as separately or jointly constituting a strict entail, under which the pursuer claims to be heir of tailzie. The earliest deed now relied upon is the crown charter in favour of James fourth Earl of Perth, Chancellor of Scotland, dated 24th September 1679, and an ingenious plea was urged that this deed constituted a strict entail, and, being dated prior to the entail statute of 1685, it is said that it did not require to be recorded in the Register of Tailzies. I am of opinion that this plea in both its branches is ill-founded. First, the charter of 24th September 1679 is in no sense a deed of strict entail. It contains, no doubt, a destination, but it does not contain any of the prohibitions or any of the clauses, irritant and resolutive, which are essential to constitute an entail, whether dated before or after the Act 1685. The only clause which gives the deed the least semblance of an entail is the prohibition against alienation without the consent of the Crown. But I agree with the Lord Ordinary that this is a mere expression in somewhat broader terms than would be inferred at common law of the casualty of recognition which obtained in all wardholdings, and was not in the least intended to secure a tailzied order of succession. Besides, it is merely a clause for the benefit of the Crown, and which would have no effect if the Crown consented to the alienation. If such consent was given the clause could not have been pleaded upon by any of the substitute heirs, and the clause could not be pleaded against the Crown as defeating an alienation or a forfeiture in favour of the Crown itself. Second, even if the charter of 1679 were a strict entail, which it is not, it would still require to be registered, for the Act of 1685 applies both by its reason and by its words to entails executed before as well as after its date.

It is also to be observed that this charter of 1679 does not direct its prohibition against the Chancellor of Scotland, the first grantee therein. On the contrary, it expressly gives the Chancellor the fullest power to sell and alienate the estates at pleasure, without the consent of any of the heirs of the destination, and this power the Chancellor exercised by the deed of entail and procuratory of resignation of 11th October 1687, already referred to, and which formed the chief subject of discussion in the pursuer's first action. It is vain to go back to the title of 1679, for it was entirely displaced and superseded by the title of 1687.

The pursuer next resorts to the charter of novodamus dated 17th November

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1687, being the charter which followed upon and in virtue of the deed of entail and procuratory of resignation of 11th October 1687. The pursuer's argument here is that the crown charter of novodamus is itself a crown entail, requiring no recording, and standing by virtue of the Crown's authority alone, independent altogether of the Act of 1685, or, stated more generally, that wherever the Crown grants a charter of novodamus embodying a tailzied destination with the usual clauses of a strict entail, such clauses being inserted at the request of the owner, and in terms of a procuratory of resignation, then such crown charter, the pursuer pleads, forms *per se* a deed of strict entail, and does not require to be recorded. The provisions of the Act 1685, it is said, do not apply to such a charter.

It humbly appears to me that there is no foundation whatever for this contention. The charter of resignation and novodamus is a mere charter by progress. Its sole warrant is the procuratory of resignation which prescribes its terms. The Crown, like any other superior, will insert in a charter by progress any conditions which the owner pleases, not affecting the superior's rights. An entail is never the act of the superior, but the act of the vassal or proprietor, who alone has right, if he chooses, to entail the lands in accordance with law. The clause of novodamus does not in the least alter the nature of the deed, but is merely inserted to meet the case of lost title-deeds or of doubts as to the validity of the title, and to form the foundation for a new and prescriptive right. I have never heard it suggested till now that a superior, whether a subject superior or the Crown, can create an entail by conditions in a charter independently of the Act 1685. On this point also I entirely agree with the Lord Ordinary, that no crown charter, proceeding upon a procuratory of resignation, and whether containing a clause of novodamus or not, can ever create an entail, or affect in any way the Crown's rights, or alter the general law of treason.

It is proper to notice here, that on 28th August 1713 James Lord Drummond, the Chancellor's son, and the institute under the procuratory of 11th October 1687, and under the charter of novodamus of 17th November 1687, conveyed the estates in favour of his son James Master of Drummond, then an infant, and on this deed the Master of Drummond was duly infeft. Now, by the procuratory of resignation, as well as by the charter of novodamus, James Lord Drummond had full power to alienate or dispone the estates in fee-simple, and free from all the fetters of an entail, and the deed of 1713 contains none of the prohibitions or fetters necessary in an entail. It contains a simple destination, but it made the infant Master of Drummond absolute proprietor of the estates. It created, in short, a new investiture.

The object of this deed of 1713 was, of course, to save the forfeiture of the estates in case the granter James Lord Drummond should be attainted,—an event no doubt regarded as possible or probable. The expected attainder actually took place in 1715, but the device to save the estates was effectual, for although the estates were seized by Exchequer upon the attainder of Lord Drummond they were thereupon claimed by the infant Master of Drummond, and his claim was ultimately in 1718 sustained, and so the forfeiture of the estates was prevented, but it was only prevented by the absolute deed of alienation of 1713, which was upheld as a valid and effectual title fully vesting the estates in the Master of Drummond. It was held that James Lord Drummond, the granter of the deed of 1713, was absolute proprietor of the lands, and that he had effectually and completely divested himself before his treason and attainder.

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Here, again, I think it is conclusive that there was a new investiture created by the deed and sasine of 1713, and I am of opinion that this deed of 1713 was not and cannot be read as a deed of entail, or as a deed propelling an entailed succession. It contains none of the necessary clauses and never has been recorded as an entail, but it supersedes the former investitures and really puts an end to the pursuer's pleas. This deed of 1713 has been produced by the defenders.

The Master of Drummond, who thus got the estates unaffected by his father's attainder, afterwards assumed the title of third Duke of Perth, and completed a separate and independent title to the estates by service to his grandfather, the Chancellor, and by crown charter of confirmation and resignation dated 12th February 1731, upon which infeftment duly followed. Now, it appears to me that this also was a fee-simple title, not constituting in any sense a strict entail and imposing no prohibition or restriction against alienation, but leaving James, styled third Duke of Perth, the absolute and unfettered proprietor of the lands, having full power to alienate and dispose thereof at pleasure. So stood the title when the Rebellion of 1745 occurred. James third Duke of Perth then stood absolute and fee-simple proprietor, unfettered and unrestricted, although there was a simple destination in favour of heirs-male.

This James third Duke of Perth and his brother John both took part in the Rebellion of 1745, but both escaped in the French frigate "Mars" in 1746. They were both included in the Act of Attainder which followed the Rebellion of 1745, which, however, contained a proviso and condition that they might surrender before 12th July 1746, and if they did so the attainder should not take effect. James third Duke of Perth died at sea on 11th May 1746, but as this was before the day of surrender he was held not to be attainted. He died without issue, his heir-apparent being his brother John, and the attainder took effect upon John, who called himself fourth Duke of Perth. He became attainted on 12th July 1746, when the time for surrender expired.

On John's attainder the question arose, Had the fee of the Perth estates become forfeited to the Crown, they being held by John, the traitor, in apparency? The estates were seized by Exchequer, and the question as to their forfeiture was tried apparently twice over, first, whether they were forfeited by the treason of James third Duke, who stood infeft, and this was negatived; and then again, whether they were forfeited by the attainder of John, styled fourth Duke, who held them only in apparency.

This last question was ultimately decided in favour of the Crown, first, by the Court of Session on 1st December 1750, and then by a judgment of the House of Lords on 30th April 1751. The final judgment was that the whole estates had fallen to the Crown on the attainder of John, styled fourth Duke of Perth, although he was merely heir-apparent and had never made up any title thereto. This judgment is not challenged by the present pursuer.

Here, again, it humbly appears to me there is a fatal bar in the way of the pursuer's present claim, for if the pursuer is right in his present contention the estates must have been held under strict entail in 1745, and the attainder of John, styled fourth Duke of Perth, could only have forfeited his life interest therein. But the decision was otherwise, and although possibly the pursuer's present pleas may not have been urged in 1746, it is difficult to see how a final judgment pronounced a century and a quarter ago, and acted upon ever since, can now be got rid of.

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But this is not all. The attainders consequent upon the Rebellion of 1745 were followed by the Act 20 Geo. II. cap. 41, commonly called the Vesting Act. This statute vested the whole lands and estates of all the attainted persons in his Majesty, "without any office or inquisition thereof," "and without any declarator or forfeiture to be obtained." Power was given to the Barons of Exchequer to inquire into the estates, and to levy the rents thereof for behoof of his Majesty, and lists of the attainted persons were to be transmitted to the King's Remembrancer. This was followed in 1752 by the Act 25 Geo. II. cap. 41, commonly called the Annexing Act, which annexed certain forfeited estates to the Crown, and among other estates specially enumerated are "the lands and other premises which became forfeited to his Majesty by the attainder of" . . "John Drummond, taking upon himself the style or title of Lord John Drummond, brother to James Drummond, taking on himself the title of Duke of Perth." The whole of the lands were annexed inalienably to the Crown, provision was made for creditors, and royal commissioners were appointed for the management of the estates for behoof of the Crown. This appears to be a statutory recognition of the absolute forfeiture of the Perth estates, and accordingly these estates were possessed by the royal commissioners down to 1785. I cannot see how it is possible for the pursuer now to go back and challenge any of these proceedings, or the statutes and warrants on which they were founded.

In 1784, however, the Restoration Act passed, 24 Geo. III. cap. 57. It is entitled, "Act to enable his Majesty to grant to the heirs of the former proprietors upon certain terms and conditions the forfeited estates in Scotland which were put under the management of a Board of Trustees by an Act passed in the 25th year of the reign of his late Majesty King George the Second." The provisions of this statute are exceedingly important, and it deals expressly with the Perth estates. Clause 10 of the statute provides,—"And whereas the estate of Perth, which became forfeited by the attainder of John Drummond, taking upon himself the style or title of Lord John Drummond, brother to James Drummond, taking on himself the style or title of Duke of Perth, stood devised before the forfeiture to heirs-male: And whereas the said John Drummond died without leaving issue lawful of his body, and it is not yet ascertained who is his nearest collateral heir-male, be it enacted by the authority aforesaid that it shall and may be lawful to his Majesty, his heirs and successors, to give, grant, and dispone to the heirs-male * of the said John Drummond who would have been entitled to succeed by the investitures of the said estate had it not been forfeited, and to the heirs and assigns of such heir-male, all and every the lands," &c. (being the whole estates of Perth) "which became forfeited as aforesaid," subject to a charge of £52,547, 1s. $6\frac{3}{4}$d. to be paid into Exchequer.

Of course the pursuer does not and cannot challenge this statute, and I think it is impossible to read it without seeing that it recognises and proceeds upon the fact that the fee of the whole estates had been absolutely forfeited to, vested in, and annexed to the Crown. The contention that the estates had been held under strict entail is thus negatived, for in that case nothing but the liferent of the traitor would have been forfeited, and that of the heirs of his body, leaving remoter heirs unaffected. The statute also gives to the Crown power to dispone the estates, that is, the fee of the estates, "to the heirs-male of the said

* The defenders averred that in the rolls of Parliament this word stands in the singular, "heir-male."

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John Drummond," and to the "heirs and assigns of such heir-male." This clearly implies, or rather enacts, that the estates shall be restored, not under the form of a strict entail, but under the form of a simple destination, which will leave the grantee at liberty to dispose of them at pleasure. A direction to give to the heirs-male and "to the heirs and assigns of such heir-male," plainly means a fee-simple, and not a strictly tailzied destination. I am aware of the dispute as to the alleged erasures on the parchment roll of this Act of Parliament, but I do not think anything turns upon these erasures, for I think it plain that the first grantee under the statute would be entitled to receive the grant, with a destination to his heirs and assigns, or, at all events,—and this would be enough for the present question,—would be entitled to the grant free of prohibitions and fetters, and so would have full power to alienate and dispone at pleasure.

Accordingly this was the reading which the statute received at the time. For immediately on its passing, "Captain James Drummond" obtained, after an *ex parte* proof, decree of declarator from the Court of Session that he was heir-male of Lord John Drummond the traitor, and that he was entitled to receive a grant of the estates. Having got this decree, he obtained from the Crown a fee-simple grant to the whole estates in favour of himself and his heirs and assignees. In virtue of this title "Captain James Drummond" (afterwards first Baron Perth) obtained possession of the estates. The late Lady Willoughby de Eresby was his daughter and undoubted heir-at-law. She took the estates, not only as Baron Perth's heir under his investiture, but as his disponee under his trust-deed and deed of instructions.

It is true that the title made up by Baron Perth under the Act of Restoration of 1784 is included in the writs now challenged by the pursuer, and therefore this formal title cannot be founded on by the defenders as an objection to satisfying the production. There would require to be at least a partial production, but if I am right in the reading of the statute of restoration itself, that statute forms a sufficient defence, for it authorises the absolute fee of the estate, then wholly and absolutely vested in the Crown, to be given out and restored to the heir-male of the traitor, and "the heirs and assigns of such heir-male." I think the meaning would be the same though the words of the Act were to be read "to the heirs and assigns of such heirs-male;" and separately, I think that the grant under the statute must be a grant in fee-simple,—that is, a grant with power to alienate, and without the restrictions and fetters of a strict entail.

Such being the view which I take of the titles of the Perth estates and of the admitted facts in the history of the family, it follows that the judgment pronounced in the former action and affirmed in the House of Lords must be repeated in the present action. The new grounds of action, and the new pleas which the pursuer has brought forward in the present action, make no difference in the result. All the pursuer's new pleas appear to me to be equally ill-founded as the pleas on which he formerly relied, and as the pursuer is bound, and as this Court is bound by the judgment in the former action, so far as it goes, I think the pursuer's new pleas must now be repelled, and the former judgment substantially repeated. The terms of the former judgment affirmed in the House of Lords were,—(His Lordship here quoted the interlocutor given *supra*, p. 538.)

I think that the judgment must now in substance be repeated, but the mode of expression of the judgment may require to be varied. For example, the reference to the pursuer's service seems inapplicable, for the pursuer now founds upon a variety of services, not only to the third Duke of Perth, but to the

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Chancellor, the Chancellor's son, and to Baron Perth and his father. It appears to me that none of these services are of any avail to the pursuer, for this simple reason, that nothing has been left in the *hæreditas jacens* of any of the parties which could be taken up by the services. I incline to think also that there should be a finding that the pursuer's title is excluded by the writs, titles, and statutes founded on by the defenders.

I may summarise the grounds on which I rest my opinion thus,—(1) I hold the former judgment as *res judicata* against the pursuer in reference to the whole pleas formerly insisted in. (2) I think the pursuer has failed to shew that there ever was any valid and effectual strict entail of the Perth estates, or, at all events, that he has failed to shew that there was any valid and subsisting entail in 1746, when John Drummond was attainted. (3) On the contrary, I think the defenders have shewn that the estates were held in fee-simple, that is, on a simple destination, and with full powers of alienation, all along, or at least downwards from 1679. I think the charter of that year was an unfettered title, and it stands decided that the entail of 1687 was ineffectual, because not recorded. I think the charter of novodamus following could not make an entail. The disposition and sasine of 1713 was a new and unfettered investiture. So was the charter and sasine of 1731, upon which the estates were held when forfeited. (4) The decision of the House of Lords in 1751,[1] and the statutes of George II. and George III., are conclusive that the absolute fee of the estate was forfeited to and vested in the Crown, and the last of these statutes is conclusive that the estates were to be given back, not under the limitations of strict entail, but to the heir-male of the traitor as unlimited and unrestricted fiar. On his own shewing, therefore, the pursuer has no title to call for or set aside the writs which he seeks to reduce, but he is entirely excluded by the unchallenged writs, titles, and statutes founded on by the defenders.

LORD JUSTICE-CLERK.—This very important case has received that consideration which its merits deserve, and I shall content myself with stating very shortly the grounds on which I concur in the result at which your Lordships have arrived.

This is essentially an action of reduction,—at least the pursuer cannot arrive at the result aimed at until he sets aside the standing investitures of the estates which he claims, which are now in the persons of his antagonists. The plea which is raised against the reduction is that the pursuer has no title to sue. The defenders say,—"On your own shewing you have no title to make the demand for production." Upon this and this only the discussion has turned. It was in the power of the defenders to say,—"Supposing that on your own shewing you had a title, we have a better, and one which will exclude yours, however good that might have been, standing by itself." If the defenders had chosen to take that plea, and produced the title on which they founded it, we should then have been obliged to see whether, assuming the pursuer's title otherwise well founded, the title to exclude must prevail. But in this case we have not arrived at that point.

The first question—the only question decided in the former case, and the only question that has been raised here—is, whether the pursuer has set out a sufficient title to support his call for the production of the writs, for that is the first stage in an action of reduction. The first plea which is raised against the action

[1] Drummond of Logie Almond v. Lord Advocate, April 30, 1751, 1 Paton, 503.

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is the plea of *res judicata*. On that point I agree entirely with your Lordships. Lord Neaves has stated very fully the legal principles applicable to the plea of *res judicata*, and I shall not repeat them. The former case was decided upon one specific ground, and that was, that by the attainder and the annexation to the Crown following upon the rebellion of John Drummond in 1746, the fee of the estate had been fully vested in the Crown, and that, therefore, any prior destination was wholly evacuated. That was the ground of the judgment, and it necessarily cuts away any title which the pursuer had to insist in the action. The object of the present action is to try that question over again, whether that attainder did or did not forfeit the whole estate. It was maintained in the former action that the estates were entailed under the procuratory of resignation of 1687, and that, therefore, the provision of the Act of Queen Anne,[1] introducing the equitable remedy of the English law of settlement into the Scotch law of entail and forfeiture, ought to take effect. That plea was repelled, because the entail was admittedly not recorded.

The real question is, whether, in this action, that objection has been sufficiently obviated,—in other words, whether, at the time of the attainder, there was or was not subsisting a protected destination. I am of opinion that the grounds upon which that is maintained are not the grounds which were maintained in the former action. In that action the procuratory of resignation of 1687 was founded on as being in itself the entail which was said to be subsisting at the date of the attainder. But it is now pleaded, first, that the charter of 1679, which was not founded on in the former action, constituted a valid entail; and, secondly, that at all events the royal charter of 1687, apart altogether from the procuratory, apart from any warrant, constituted a royal grant, which was sufficient to protect the right of the substitutes in the destination against the treason of the heir in possession. Now, although there is much force in what Lord Gifford has said, as to the subsequent stages through which these estates have passed, I should rather decline to enter into any question on these topics, because manifestly these proceed upon the plea of title to exclude, and these titles to exclude,—the effect of the Acts of Parliament, the effect of the investitures of 1713 and 1731, indeed the effect of Baron Perth's title itself, might depend on whether either of those charters constituted a strict entail. I can see great difficulty in the way of the pursuer, even if he overcame the obstruction which is now placed in his path. But I am not prepared to decide what the effect would be if he is right in his present contention, which alone has been argued to us. I confine my opinion entirely to the question, whether, under either of those investitures, there was a destination which protected the heirs-substitute at the date of the forfeiture in 1746.

Upon the charter of 1679 I am very clearly of opinion that there is nothing there that can be construed into a protection of the destination. On the contrary, I think that the whole complexion of that deed is opposed to that construction. The clause in regard to the prohibition to sell without the consent of the Crown manifestly could not have that effect on any principles of conveyancing. It merely expresses the old feudal casualty of recognition. And, therefore, putting that aside, the only other question is, whether the charter of 1687, as apart from the procuratory, did or did not constitute a right in the heirs-substitute to be protected against the treason of the heir in possession.

[1] 7 Anne, c. 21.

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I cannot deal with that question as being without a good deal of novelty and importance. If this had been an original crown grant, in which the Crown undertook to its vassal and the substitutes in a destination therein inserted, that when any heir in possession committed treason, so far as the Crown was concerned, the next heir-substitute not descended of his body should succeed, I am not prepared to say what the effect of such a clause might be. It could not interfere with public law, but it might raise the equitable principle embodied in the Act of Queen Anne, in so far as the right of the Crown was concerned, and in so far as the Crown had a right to confer the privilege. But I am clearly of opinion that there is no such case here, because the charter of 1687 was not and was not intended to be an original royal grant. It was a charter by progress essentially, and the clause in regard to forfeiture was not a clause flowing from the Crown, as a gift conferred by the Crown's prerogative, but a provision by the vassal applying for a renewal of his investiture, that if the heir in possession should commit treason he might be divested under the powers of the entail before an Act of attainder could take effect upon him. I think that its being a charter of novodamus makes no difference. Lord Gifford has rightly explained that part of our law, that a charter of this kind, proceeding upon a procuratory of resignation for new infeftment, in terms of that procuratory, does not become an original grant, but is still a title by progress, although there may be introduced into the crown charter of resignation a clause of novodamus; and that being the state of the matter, we need not consider what the effect would be upon the subsequent proceedings if there had been an original grant in those terms. I can well understand that if there had been, a strong argument might have been made on the title of 1713 and the title of 1731, and upon the Act of Attainder itself. The nature of the plea is not so much that the charter constituted an entail under the statute as against creditors, but rather that it conferred on the heirs-substitute a privilege which at least was available against the Crown, as each fell under the principle, if not the letter, of the Act of Queen Anne. But, as I have said, there are not materials here to raise it.

These are the grounds on which I concur in the judgment which your Lordships have proposed.

THIS interlocutor was pronounced:—"Find that the *media concludendi* on which the present summons proceeds, in so far as the same bear or are maintained to be different from those on which the former action between the parties to the present process was founded, are not relevant or sufficient to support the pursuer's title to call for production of the writs specified in the summons: *Quoad ultra* adhere to the Lord Ordinary's interlocutor: Find the pursuer liable in additional expenses, and remit to the Auditor to tax the same, and to report, and decern."

T. J. GORDON, W.S.—DUNDAS & WILSON, C.S.—Agents.

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JOHN WALLACE, Pursuer.—*D.-F. Clark—Balfour—J. P. B. Robertson.*
THOMAS THORNTON (Clerk to the Commissioners of Police of the Burgh of Dundee), Defenders.—*Sol.-Gen. Watson—Johnstone—Asher.*

Property—Road—Public Right of Way.—In an action brought for declarator of freedom from public right of way by the proprietor of the *solum* of a through-going close in a town it was proved that the close had been originally

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formed by the proprietor on his own ground for the use of his tenants, and that a door had been placed at one end of it; it was also proved that the close had been used as a thoroughfare by the public for the prescriptive period, but that frequently, and particularly at night, the door had been locked by the proprietor so as to exclude strangers. *Held (rev.* judgment of Lord Shand, *diss.* Lords Ormidale and Gifford) that the acts of possession on the part of the proprietor in shutting up the passage were sufficient to prevent the public from acquiring a right of way.

2D DIVISION, with three consulted Judges. Lord Shand.

IN 1874 John Wallace, iron merchant, Dundee, was proprietor of the southern portion of a tenement of land, with the houses erected thereon, which extended from the Murraygate on the south to the Meadowside on the north.

This tenement of land measured about three hundred feet from south to north, and had a frontage of about thirty feet both to the Murraygate and to the Meadowside. It was described in a disposition and assignation by Alexander Simmers in favour of William Butchart, dated 13th December 1790, as "All and Haill that tenement of land, back houses, and garden, which sometime belonged to Alexander Watson, of Wallace Craigie, sometime Provost of Dundee, afterwards by progress to John Thom, merchant there, afterwards to Margaret Thom, his daughter, as heir cognost and infeft therein to him, and disponed by her to me, lying in the burgh of Dundee, on the north side of the Murraygate thereof, betwixt the lands sometime of Mr James Fiethie, now of , on the west; the lands sometime of Alexander Bower and Samuel Chanler, now of , on the east; the common meadows on the north; and the said street on the south parts."

At the date of the disposition to Butchart a house stood upon the Murraygate end of the ground facing that street, and having in its lower story next the west gable a narrow pend giving access to the back ground and houses built thereon. The back ground was partly built upon, and partly garden, stretching to the Meadowside, which in 1790, and for many years thereafter, was a common green belonging to the town.

About 1820, the precise date being unknown, Butchart built a tenement of houses on the Meadowside end of his ground similar to that already existing facing the Murraygate, and having a corresponding pend in the west end of the lower story to give access to the back ground and to the Murraygate. The passage which was thus formed along the west side of Butchart's ground from the Murraygate to the Meadowside assumed the appearance of an ordinary through-going close, being covered over at the two ends where it ran under the houses facing the Murraygate and Meadowside, but open to the sky for the rest of the distance where it gave access to a range of back tenements, which in course of time came to occupy the whole remaining portion of Butchart's ground up to its eastern boundary.

The close came to be known as Butchart's Close, and when a street was formed alongside Meadowside, and certain important public buildings, such as the Exchange, were erected on the Meadows, it came to be used to a considerable extent by the public as a passage from the Murraygate to Meadowside.

When Butchart erected his tenement of houses facing Meadowside in or about 1820 he inserted a door in the Meadowside entrance to the close, which gave him, and subsequently his daughter, Mrs M'Leish, who succeeded him in the property, the means of closing the entry at pleasure.

The tenements built on the adjoining property to the west, belonging

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to James Feithie, afterwards to Daniel Macintosh, did not enter from Butchart's Close, though many of them had windows looking into it. They had, however, no servitude of light, excepting at one place about the middle of the close, where, for a distance of thirty-two feet, Butchart had in 1838 granted a bond of servitude in favour of Macintosh's houses over the ground occupied by the close.

Mr Wallace being desirous of closing up the Murraygate end of the close brought this declarator of freedom from right of way.

The Police Commissioners of Dundee entered appearance to defend the action on behalf of the public, and pleaded;—(2) The close in question being one of the public thoroughfares of the burgh of Dundee, under the charge of, and paved, upheld, cleansed, and lighted at the public expense by the Police Commissioners of the burgh, the pursuer has no right to close it up, or to build or otherwise encroach upon it. (3) The said close having existed and been used by the public, and treated as a public thoroughfare, and known only in that character for a period of upwards of forty years, the defenders are entitled to absolvitor.

The import of the evidence fully appears from the opinions delivered by the Judges.

The Lord Ordinary, on 6th November 1874, pronounced this interlocutor:—"Finds that for forty years and upwards prior to the raising of the present action there has existed a public right of way for foot-passengers through the close or passage known as Butchart's Close in Dundee, between Murraygate and Meadowside of Dundee: Therefore assoilzies the defenders from the conclusions of the action and decerns: Finds the pursuer liable to the defenders in expenses," &c.*

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* "OPINION.—The issue which this case practically raises is, whether there exists a public right of way through the close or passage known as Butchart's Close, in Dundee." (His Lordship then gave a description of the locality.)

"Such being the nature of the locality, it is proved beyond question, and I do not think it is even disputed by the counsel for the pursuer, that there has been a very extensive use of the passage as a thoroughfare by the public. The proof shews that for sixty years that use has gone on, and it does not appear that permission was asked by any of the witnesses to use the passage. The defenders' witnesses, from various different ranks of life, all say they regarded the use as a matter of right. I think the evidence shews that the use has been for more than the prescriptive period of forty years, that it has been an open use, and that the parties regarded it as a use of right. It has increased as time went on, growing as the population increased with the necessity and convenience of the neighbourhood. The use for the earlier part of the prescriptive period appears to have been mainly for three purposes,—in the first place, as an access to the public green used for bleaching purposes by the inhabitants in Murraygate, and indeed generally by the inhabitants of Dundee, many of whom used the passage for going and coming to the green with clothes. That particular use went on till about 1825, or perhaps a little later, when an Act of Parliament providing for a substitute green was passed. Another important use was in connection with the market held once a week at Meadowside for a considerable time after the green had ceased to be used for bleaching,—some of the witnesses say until about fifteen years ago. In addition, two important schools in Meadowside were attended by numerous boys, a large number of whom used this passage in going to and coming from school, and the people in the neighbourhood of the two districts I have mentioned—workmen and others going to and from their work—also made use of it. Latterly the use of it is proved to have largely increased, owing to the buildings to which I have already alluded having been erected. It has been used by the inhabitants generally,—by merchants and others going to and from their houses, and to and from the Post Office and other public buildings,—and has continued to be used by the boys attending the High

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The pursuer reclaimed. After hearing argument, the Court ordered the case to be reheard before seven Judges.

School, which has come to be a substitute for the other schools in that locality. The witnesses, who are pretty numerous, speak, as usual in such cases, not merely to their personal use of the passage, but to having observed it to be used by a number of others at the same time. Some of them speak to hundreds in a day, and others to rarely being in the close without meeting three or four others using it as they were doing. The use so proved is therefore not that of a few straggling individuals, but practically of a considerable number of the public, a large number on market days, of workmen at meal hours and in the mornings and evenings, and men of business at different periods of the day, but more frequently in the beginning of the business day, and towards the close of it. In addition, it is proved that the passage has been lighted, cleaned, and paved at the public expense for upwards of forty years. I do not attach much weight to the evidence in regard to the lighting and cleaning of the close, as proving it to have been a public passage, for it appears to have been a common practice in Dundee to expend public money, not merely on thoroughfares, but on closed places or closes, which could not be made really useful by the public. But I think it a very important feature in the case that since the passing of the General Police Act of 1850, as well as earlier, the paving of the close has been in the hands of the Commissioners of Police. It appears that in 1867, the pavement being then in a very bad condition, the Police Commissioners having had complaints as to its state, had the whole or the greater part of it entirely renewed, and that the work lasted for some days; and it is worthy of observation as a circumstance shewing the extent of the use of the passage, that the traffic at the time of the repairs was so great as to cause the workmen considerable inconvenience. Ever since 1867 the pavement has been upheld by the Commissioners, and in 1873 there was another special repair. It is further proved by Mr Hean, formerly a commissioner of police, that for many years before 1867 the paving of the close had been in the hands of the Commissioners, who had done what was necessary. It is further proved that since the passing of the Act of 1850, a drain was put in at the public expense, for the purpose of draining the close. These facts are important, and are all consistent with the existence of this public right. The fact of their paving the close is an acknowledgment by the Police Commissioners, on account of the use by the public, of responsibility to keep the passage in proper order, and the fact that the proprietor allowed the Commissioners to execute the necessary operations over a period of time, amounted to a recognition that the obligation lay upon them, and was only consistent with its being a public passage. It is an extremely important feature in this case as distinguished from others that have occurred, that the use has been so extensive and so open as I have described,—because used as the passage has been by so many people, and at all hours of the day, there was the clearest notice to the proprietor that the public were acquiring a right over the ground. He could not fail to be fully aware of the use that was being made, and if that were allowed without very distinct objection I think it must be held that a tacit consent was given to the acquisition of a right by the public. All the more when the paving and repairing of the passage was undertaken and executed with at least the tacit consent of the proprietor, at the expense of, and by the public authorities. In such a case it appears to me that the evidence of interruption (which is the case made upon the pursuer's behalf), must be clear, and shew a distinct intention, notwithstanding the extensive use, to prevent that public enjoyment of the right which alone would interrupt its acquisition,—not an impediment so trifling as practically to attract little if any notice, but a formal distinct interruption to give clear notice to the public that the use of the passage was given as matter of temporary accommodation, and not to be founded on as a right. The case is very different from one in which the public have made a comparatively slight use of a road, as in country districts, and where the opportunities of the proprietor seeing the use made are comparatively few. In such a case slight interruption might be

Argued for the pursuer;—Butchart's Close was a private close formed for the purpose of giving his tenants access from the Murraygate and

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sufficient; but where, as here, there is an open, continuous, frequent use by the public in large numbers, I think something very distinct in the way of interruption would be required to prevent the acquisition of a right.

"Now, the interruption which is relied upon in this case is the use of a door, and afterwards, for a short time, of a gate at the Meadowside or north end of the passage; and if it were shewn that the door had been used as a bar to the thoroughfare with such frequency, or for such periods, although at intervals, as to give distinct notice to the public that their use, as matter of right, was questioned and interrupted, it would be enough as an answer to the claim. On the whole, I have come to the conclusion that such interruption, or impediment, I should rather say, as has been proved to have been thrown in the way of the public, is not sufficient to prevent the acquisition of a right. I think it has been proved that the door was part of the presently existing building, which is said to have been put up somewhere about forty years ago, but it is also clear that it was only used from time to time, and at intervals. From 1858 or 1860 down to the raising of this action there is no evidence that the door was ever used or shut. There is no doubt some evidence about the use of the iron gate for a short period about 1871, but with that exception eleven or thirteen years elapsed during which this passage was completely open without impediment or obstruction of any kind, and during the whole of that time a constant and increasing use of the passage day and night by hundreds of people took place. If that had been the state of matters all along there could have been no question between the parties, but the pursuer founds upon the use of the door as an interruption for the period from about 1832 to, I think, 1858. The most important witnesses on this subject are Mrs Fyall, a daughter of Mrs M'Leish, a predecessor of the pursuer in his property, Joseph Westwood, and the Misses Baxter. Mrs Fyall, who is quite distinct that the door was never used for the period from between 1858 and 1860 till about 1871, states that for about twenty-five years before 1858 it was used; but I think the substance of her evidence—and no one had better opportunities of knowing about it, for she was living in the close almost the whole of the time—comes to this, that during the day the door was generally open,—I think but rarely closed,—and when closed, closed only for short intervals. During the night it was certainly more frequently closed; but even the closing at night was not a constant practice extending over the whole time. Joseph Westwood speaks of the period of four years from 1832 to 1836, and, substantially, his evidence comes to the same thing. According to his statement the door was shut a good deal during the night, and he very often found it so in the morning; but, on the other hand, it was open during the day. No doubt the pursuer says it was open during the day for the convenience of the people who lived in the close. That certainly is a reason why it must have been open almost at all times during the day; but if it be proved that contemporaneously with the use of it by persons living in the close the public were allowed to come and go as they pleased, the fact that the tenants were using it at the same time will not detract from the public use. Then the two Misses Baxter speak to eleven years of the same period that Mrs Fyall spoke to. They were the only persons besides Mrs M'Leish who had a key to the door, and they speak very little of the closing of the door during the day, and to the time of its being shut being short, but to more frequent closing during the night. During part of the time they say there was even a regular practice of shutting the door at night; but I think, taking the evidence as a whole, it substantially comes to what I have stated, that there was not a constant, but yet a frequent, practice of shutting the door at night, and an occasional practice of shutting it during the day for short intervals.

"The question is, what is the effect of the interruption by the closing of the door in the way I have now explained? And, in considering that, I think it is important to look at the purpose for which the door was shut on both occasions, that is, by day and by night. If it were meant plainly as an interruption to

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Meadowside to the range of back buildings built on his own ground. That it was looked upon as a private close in 1838 was clear from the

the use of the passage as a thoroughfare, and if the act of shutting the door was plainly calculated to convey that impression to those who were using the passage, then it would be a strong element in the way of interruption; but I do not think that the evidence shews that to have been really the intention with which the door was closed, or that, in point of fact, its being closed to the extent to which this occurred, formed any such distinct interruption to the use of the passage by the public as would amount to notice to them that their right to go there and use it as a thoroughfare was disputed, In regard to the shutting of the door during the day, the evidence of Mrs Fyall, as well as of a number of other witnesses, goes to shew that the door would have been constantly open but for the circumstance that a great many children congregated in the neighbourhood, and during the hours when they were not at school were in the habit of making the passage a sort of playground, that Mrs M'Leish, who is the person who seems alone to have shut the door during the day, was a good deal annoyed by this, and that her purpose in closing it was not to prevent the use of the passage as a thoroughfare by the public but really to put a stop to the annoyance she experienced from the children. Again, I think the closing of the door at night is to be explained on the footing that something else was intended than interrupting the use of this as a public passage. Mrs Fyall says, in speaking of its being locked at night,—'It was partly for the orra creatures who would have come about it that she wished to have it locked, and partly, I suppose, because it was a private close.' This evidence is corroborated by that of other witnesses. It appears that this close was infested by a class of people who hung about it at night, and were a nuisance to the people living there. This is plainly the idea which Mrs Fyall expresses, and which is expressed also by other witnesses; and so little does she seem to think of the question of public right that when she speaks on that question she adds, 'and partly, I suppose, because it was a private close.' I can scarcely think this is the language she would have used if she had thought that her mother's state of mind—which she must have known—was a determination to vindicate private property as against a public thoroughfare; that her mother had the intention of refusing the public the use of it, so as to preserve her own private right. As regards Mrs M'Leish herself, it occurs to me that if she had had it in her mind to do what the pursuer proposes in this action,—I mean, to build over this close,—we should have had a very distinct interruption on her part. The circumstance that she did not distinctly interrupt the use by the public shews that at all events she had not building in view, and if not, it is a circumstance in the case tending to support the inference, that she was not resolved to prevent the acquisition by the public of a right to use this passage. The closing of a gate, even in a public place of this kind, is countenanced by the provisions of the Police Acts themselves, for there are provisions that where it is desirable to shut up public thoroughfares of this kind the police authorities have the power of doing so. This shews that there is really a recognised necessity even with public places of this kind for closing them from time to time, although that should practically interfere with the use of them for a time as thoroughfares. There is, I think, scarcely any evidence of anyone being turned back in the use of this close except boys, and the turning back of boys is to be accounted for in the way I have stated. It is quite true, as Mr Robertson observed, that some who saw the gate shut occasionally turned and did not go up to it, and so far that is in favour of interruption. The only question is, whether the degree of that interruption is such as would prevent the acquisition of this right? It is a jury question, whether the amount of interruption has been such as to have prevented a peaceable use, and to have been notice to the public that their right was disputed, and on the whole matter I have come to the conclusion that the interruption was not sufficient. With regard to the gate which was put up in 1871, I do not think it has a material bearing on the case. It was used, I think, almost entirely at night, and certainly not till evening. It was explained by one witness that he could not get to the post-office at

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terms of the bond of servitude granted by Butchart in favour of Macintosh's adjoining tenement on the west, and which would have been unnecessary had the close been a public close. The tenants in Butchart's houses in the close were very numerous, and it would have been impossible entirely to exclude the public without, at the same time, causing extreme inconvenience to the tenants. But the public were only allowed the use of the close by tolerance. The actings of Butchart and his successors in controlling the public use by closing the door on the Meadowside end of the close was an unequivocal act of possession, which, unchallenged as it was, rendered it impossible for the public to acquire a right of way.

Argued for the defenders;—The case resolved itself into a comparison of the evidence of the amount of possession with that of the amount of interruption. Where there was such continuous use by the public as was proved in the present case any interruption required to be open and distinct. Here to all appearance the close was a public close; no notice of its alleged private nature was given. The public were admitted freely whenever they wanted. The only interruption founded on was the occasional closing of a door to prevent annoyance from boys, and to prevent disreputable characters harbouring in the close at night. Such was not a sufficient interruption of the public right of way, which was, at the same time, acknowledged by the proprietor himself in allowing the close to be cleansed and lighted, and even paved, by the defenders, at the public expense.

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nine o'clock, but during the day it is not proved that the iron gate was ever shut. I do not attach any great importance to the shutting of it by night, for the reason I have already stated, but even that ceased after a short time.

"The Portobello case of Cargill[1] was founded on by the defenders as an authority conclusive in their favour, but I cannot say I regard that case as decisive of the present, although I think it an authority to some extent in favour of what is contended for. The particular distinction between it and the present case is, that the person who sued was not proprietor of the ground which was the subject of the action. He had a bounding title, and the lane was not his at all. It was not a right he could properly vindicate, and Lord Curriehill rests the first part of his judgment very much upon that ground. At the same time I think the judgments of the Lord President and Lord Deas in that case—apart from the question of title, on which they did not rest their opinions—proceed upon this, that from the date when the Police Act came into operation in 1850, and for years afterwards, the lane was confessedly within the jurisdiction of the magistrates of Portobello, who had been allowed to light, cleanse, and pave it, and to treat it otherwise as subject to their control. If it had not been for the peculiarity that the lighting and cleansing was not in practice limited to public thoroughfares in Dundee, but was extended to property obviously private, I think that the case would have been a direct authority. The acquiescence of the proprietor in allowing the magistrates, from 1850 to 1873, to light, cleanse, pave, and treat this passage as a public street, on the principle adopted in the case of Cargill, would have brought the passage under the operation of those Acts, and made it a public street, apart altogether from the long usage there had been before, but the only element of that kind which I have here—certainly a very important one—is that of the paving of the street. I cannot say I should regard that circumstance alone as bringing this case plainly within the operation of the Act, but it is of great importance as an element of evidence on the question, whether the actual use by the public was not that of a public right of way; and on the whole, I have come to the conclusion that the defenders must succeed in the action. I shall therefore find that for forty years and upwards there has existed a public right of way, and in respect of that I shall assoilzie the defenders from the conclusions of the action, with expenses."

[1] Cargill v. Magistrates of Portobello, Dec. 11, 1863, 2 Macph. 244, 36 Scot. Jur. 126.

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LORD DEAS.—The pursuer in this case is proprietor of certain subjects in Dundee, which are described in the disposition in favour of his author, William Butchart, dated 13th December 1790, as "All and Haill that tenement of land, back houses, and garden, which sometime belonged to Alexander Watson," "lying in the burgh of Dundee, on the north side of the Murraygate thereof, betwixt the lands sometime of Mr James Fiethie, now of on the west, the lands sometime of Alexander Bower and Samuel Chanler, now of on the east, the common meadows on the north, and the said street on the south parts."

The defenders allege that a lane or close, called Butchart's Close, leading through the pursuer's property from the Murraygate on the south to what is now called Meadowside, or Meadowside Street, on the north, has been used by the public as a public close or street for foot-passengers for the period of the long prescription, and consequently that a right of public foot-road exists over it, which the pursuer is not entitled to obstruct or interfere with.

The proof and productions do not furnish us with a precise description of the subjects through which the close runs, without the aid of verbal explanations, for which I was much indebted to the Dean of Faculty on the one hand and the Solicitor-General on the other, and which made that description quite intelligible. I do not say that these verbal explanations were essential to judgment, but they removed a certain vagueness which, to my mind at least, was unsatisfactory. Taking the benefit of them, I understand the nature of the pursuer's subjects to be this:—The length of the ground comprehended in the disposition, just quoted, of 1790, between the Murraygate and Meadowside is about 300 feet, and its breadth between the houses fronting Murraygate and backwards is from 30 to 35 feet. The ground seems to run from the Murraygate towards Meadowside in somewhat of a north-easterly direction, but which is described in the titles as "north," and to call it so is sufficiently accurate for all practical purposes.

The state of the subjects up to a date not quite ascertained, somewhere between 1818 and 1822,—probably about 1820,—was this:—At the Murraygate end the pursuer's author, Butchart, had a house, still extant, the second story of which filled the whole space betwixt the house which had belonged to Fiethie on the west, and the house which had belonged to Alexander Bower and Samuel Chanler on the east. But, in the lower story of Butchart's house, a space of about four feet in breadth had been left next the gable wall (understood to be mutual) of what I shall call for brevity Fiethie's house, for a passage northward to Butchart's garden (mentioned in the disposition of 1790) and to his back houses (also mentioned in that disposition), situated on the east side of the passage, and occupied by his tenants, consisting, according to the defender's witness, Peter Gillan, of about fifteen families.

Sometime between 1818 and 1822 Butchart erected a tenement on his garden, or on that part of it which abutted on Meadowside, and in doing so he so far followed the fashion of the house at the Murraygate end of his property as to leave a covered passage through the lower story, whereby the occupants of his new tenement had direct ingress and egress to and from Meadowside, and his other tenants in the close, as well as himself, had the means of passing in and out either at the Murraygate or Meadowside end of his property as they thought proper. An uncovered portion of Butchart's ground was thus left between the

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old tenement and the new, and in 1822 Butchart, on the occasion of building a stable on part of that ground, entered into a transaction with Daniel Macintosh, who had acquired Fiethie's subjects immediately on the west, whereby, on payment by Macintosh of £65, Butchart bound himself to keep his stable 8 feet 9 inches distant from the west wall of Macintosh's house for preservation of Macintosh's lights, and not to raise the side walls of the stable, which were to be 32 feet in length, above the height of 15 feet 9 inches from the ground, nor to raise the roof of the stable more than 8½ feet higher than the side walls. This transaction was embodied in a deed of servitude executed on 2d August 1822, and the stable then in course of erection was completed accordingly.

Butchart's house fronting Murraygate was stated at the bar to have no direct entrance from the street. The new tenement erected by Butchart at the other end of the close had a door entering from the close to the upper portions of the building, and a door entering to the ground flat direct from Meadowside Street. With the exception of this last mentioned door all the doors of the pursuer's subjects enter from the close. The whole subjects on the east side of the close belonged to Butchart, and now belong to the pursuer. All the occupants of these subjects had and have thus to enter through one or other of the two covered passages in order to get to the premises occupied by them. On the other hand, although the proprietor of the subjects stretching along and forming the pursuer's western boundary has extended his back buildings to within a few feet of Meadowside (as we see from the Ordnance plan), covering nearly all of what was his garden, he has no door or entrance from Butchart's Close, but enters by doors from a through-going close situated on the other—that is the western—side of his subjects, although he may possibly have also a door or doors direct from Murraygate or Meadowside,—a fact left unexplained, and which is not material. Two material facts, however, become clear from this minute description of the subjects,—1st, That the close or passage in dispute is essential for the occupants of the pursuer's subjects; and 2d, That no use of that close or passage is or can be made by adjoining proprietors on either side unless it be as members of the public, and accordingly we find that no right to enter the pursuer's close is asserted by any one whatever in any other capacity.

It is now necessary to notice that, in erecting his tenement at the Meadowside end of his ground, Butchart made preparation for a door there, by inserting in the wall an iron hook in the usual manner for a crook and band hinged door, which was accordingly forthwith put on, having a lock and key, or rather keys, for the use of himself and his tenants. It is proved "that the stone work is of the same date as the building, and has been constructed for a door." Butchart, at the same time, formed a recess in the wall, so that the door when opened back might not, to any extent, obstruct the narrow passage through the archway, or what we familiarly call the "pend." This fact may account for some of the witnesses, who no doubt passed through the close, saying they did not see the door, which is stated to have been much of the same colour with and scarcely distinguishable from the wall.

At the time when the door was put on there were, with the exception of a public school or schools, no houses on Meadowside, which was then a public green. It was not till 1825 that the magistrates and council obtained an Act of Parliament authorising the green to be built upon, on condition of a public bleaching green being provided elsewhere. This condition was ultimately complied with, and in course of years Meadowside has come to be covered with

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buildings, leaving only the breadth of a street, now called Meadowside Street, running at right angles across the end of what had been the gardens of Butchart and the other Murraygate proprietors, and parallel to Murraygate Street. Of course a door upon the close was not necessary to enable Butchart's tenants to get into their houses, nor could it be intended to obstruct their entrance, and as there was nobody else to be kept out except the public, it follows that the object of the door must have been to keep out the public and prevent their passing through. The portion of the public most likely at that time to have taken advantage of the opening were the scholars, spoken of in the proof, for there were then no buildings on Meadowside, with the exception of a public school or schools, and most probably it was the existence of the schools, coupled with the opportunity of connecting the door with the new building and securing it in the wall, which led to the door being put on at that end of the close in place of the Murraygate end, where no door was necessary so long as there was no through-going close.

The door thus put on by Butchart continued in its place for nearly fifty years. Butchart died on or about 1832, and was succeeded by his daughter, Mrs M'Leish, who died in March 1862. There can be no doubt that the door was still there at Mrs M'Leish's death. She left a son, John M'Leish, who came home from Australia in 1867. His sister, Mrs Fyall, who then occupied the house in which her mother had died, says the door was still there at that time, and the witness Roy says the same thing. Mrs Fyall further says her brother John M'Leish replaced the door by an iron gate after he returned home. The witness Allan Macdonald says the iron gate was put up in May 1871, and whether this date be correct or not the cross-examination suggests no doubt of its being so. Some of the witnesses think there was an interval of three or four years between the removal of the door, as having become useless from age, and the substitution of the iron gate. The door may, however, have been dilapidated and standing back in the recess, scarcely observable during that time; but the precise dates, either of taking off the wooden door or putting on the iron gate, are not material. All or nearly all the witnesses are agreed that the door was there within the last ten or twelve years, and that an iron gate put on by John M'Leish was still there after his death, thus bringing us down to within a very short period of the commencement of this litigation.

Next, as to the use made of the door and iron gate. It admits of no doubt at all that during the whole period of Mrs M'Leish's life the door was frequently kept locked during the night, and by no means unfrequently during the day, and this practice, although latterly not so well observed, continued to some extent after Mrs M'Leish's death, with reference both to the door and the gate successively, down nearly to the present time. Neither does it admit of any doubt, 1st, That the object of this practice was to exclude the public, and 2d, That the effect of it was to exclude the public upon all the occasions when the door or gate was locked.

The locking of the door and gate implies, of course, that the proprietor kept a key or keys, and it appears that keys were also furnished to some of the tenants. The locking of the door in Mrs M'Leish's time is very specially spoken to by her daughter, Mrs Fyall, who was born in the close, forty-six years ago, and lived there till within the last three years. She says,—"My father died a long time before my mother. I think I was about fourteen years of age when he died. He was terrible pointed about having the door locked. I can't say that the door was kept much locked during the day. In fact we did not

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like to lock it during the day for the tenants, but it was usually locked at night, —the hour of locking varied. I think some of the tenants at last got keys for themselves. I have often seen people coming into the close from the Murraygate, and having to turn back because the door was shut." She adds, on the cross-examination,—"I have heard my mother saying that it was a private close, and that she had a right to lock it."

The witnesses next in importance to Mrs Fyall, as to the locking of the door, are two sisters, Jane and Elizabeth Baxter, who lived in the close for eleven years, viz., from 1835 to 1846, and had the best possible means of knowledge. Jane Baxter says,—"When I lived in Butchart's Close there was a door at the top of the close. It was very often locked, both at night and during the day. (Q.) Was it more frequently locked during the night than during the day? (A.) Much about it. I can scarcely say. I knew in the evening that it was locked by my father being out and our having to watch for him coming in, and having to open the door to him with a key. My father was Mrs M'Leish's tenant, and had a key as her tenant. We got the key from Mrs M'Leish." In answer to the cross-question,—"During how many years do you think you had a key?" she says, "Perhaps the most of them, but I cannot tell exactly when we got it. We gave up the key when we left."

In like manner Elizabeth Baxter says,—"We had a key to the gate at the top of the close, and had often to open it at night to let my father in, and to lock it again afterwards. I have found the gate locked during the day, and opened it when it was locked." Then she speaks to the only occasion on which she remembers precisely what it was which led her to open the door during the day, viz., to let in a "certain gentleman" who beckoned to her at the window, and which fact obviously remained on her memory because he was a certain and not an uncertain gentleman. In answer to the Court she says there was no particular time of the day or night for locking the door,—"just when the landlady thought proper. She had it at her own will." "(Q.) How often in the course of the winter had you to come down and unlock the gate to let your father in? (A.) Once or twice a week, I think, but I cannot be certain."

The evidence of these three witnesses, Mrs Fyall and the two Misses Baxter, is supplemented and amply corroborated by numerous other witnesses, if corroboration were deemed necessary. I shall briefly refer to some of them, because it is the locking the door from time to time which gives its chief importance to the existence of the door. Taking them in the order of the proof, we have in the outset the defender's witness, Mrs Watson, whose evidence is valuable because she is a leading witness for the defenders. Mrs Watson says, —"When I knew the place first Mrs M'Leish had a door at the top of the close, on the left hand side going up from Murraygate, which closed up the entry when the landlady pleased. That door was there a long time before 1822. I cannot say how long. At that time any person used the close who could win through it, but when it was shut they could not, and had to turn back again. I have seen the schoolboys turned when they came, and the door shut long before 1840. I don't remember of anybody being turned for many a day. After I went to Butchart's Close I saw people turned many a time. I have seen Mrs M'Leish shut the door,—that was Mr M'Leish's wife. I never saw an iron gate, but I believe one was put on after the wooden door was away." On the cross-examination Mrs Watson says Mrs M'Leish had the property from the time her father died till she died herself. "(Q.) Did she lock the gate when-

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ever she chose all the time? (A.) Whenever she got in a passion with boys running about the close she locked it till it pleased her to open it. (Q.) When she locked it did it stop everybody from going up and down the close? (A.) Yes." Being asked how long Mrs M'Leish would keep the door shut at a time the witness says,—"If any of her tenants were going in she would come and open it and lock it again. That was during the daytime. (Q.) Can you tell me if she locked the door every night, or all night? (A.) No, she just locked it when she pleased. (Q.) Have you often seen people coming in, finding the door locked, and going back to Murraygate again? (A.) I have seen that. (Q.) All over the thirty years she had the place? (A.) Yes. I was not living in the close before she got the property, and do not know so much about what her father did."

This evidence, coming from defenders' witness, is so conclusive as to Mrs M'Leish's practice that it is hardly necessary to refer to any of the pursuer's witnesses on that point. It is fair, however, to Mrs M'Leish to mention that the same witness, viz., Mary Martin, who speaks most strongly of that lady's passionate manner, in coming out in "a great pergand" as the witness calls it, and putting away "schoolboys and the like," being asked on behalf of the defenders, by way of insinuation, whether Mrs M'Leish was "eccentric, queer!" she answers, "No, she was just ill-natured if she saw anybody go into her close. She was a fine, well-living woman." The same witness had just before said that the door "was sometimes kept locked all the day when I was young, and sometimes it was open." John Cooper, whose age is fifty-eight, says he often went up Butchart's Close prior to 1848 to get to Meadowside. "I remember of there being a door at the top of the close. I often found it shut and locked. I was a boy when I first found it shut and locked. This was during the daytime. I never considered I had a right to go up that close on account of the door being there. (Q.) Were you sometimes turned back? (A.) Always, when the door was locked. (Q.) Did anybody ever turn you back? (A.) Yes; Mrs M'Leish used to turn us back. I have gone through the close to get to my work in the morning, and been turned back. Afterwards I made a point of noticing whether the door was shut or open before I entered the close at the Murraygate end." The witness afterwards says he is certain that Mrs M'Leish turned him back a dozen times when he was a boy, but he did not give her the chance when he became a man, as he went only early in the morning, and he could see from the Murraygate end whether the door was shut, and if it was, he did not go in. He also says that he has seen the door locked during the day, more for the boys, he supposes, than for others. James Cunningham, whose age is fifty-two, and who lived at the foot of Butchart's Close from 1840 till 1865, speaks to the door being locked against the scholars when he was a boy. He says the boys very frequently annoyed Mrs M'Leish. "She often came downstairs and locked it with a key, and would not open it, perhaps, till the following morning. I have seen that happen." James Westwood, whose age is sixty-three, says that from 1832 to 1836 he wrought to a cabinet-maker in Butchart's Close, and had occasion to be there every day. "I remember the door at the upper end of it. That door was always shut and locked in the morning when I came to my work. During the daytime the door was sometimes shut, but more frequently open." In the cross-examination he says,—"We left at seven o'clock in the evening, and I have seen it locked at that time. In the winter time it was locked about twilight." Being asked whether he

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had gone five or six times and found it locked, he answers,—"I have gone twenty times and found it locked. That was about six o'clock in the morning, both in summer and winter." Being asked how often he had put his hand on it and found it locked, he says,—"I cannot exactly say—several times." Mrs Kelt, whose age is forty-eight, says that prior to 1840, when she was at school, the door "was sometimes shut during the day," but when it was open she and the other girls used to steal up to avoid the old lady, who turned them back, and had sometimes drenched her with water. On cross-examination the witness says,—"I found it locked dozens of times,"—that it was generally shut about ten o'clock in the morning, but not always,—that she cannot tell how often she herself put her hand on it and found it locked. "(Q.) Did you do it ten times? (A.) Oftener, I believe." Alexander Wilson, who was born in 1825, and has lived since then in the immediate neighbourhood of the close, says his recollection goes back about forty years, when he was at Hamilton's school. He speaks to the door being pretty often locked when he came out of school. He also says,—"I have found the door locked at night," and he speaks to an occasion, within the last eighteen or twenty years, when a young man, chased by the police, was caught inside the door, between ten and eleven o'clock at night, in consequence of the door being shut, the impression made on the witness by what he saw at the time obviously being that the door was locked as well as shut. Allan Macdonald speaks to the locking of the iron gate subsequent to May 1871, and Thomas Kinnear speaks to the close having been within his beat as a police-constable for about six weeks in July and August 1860, and having found the door locked on two different nights during the six weeks." The last witness I shall refer to on this point is John Martin, who was born in 1822 or 1823, and remembers the close as long as he can remember anything. He says,—"I used to play about the close forty-four years ago, and for thirty-five years or so I used to go up and down it frequently,"—the door at the Meadowside end "had a lock upon it. I used often to find it locked down to the time old Mrs M'Leish died, and to the best of my opinion I would say it was pretty steadily kept locked during her lifetime." He further says that, when he was a boy, he believes he found it locked at every hour of the day, and that he can further speak to having found it locked on various occasions after he became a lad. He adds,—"I went to be an apprentice slater when I was about sixteen years of age, and during my five years' apprenticeship I used to pass the door five or six times perhaps in a forenoon, and I repeatedly found it locked."

It is impossible to say that there is not here a formidable body of evidence of substantial interruptions extending, at intervals, over the whole period from the erection of Butchart's new tenement almost to the present time, coeval with the extensive use which the public have undoubtedly had during the same period of the close or passage in dispute. But, before I consider the effect of these two elements in combination, it is important to observe that the period to be taken into account, in considering whether the defenders have proved their case, is exclusively the period between the erection of that new tenement and the date of raising the present action. There is no evidence whatever of the exercise of a right of public road through the pursuer's property anterior to the erection of that tenement. The only witness who seems, at first sight, to carry the evidence of a through-going passage farther back, is the old man John Arkley, who says he has known the close since 1809, but who also says the door,—obviously meaning the door in question,—existed before he first began to go about the close, so

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that his knowledge of the door and of the Meadowside end of the close are coeval with each other, and it is quite clear that he neither speaks nor means to speak of any opening at that end of the close before the door was put on, which it certainly was not for some ten years after 1809. It has been suggested, however, that proof of public use during the last forty years may presume prior public use for time immemorial. But that would be a total misapplication of a principle which applies only in circumstances quite different from what we have here. Suppose a road has been shut up for the last thirty-five or thirty-eight years, but proof is adduced that for time beyond the reach of human memory, before the commencement of these years, the road had been unequivocally used as a public road, the law presumes the usage to have gone back for the prescriptive period of forty years, although human memory does not extend so far. But that principle has no application whatever to the present case, where the pursuer's evidence commences at a date quite within human memory,—namely, a date between 1818 and 1822,—probably, as I have said, about 1820, and not a single witness says that at that date there was any prior usage, either immemorial or otherwise, in the case. This of itself is conclusive,—for in the absence of all proof of immemorial usage the presumption applicable to the period prior to the date spoken to is a presumption in favour of the proprietor, who is not called upon to adduce evidence to disprove the immemorial existence of a burden which is not even pretended to have been immemorial, for it is rather remarkable that the defenders' third plea in law is based entirely on the usage as a thoroughfare for forty years and upwards, while in their fifth statement of facts this forty years' usage is carefully distinguished from the usage of cleansing and lighting (founded on in the 2d plea), which last mentioned usage is said to have been immemorial.

But even if the presumption were not in favour of freedom, as it clearly is here, there would be no incompetency in a case like this, and, indeed, there is no incompetency in any case, in ascertaining, if you can, at what period a path or passage first came to exist and to be used by the public, and by whom and for what purpose that path had been called into existence. Our law of prescription does not limit the ascertainment of facts like these to the last forty years, and it would be most unfortunate if it did, for there can be no question that the state of facts (if ascertained), at and prior to the commencement of the forty years, does and ought very deeply to affect the complexion of all that has followed within the forty years, and the weight of the *onus* incumbent on the parties respectively, in a question of public road. If the proprietor can prove by parole testimony that at a date, however remote, within human memory, or if he can prove by a writing, however ancient, that he formed a particular road or path at his own expense and for his own purposes through his own ground, where no road or path previously existed, and that the path has always been and continues to be used by him for the purposes for which he made it, nobody can doubt that these facts raise a very different question and infer a very different *onus* on the parties respectively from what would be incumbent on them if the law were to prevent the proprietor from proving any such facts, unless they had occurred within the last forty years.

I think it impossible to read the proof in the present case, and to take into account the real evidence deducible from what the defenders have not attempted to prove, as well as from what has been proved, without being impressed with the conviction that there had been no use of the close by the public as a thorough-

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fare before Butchart built his new tenement upon his garden,—that he then opened up the passage at his own expense for a purpose useful, and, indeed, essential to the beneficial enjoyment of his property,—that he and his successors have used the passage for that purpose ever since,—and that so long as the state of the property is not changed it is essential to their own enjoyment of it that they should continue to use the passage in a way which necessarily leaves it accessible to a considerable portion of the public. To insist upon all the members of the fifteen families who live in the close going out and in by keys only, and locking the door behind them, and all their friends, visitors, and customers getting in by ringing bells, which the inmates must answer, and passing out with an attendant to lock the door after them, would be obviously impracticable; and to have sentinels constantly on the watch to inquire into the whereabouts of every one who enters when the door is not locked, and turn back intruders who do not allege some errand in the close, would plainly be equally impracticable; so that to sustain the claim of the defenders upon the proof led by them would be very like condemning every proprietor who forms a throughgoing close to have the burden of a public road imposed upon him whether he will or not.

A public road through a garden, as Lord Neaves, I think, observed during the discussion, is not very usual. The fruit and the vegetables would be apt to disappear. If there had been such a road through Butchart's garden, before he built his new tenement upon it, there could have been no difficulty in adducing proof of the fact, and it is inconceivable that the defenders would not have attempted to do so. It is equally inconceivable that when Butchart put on a door and locked it in the face of the public nobody should have objected to the existing footroad, if there was an existing footroad, being thus obstructed; and that, on the contrary, at the fiat of a feeble old lady, for more than forty years thereafter, nobody whom she forbade to pass should have insisted on getting through, but everybody she desired to turn should have immediately turned, and gone back. I think the inference is irresistible that there had been no previous public use of a passage through the garden, even if the presumption to that effect in favour of the proprietor were not of itself sufficient, which I think it is.

The strength of the pursuer's position as proprietor of the *solum*, and the extent of the *onus* thereby thrown upon the defenders seem to me to have been somewhat overlooked by the Lord Ordinary, and hence alone, I think, has arisen any room for difference of opinion as to the result. The existence of the footroad claimed is not alluded to in the pursuer's title-deeds, either as a boundary or in any other way. The pursuer's boundary on the west is there stated to be the subjects formerly belonging to Fiethie. The law in no case presumes the existence of a public road across the private property of an individual. The *onus* of proving that burden rests on the party or parties alleging it. If not established by writing it must be established by proof of its uninterrupted exercise as matter of right for at least forty years. That is essential to the *constitution* of the right. If the interruptions have been successfully resisted by the public,—if the individuals challenged have uniformly or generally disregarded the challenge, and gone on in the face of it,—if the barriers, from time to time erected against them, have been destroyed as often as they were put up, and the proprietor has taken no legal steps to protect himself against such masterful proceedings, he may very well be held to have acquiesced in the public claim at the lapse of the prescriptive period. But here the assertion of

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right is all on the side of the proprietor, and the acquiescence is all on the side of the public. The right of the proprietor was asserted, from first to last, by the existence of the door, locked at pleasure by night and by day, as suited himself or herself, without regard to what did or did not suit the public. That state of matters was acquiesced in by the public. Every man, woman, and child who were challenged acquiesced in the challenge, and only returned when they saw an opportunity afforded by the door standing unlocked to suit the proprietor's own exigencies and nobody on the outlook to interfere. The *onus* incumbent on the pursuers, to prove uninterrupted exercise of the right claimed by them for the prescriptive period, fails, even on the face of their own evidence, as we have seen from the deposition of Mrs Watson, which applies to the whole period from the putting up of the door prior to 1822 to the death of Mrs M'Leish in 1862. Day and night, during all that time, according to Mrs Watson, Mrs M'Leish exercised her pleasure over the door, and consequently over the passage, and nobody resisted. Even, however, if the *onus* incumbent on the defenders could be held to have been to any extent shifted by their proof, the references I have made to the proof for the pursuer would leave no doubt upon my mind that the constitution of the alleged public right has not been established.

If this would be the fair and legal result of the evidence apart from what is founded upon the lighting and cleansing of the close—the paving of it by the commissioners in 1867—and the occasional repairs vaguely alleged to have been previously made upon it,—I do not suppose I need detain your Lordships by remarking upon the comparative unimportance of these circumstances in a question like the present. We have more than once had occasion to lay it down that the question, what is to be held to be a street, or a public street, in the sense of a Police Act, may be, and generally is, quite different from the question, what is to be held a public street or a public footpath in a question like the present; and if the Lord Ordinary had not thought my opinion in the case of Cargill to be somewhat favourable to the view he takes on that point, I should, certainly, have thought it to be pretty clearly the other way. It is necessary that closes, whether they be thoroughfares or *cul de sacs*, into which the public are in use to enter, should be made safe and wholesome for the public, by being lighted and cleaned, so long as they are accessible to and used by the public, however the rights either of property or servitude may stand; and it is not incumbent on the commissioners to enter into litigation with individuals upon these points, before they can exercise their jurisdiction over such places and expend public money upon them for the safety and comfort of the public. I should have so construed the Police Statutes applicable to Dundee, even if it had not been proved to demonstration, as it is, that in practice the commissioners themselves have so construed these statutes. As to the slight repairs occasionally made on the *solum* of the close (proved to have been very dirty at the best), and the ultimate paving of it in 1867, these might be found, in the end, more economical methods of keeping the close clean and wholesome than constant and unsuccessful sweeping of a rough and irregular surface. The proprietor had no interest to object to such beneficial operations, but the reverse; and in no view can they be regarded as material elements in the present question.

In arriving at a conclusion hostile to the contention of the public it is consolatory to reflect that, although thieves and prostitutes, who are proved to have taken the benefit of the close since there ceased to be "a fine well-living woman," like Mrs M'Leish, to exclude them, the respectable portion of the

public will lose little by the pursuer's object being carried out, of substituting for the close "commercial buildings and warehouses." Some of the defender's keenest witnesses for the vindication of public rights tell us that the close in question and other closes in Murraygate Street, which lead through to Meadowside, are situated between Panmure Street on the one hand and Meadow Entry on the other, both unexceptionable cart and carriage streets, leading direct from Murraygate to Meadowside—that the distance between these two streets, measuring along the Murraygate, is from 50 to 60 yards, and that the difference in time by taking either of them instead of the close is two or three minutes.

My opinion is that the interlocutor complained of should be recalled, and decree pronounced in terms of the conclusions of the summons.

LORD NEAVES and LORD ARDMILLAN concurred.

LORD ORMIDALE.—The question in this case is, whether Butchart's Close in the town of Dundee is or is not a public thoroughfare between two streets of that town—the Murraygate on the one hand, and Meadowside on the other.

The pursuer, who has some property in the close, has brought the present action to have it declared that it is not a public thoroughfare, and that the public have no right to use it. The defender, Mr Thornton, clerk to and as representing the Dundee Police Commissioners, resists the action, on the ground that the close is a public thoroughfare, and as such has been used by the public for fifty years and upwards prior to the institution of the action.

The Lord Ordinary allowed the parties a proof, and as it appeared from title-deeds produced that the *solum* of the close belonged, to a certain extent, to the pursuer, he appointed the defender to lead in the proof. On ultimately advising the case, along with the proof, the Lord Ordinary found the defence established, and assoilzied the defenders from the conclusions of the action. The pursuer has reclaimed against the Lord Ordinary's judgment, and the Court has now to determine whether it ought to be affirmed or altered.

I am of opinion that the Lord Ordinary's judgment is, on the grounds stated by him, well-founded, and that it ought to be adhered to.

That the close in question has for more than fifty years prior to the institution of the present action been greatly used by all classes of the inhabitants of Dundee seems to me to be indisputable on the proof. It may, indeed, well be doubted, having regard to the evidence of many of the witnesses, and especially that of Peter Gillan, William Hean, and Peter Arkley, whether it ought not to be held, on the principles given effect to in the case of Harvie v. Rodgers and Others, 3 Wilson and Shaw, p. 251, and many subsequent cases, that as the right to the use of the close in question has been shewn to have existed beyond the memory of man, it lies upon the pursuer to make out that he had, by interruptions acquiesced in, put an end to that right. It has been said, no doubt, that there were gardens at one time behind the houses in the close, which must have effectually prevented a thoroughfare from the Murraygate to Meadowside; but none of the witnesses speak to any such gardens except James M'Laren, and he merely speaks inferentially from indications on an old plan. It is true that the witness John Cooper says that he remembers a green at the back of the Murraygate houses, but he adds that the close "came down by the side of the green." I cannot see, therefore, that the pursuer's point, founded upon the assumption that there were pieces of garden ground behind the Murraygate houses which prevented the close extending to Meadowside, has been at all made out.

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Dealing, however, with the case as the Lord Ordinary appears to have done, on the footing that it lay upon the defenders to shew that for the prescriptive period before the institution of the present action the close has been used as a public thoroughfare, I am unable to resist the conviction that they have succeeded in doing so. It is said, however, by the pursuer, that the use of the close has been had, not in the exercise or assertion of right by the public, but by the tolerance merely of the pursuer and his predecessors; and in support of this contention the pursuer mainly relies upon the circumstance that for the greater part of the period embraced by the proof there was a gate kept frequently shut, and occasionally locked, at the Meadowside end of the close, which had the necessary effect of so obstructing or interrupting the alleged use of the close by the public as to prevent them acquiring by prescription the right they claim to it as a public thoroughfare. But I concur with the Lord Ordinary in thinking that the alleged obstruction was not in the circumstances sufficient. Many of the witnesses who have known and frequented the close for more than forty years do not appear to have ever seen the gate; and, with very few and unimportant exceptions, none of them say that they were by that or any other obstruction prevented from using the close whenever they required to do so. Besides, the object of having occasionally a shut or locked gate on the close seems to have been to prevent, not the legitimate use of it as a public thoroughfare, but the resort to it in the daytime of school-boys for the purpose of mischief or noisy diversion, and during the night of loose and improper characters.

In short, it appears to me that while it has been proved that Butchart's close has for forty years and upwards prior to the institution of the present action been used by the inhabitants and others frequenting the town of Dundee as a public thoroughfare whenever they required it, there has, on the other hand, been no obstruction to such use proved on the part of the pursuer sufficient to prevent the acquisition by prescriptive possession of the right claimed by the defenders. And in support of this view I agree with the Lord Ordinary in thinking that the paving and repairing of the close, since at least 1850, by the public authorities, and at the public expense, is a fact of much importance—a fact, indeed, which the pursuer has not attempted to get over or explain. It is not to be supposed that the public authorities should, out of the public rates, have paved and kept up a private close; nor can the pursuer, in the face of that fact, be permitted now, except on the clearest grounds, to maintain that the public are not entitled to the use of the close.

For these reasons, generally stated, and without entering into a minute examination of the voluminous proof in the case, which can only be properly judged of by a perusal of it as a whole, I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to. The case is essentially a jury one, and therefore the verdict of the Lord Ordinary, who, as a jury, saw and heard the witnesses (an advantage which this Court has not had) ought not, I think, in the circumstances, to be interfered with.

Lord Mure concurred in the opinion of Lord Deas.

Lord Gifford.—I have found this case to be attended with great delicacy and difficulty, and, notwithstanding the very full discussion and the full consideration it has received, although I have formed an opinion I cannot say that I entertain it with much confidence.

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On the whole, however, I am disposed to agree with the Lord Ordinary, and although, looking to the opinions which the majority of your Lordships have expressed, I must needs feel greater diffidence than ever in the conclusion at which I had arrived, still, as I remain of opinion that the judgment of the Lord Ordinary is right, I think it my duty to the parties to express, very shortly, the grounds on which my opinion rests.

I concur generally in the views and reasonings of the Lord Ordinary, and in this case, as indeed in all cases of fact where the Lord Ordinary has had the advantage of himself seeing and hearing the witnesses—of observing their demeanour and judging of their intelligence—I attach very great weight to the impression which the evidence as a whole has made upon the Judge who took the evidence, and who is in a better position in many respects than a Court of review can ever be.

The question in the present case is really a jury question. Such cases are almost always tried by juries, unless some special reason can be given for a contrary course, and although when Lord Ordinary I never refused, when both parties concurred in requesting me, to accept the functions of a jury, still I cannot help regretting that the present case was not tried by jury in the ordinary way. I think a jury would have been a very appropriate tribunal for such a question.

As it is, however, the Court must dispose of the case upon the evidence just as a jury would have done, for the nature of the question is the same whatever be the form of trial, and in such cases I think it is of advantage to keep steadily in view what would have been the issue sent to a jury.

According to modern style the issue in the present case would have been "Whether for forty years, or for time immemorial, there has existed a right of way for foot-passengers through Butchart's close, Dundee, between the Murraygate and Meadowside of Dundee." This is the issue which the Court must try —a pure question of fact to be decided upon the evidence alone,—although it is quite true that the evidence must be viewed according to certain legal principles which the presiding Judge would have laid down to the jury if the case had been sent for jury trial.

Now, taking first the evidence for the defenders, the Police Commissioners of Dundee, I think it is quite clear that they have abundantly proved, by every kind of evidence and by witnesses of all classes and ranks, that the public of Dundee have for a period far exceeding forty years used Butchart's Close as a public foot-passage between Meadowside and Murraygate. For a very large number of persons it forms the shortest road, and although the saving in time by the use of Butchart's close is not very great, there being other accesses between Murraygate and Meadowside, still time is valuable in Dundee, and there can be no doubt whatever that Butchart's close was used by a large number of persons as their nearest and most convenient way. Almost all the witnesses for the Police Commissioners also prove that the public use of the close was absolutely unchallenged and uninterrupted. The public were never stopped or challenged in their free use of the close as a footpath and thoroughfare, and although one or two of the defenders' witnesses speak to the locked gate upon which the pursuer's, Mr Wallace's, case exclusively turns, I think it must be admitted that, looking to the evidence led by the Police Commissioners alone, they have abundantly proved their case. The difficulty really arises upon the evidence adduced by Mr Wallace in reference to the alleged locked gate by which he says the privacy of the close was preserved. I will return to this immediately as raising

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the only question in the case. In the meantime I think it of importance to keep clearly in view the effect of the proof of public general and uninterrupted use of the close.

It is impossible to say when the public use of the close as an open thoroughfare originally began. There is in the present case rather a scarcity of old witnesses,—a scarcity not properly accounted for. The oldest witnesses, I mean the witnesses who speak to the use of the close at the remotest period, are John Arkley, 79; Alexander Tawse, 86; James Reid 74. Arkley speaks to the close since 1809—Tawse since 1825, and Reid for fifty-four years, that is, since 1820. All say that there was public passage since they knew the close—Arkley speaking from 1809, when he was fourteen years of age. It is said that the back tenement, being the tenement next Meadowside, was built about the year 1820 or shortly before, but this nowhere distinctly appears, the only trace being that in the bond of servitude, dated August 1822, the tenement at Meadowside is said to have been then lately erected. But the expression "lately" will cover a great many years, and, as I read the evidence, I think none of the witnesses distinctly remember or describe the state of matters before the Meadowside tenement was built. There is no evidence either one way or another as to the state of possession before the Meadowside tenement was built and when the ground was used as a garden, and although the word "garden" occurs in the disposition of 1790 that may be a much older description applicable to a former state of matters. We have not the original grant, and no title older than 1790. If there was no road before the erection of the Meadowside tenement, and if that tenement was originally built about 1820, it is very strange that Mr Wallace has adduced no evidence to this effect, and should have left us without any trace of the commencement of the passage.

In this state of the evidence it is impossible to say whether, before the Meadowside tenement was built, there was or was not the same passage up by the side of the garden and into Meadowside as there was after the Meadowside tenement was erected. There was always occasion to go to the meadows for bleaching and other purposes, and no witness has been brought who can remember a time when there was not access through Butchart's Close. I do not think Mr Wallace is entitled to assume, as was done by his counsel, that the use of the passage only began after the erection of the Meadowside tenement. On the contrary, I think this is a case to which the ordinary rule applies, that possession and right of way having been proved as far back as the memory of the oldest witnesses extends, the use is presumed to have been precisely the same previous to the memory of these oldest witnesses. This was the rule laid down both in this Court and in the House of Lords in the well-known case of Harvie v. Rodgers, 8th July 1828, 3 W. and S. 251. In the present case, possession being proved up to 1809, and there being no evidence prior to that date, the possession must be held to stretch backwards as far as is necessary for the establishment of the right. In Harvie v. Rodgers only thirty-four years' possession was proved prior to interruption, but there being no contrary proof regarding prior possession, the uninterrupted possession was held to have been established for at least forty years.

Assuming, then, as I think I may, that the evidence relied on by the commissioners, taken by itself, is amply sufficient to warrant a verdict in their favour, I proceed to the only difficulty in the case, which is, whether the evidence of interruption by means of a locked gate, upon which evidence the defender in

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the issue relies, is sufficient to negative and overcome the case of the Police Commissioners. I think the Lord Ordinary quite rightly treats the question as an interruption of the right claimed by the public. He says, it "must be shewn that the door or gate had been used as a bar to the thoroughfare with such frequency or for such periods, although at intervals, as to give distinct notice to the public that their use as a matter of right was questioned and interrupted." I think this is the real question at issue,—Did the locked gate relied upon by Mr Wallace really form a substantial and actual interruption of the right and use had and enjoyed by the public? If it did, so that uninterrupted use for forty years cannot be affirmed, then the verdict must be for the pursuer, Mr Wallace. If, however, the gate was so used as not to form or create an interruption of the public use, then the verdict must be for the commissioners of police.

I do not intend to examine the evidence in detail, for I am only anxious to explain the principle upon which I have come, though I admit not without hesitation, to the same conclusion as that reached by Lord Ormidale and by the Lord Ordinary.

Now, it appears to me that in order to prevent the public from acquiring a right of way or passage, the interruption or stoppage of the use must be open, effectual, and distinct, so as clearly to notify to those who claim the right that it is disputed and disallowed. I think it must be such as to put the public necessarily to the choice either to submit to be deprived of the use of the road, or to vindicate their right *via facti*, or in a court of law.

In the present case I do not think that the locked gate was used to stop the traffic in the close in such a manner as to certiorate the public that their right of way was disputed. The use by the public was open and notorious—the gate was never used to stop the public traffic. It will not be enough to allow the traffic to flow unchallenged all day, and then merely to shut the close now and then at night, when no one requires to use it. If the public claim and are allowed free passage, it will not do merely to stop children who are annoying the residents by playing in the close. Effectually to interrupt a public use it is the public that must be stopped and not children, for although it may be true that, if there be a right of way at all, children have as much right as adults, still children have not the same means or power to vindicate their rights, and their submitting to exclusion will not affect or bind the public.

Acting as a juryman, therefore, I take the same view of the alleged interruptions that the Lord Ordinary has done. I think they are not sufficient to prevent a verdict that for more than forty years the public have had the uninterrupted use of the right of way,

I am also much moved by the evidence that the paving of the close and the upholding of the roadway in repair has been in the hands of the commissioners of police. It is true that the complete paving of the close was only in 1867, but it seems sufficiently established that for many years before the whole repairs were undertaken and carried out by the police authorities at the expense of the public. Since 1850 the close has also been drained at the public cost and as a public place. Facts like these give a colour and a character to the use of the road as a passage which greatly strengthens the case of the commissioners.

While, however, I am not able to concur in the judgment now to be pronounced by the Court, I have great satisfaction in the very full and careful

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discussion and consideration which the case has received. I quite understand and appreciate the view which the majority of your Lordships have taken, and I admit the force of the considerations by which it is supported. In a question of considerable local importance and interest I think the parties and the public of Dundee have every reason to be satisfied that the case has been most carefully, fairly, and fully tried.

LORD JUSTICE-CLERK.—As this case belongs to the Second Division, I may shortly explain the grounds on which I entirely concur in the result arrived at in the opinion of Lord Deas. It is said that this case raises a pure question of fact. If it were so, I should be slow to differ from the Lord Ordinary, who took the proof, and saw the witnesses. But, like every case of this kind, the question of public right of way depends as much on the quality of the facts, and the legal effect of them, as on the facts themselves. On these, excepting on some isolated details, there is truly no room for doubt. That since these buildings were erected, the passage so left along the property of Butchart has been largely used as a thoroughfare by the public of Dundee must be conceded. It is equally certain that the property over which the right of way is claimed was the private property of Butchart when the building was commenced, and I think there is no evidence that there was any use of that ground as a passage, or that any existed there before that time. It was formed for the convenience of the proprietor and his expected tenants, and it seems established that at that time a door-way was constructed at the Meadowside end, on which a door capable of being locked has been maintained, with short intervals, ever since, and has been under the control of the proprietor. The important elements in the proof are, first, that the ground was originally cultivated ground, of which Butchart was the proprietor; and, second, that in the exercise of this right of property this door was, if not continuously, at least frequently and systematically, locked by the proprietor,—at night for the most part, and sometimes during the day. That this was the state of possession during the greater part of the prescriptive period admits of little doubt.

The real question on which the case turns is the legal effect of those facts. The Lord Ordinary, and my brothers who have just spoken, regard these acts of the proprietor in the light of an interruption of some supposed right in the public. I cannot so regard them. They were acts of possession by the proprietor, and as long as they continued there was and could be no use of this passage as in the exercise of a public right of way. Thus prescription never began to run, and there was no right in any one which could be interrupted by the proprietor. I have no idea that when a proprietor permits the public to use his ground as a passage during one part of each day, he is bound to explain to the public why he excludes them during the other part of it. It is enough that it suits his views to admit them during the day, and to exclude them during the night. Nor is it difficult to understand the motives of convenience which might lead to that result. Herein I think rests the fallacy of the opposite reasoning. Until possession was wholly relinquished by the proprietor the passage never was possessed by the public in virtue of a public right.

THIS interlocutor was pronounced:—"In conformity with the opinions of a majority of the seven Judges, recall the interlocutor of the Lord Ordinary, and decern in terms of the conclusions of the summons against the defender, Thomas Thornton, solicitor in Dun-

dee, as clerk to and as representing the commissioners of police of the burgh of Dundee: Find the said defender liable in expenses," &c. No. 100.

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LINDSAY, PATERSON, & HALL, W.S.—LEBURN, HENDERSON, & WILSON, S.S.C.—Agents.

JOHN ALLAN AND ANOTHER, Pursuers.—*D.-F. Clark—Brown.* No. 101.
JAMES GILCHRIST, Defender.—*Balfour—Moncreiff.*

Mar. 10, 1875. Allan v. Gilchrist.

Sale—Reparation.—A father and son raised an action of damages for breach of a contract of sale. They averred that the defender had verbally agreed to purchase the stock in trade and good-will of a baking business carried on by the father at a price to be fixed by valuation, and the property of the shop, belonging to the son, at the price of £450. That in consequence of this verbal contract the father had dismissed his apprentices, and made arrangements for retiring from business, and that by the defender refusing to implement the contract the pursuers had suffered loss. *Held* (1) that, in so far as the contract related to the sale of heritage, it could not be proved by parole, even to the effect of sustaining a claim of damages for non-implement; and (2) on a consideration of the record, that there was no relevant averment of a contract for the sale of the goodwill of the business and moveables apart from the heritage.

Observations (*per* Lord Deas) on cases of Walker v. Milne, June 10, 1823, 2 S. 379, N. E. 338; Bell v. Bell, July 9, 1841, 3 D. 1201, 13 Scot. Jur. 628; Heddle v. Baikie, Jan. 14, 1846, 8 D. 376, 18 Scot. Jur. 170.

1ST DIVISION. Lord Young. B.

THIS was an action by John Allan, solicitor in Banff, and his father, Alexander Allan, baker there, against James Gilchrist, baker there. The conclusions were that the defender ought to be ordained, "in implement of a contract entered into between the pursuers and the defender, on or about the 10th day of November 1874, whereby the pursuer, the said John Allan, sold to the defender the heritable subjects in the Seatown of Banff, more particularly referred to and described in the condescendence; and the pursuer, the said Alexander Allan, sold to the defender the good-will, stock in trade, and other effects of the business carried on by him as a baker, confectioner, and grocer in Banff, in a portion of said subjects,—to make payment to the pursuer, the said John Allan, of the sum of £450, being the agreed-on price of the said heritable subjects, ... and to make payment to the pursuer, the said Alexander Allan, of such a sum as shall be fixed by valuators mutually chosen . . . as the price or value of the said good-will, stock in trade, and other effects belonging to the said Alexander Allan; . . . or otherwise, . . . to make payment to the pursuers of the sum of £500, in such proportions as shall be fixed in the course of the process to follow hereon, according to their respective rights and interests in the premises."

The pursuers averred that John Allan was proprietor of a dwelling-house, shop, and bakehouse in Banff, which Alexander Allan occupied, and in which he had carried on the business of a baker for thirty years; and that in October 1874 John Allan, on behalf of himself and his father, advertised the business and premises for sale as follows:—"The stock in trade and good-will of the baking and confectionery business carried on for upwards of thirty years by Mr Alexander Allan, at Nos. 5 and 6 North Castle Street, Banff, will be disposed of by private bargain. The business premises, with or without the dwelling-house, will be let on lease, or the whole premises sold, as offerers prefer. Apply to Mr Allan, or John Allan, solicitor, Banff.—Banff, 19th Oct. 1874." (Cond. 4) "Immediately on the advertisement appearing the defender put himself into communication with both pursuers. In the course of their communings the pursuer, the said John Allan, explained to the defender that he would

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under no circumstances accept him as a tenant, and that he would only transact with him on the footing of his proposing to acquire the property of the subjects and the good-will of the business. This the defender stated to be his sole intention and desire." That, on 10th November 1874, the defender came to John Allan's office. "Some conversation took place between the defender and the said John Allan as to the terms and conditions of sale, and the said John Allan finally agreed to sell, and did sell to the defender the said heritable subjects, including the grates and gas-fittings therein, at £450, being the amount of Mr Booker's valuation. The said John Allan, also on behalf of his father, the said Alexander Allan, and with his authority and instructions, sold to the defender the good-will, stock in trade, and other effects of the business as a baker, confectioner, and grocer, carried on by the said Alexander Allan, including the whole shelving, counters, and fittings in the shop and bakehouse, and business tools, on condition that the price of the said good-will, stock in trade, shelving, counters, fittings, business tools, and other effects, should be fixed by valuation afterwards to be made, and that the entry should be immediate, or as soon as arrangements for the valuation could be made."

It was not stated that any valuation was ever made.

In art. 11 the pursuers stated that they stopped negotiations with other parties, who contemplated purchasing the subjects and the business, and that Alexander Allan had intimated to his customers his retirement from business, and solicited their patronage for the defender, that he had discharged his apprentices, and made other arrangements for giving up business.

On 23d November John Allan received a letter from the defender's solicitor stating that, "with reference to the communings which he has had with you as to taking up your father's business in the Seatown, he has come to the conclusion that it will be his wise course to refrain from taking it up in the meantime."

In art. 16 the pursuer, Alexander Allan, stated that he had suffered serious loss in having to resume business, through loss of customers and otherwise.

The pursuers pleaded;—(1) The defender was bound to implement the contract of sale. (2) He was barred from resiling by *rei interventus*. (3) At least the pursuers were entitled to damages.

The defender denied that the pursuers gave an accurate account of the verbal contract, and further pleaded;—(3) The action cannot be maintained, or at least it cannot be maintained in so far as it relates to the heritable subjects libelled, in respect that no written agreement for the purchase and sale of the said subjects was ever entered into between the pursuers, or either of them, and the defender. (4) In respect that no such written agreement was entered into, the defender was entitled to resile from the verbal arrangement relative to the heritage entered into between him and the pursuer, John Allan, as above set forth.

The Lord Ordinary, on 27th January 1875, allowed the parties a proof of their averments.*

The defender reclaimed, and argued;—Damages could not be sought for breach of a contract of which implement could not be enforced. The pursuers, by withdrawing the conclusions for implement, admitted that they could not enforce implement of the verbal bargain regarding the

* A minute for the pursuers was lodged in the Outer-House, restricting the conclusions to those for damages. It was lodged on 28th January, but both parties stated in the Inner-House that the Lord Ordinary's interlocutor proceeded on the footing that the conclusions had been restricted to damages, and that a minute to that effect was to be put in.

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heritage; and the bargain regarding the good-will of the business, and the fittings, &c., was dependent on and inseparably bound up with that regarding the house and shop.

The pursuers argued;—There were cases, and this was one, in which a party was entitled to damages for the loss caused by breach of a contract, even though implement of the contract might not be enforceable.[1]

At advising on 5th March 1875,—

LORD DEAS.—This action is instituted by John Allan, solicitor, Banff, and Alexander Allan, baker, his father, against James Gilchrist. The summons sets forth that on or about 10th November 1874 John Allan sold to the defender the heritable subjects mentioned in the summons for the price of £450; and farther, that about the same time the father, or the son authorised by him, sold to the defender the good-will, stock in trade, and other effects connected with the business which the father was carrying on as a baker in those heritable subjects, together with the fittings, business tools, &c. The price of the good-will and fittings, &c., was not fixed, but was to be afterwards fixed by valuation. Nothing moveable was to be included in the price of the heritable subjects except the gas-fittings.

On 27th January last the Lord Ordinary pronounced this interlocutor,—"Having heard counsel for the parties, allows them a proof of their respective averments, so far as not admitted." The first question is, whether it is competent to allow a proof *prout de jure* of a sale of an heritable subject. I take it to be quite clear that such a proof is altogether incompetent. To instruct a bargain about heritage there must be a probative writ, or the oath of the party. That has been repeatedly decided. It was so held, for instance, in Walker v. Flint, 20th Feb. 1863, 1 Macph. 417. That was a judgment of the Second Division. It was a case of verbal lease for three years, said to have been followed by *rei interventus*. The previous case of Gowans' Trustees v. Carstairs, 18th July 1862 (24 D. 1382), in this Division, was to the same effect. In both of these cases there were full opinions delivered, and the law was laid down that a verbal bargain regarding heritage can only be proved by oath of party, although, when so proved, there may be proof by parole of *rei interventus*. In the present case there is no offer of a reference to oath; but the Lord Ordinary has allowed a proof at large, which is quite contrary to all the authorities. I therefore think that we cannot adhere to that interlocutor.

It appears, however, that the pursuer has, by a minute, abandoned his conclusions for implement. The minute is said to have been lodged in the Outer-House. It bears to have been lodged the day after the interlocutor under review had been pronounced. That interlocutor makes no reference to any minute or partial abandonment, but the minute being now before us, the question arises, whether, the conclusions for implement having been abandoned, the pursuer's averments may be competently proved by parole, with a view to damages.

I am of opinion that there is no averment in this record relevant to infer a claim of damages.

It seems a tolerably clear proposition that there can, in no proper sense, be a claim for damages for breach of contract unless it be legally proved that there

[1] Walker v. Milne, June 10, 1823, 2 S. 379 (N. E. 338); Bell v. Bell, July 9, 1841, 3 D. 1201, 13 Scot. Jur. 628; Heddle v. Baikie, Jan. 14, 1846, 8 D. 376, 18 Scot. Jur. 170.

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was a contract. If the contract be legally proved the party is entitled to specific implement, and if his opponent has either made a contract which he had not the power to make, or has subsequently deprived himself of the power to implement it, he will be liable in damages for breach of that contract. But a claim of damages where it is not proved that there ever was a contract must rest upon some other ground than breach of contract.

Accordingly it will be found that, in the only two cases which can be represented as countenancing such a claim, viz., Walker v. Milne, and Heddle v. Baikie, possession of the subjects had followed, and what was recognised was really not a claim of damages for breach of contract, but a claim for reimbursement of substantial loss occasioned to the one party by the representations and inducements recklessly and unwarrantably held out to him by the other party.

In the first of these cases, Walker v. Milne, 10th June 1823, 2 S. 338 (2d edit.), the subscribers to Lord Melville's monument had agreed, by certain improbative writings, to erect the monument on Sir Patrick Walker's lands of Coates, then in the course of being feued for streets of houses, which are now there. The subscribers took possession of the site, broke up the ground and performed various operations upon it, whereby Sir Patrick was induced to alter the drains and levels of the streets he was forming, and to change his feuing plans. Thereafter the subscribers changed their minds and erected the monument where it now stands, in St Andrew Square. The Lord Ordinary (Meadowbank), in respect of the improbative nature of the writings, assoilzied the defenders from the conclusion for implement, and also from the alternative conclusion for damages. The Court altered so far as to find "that the pursuer is entitled to indemnification for any actual loss and damage he may have sustained, and for the expenses incurred in consequence of the alteration of the site of the monument," and (as appears from the subsequent reports, 3 S. p. 82 and 333) remitted to the Lord Ordinary to receive a specific condescendence of the actual loss; but the relevancy of the items of that alleged loss does not appear ever to have been settled or the case brought to any judicial conclusion.

The second case mentioned—Heddle v. Baikie, 14th January 1846, 8 D. 376—was still more special in its circumstances. These are very imperfectly stated in the brief report just cited, which is calculated to mislead. A previous branch of the litigation is reported under date 16th January 1841 (3 D. 370), but that also leaves imperfect the history of the disputes and litigation, which lasted for upwards of fourteen years, the particulars of which I have fully ascertained from the session papers, and, as the point of law is important, I shall summarise them here.

Heddle's predecessors had been the tenants of the farm of Rinnibister under a succession of leases from the predecessors of Baikie for upwards of half a century prior to Martinmas 1825, when, the farm being advertised to be let, Heddle, whose father (then an old man) was the outgoing tenant, applied for a nineteen years' lease, which he alleged was agreed to, and accordingly he,—that is, Heddle the younger,—was allowed to assume and keep possession for six or seven years, during which he expended money in repairing and building houses on the farm, taking in waste land, and otherwise improving the subjects. At the lapse of that time decree of removing was obtained against him before the Sheriff, in consequence of his having admitted, on a reference to his oath, that he had intimated his intention to leave the farm because a written lease had been refused to him. After this decree had been

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extracted and a charge given Heddle presented a suspension and interdict, and raised a reduction of the decree, coupled with a declarator of his right to a lease and to reimbursement and damages. A record was closed in the suspension and interdict on 13th January 1835, and in the reduction on 15th February 1840, and on the 25th of this last month the two actions were conjoined. In the meantime, under warrants of the Sheriff, dated 12th November 1832 and 28th February 1833, Heddle and his family had been ejected and the farm let to and taken possession of by a new tenant. In January 1840, Heddle having by this time been out of possession for seven years, lodged a minute in the reduction and declarator, abandoned the conclusion for specific implement (which had become impracticable), but reserved the other conclusions of the summons and his right to bring an action for damages. On 16th January 1841 the Court (altering an interlocutor of Lord Murray, Ordinary) found it proved, by Heddle's oath under the reference in the Sheriff-court, that he had given the alleged intimation of his intention to leave the farm in consequence of being refused a written lease, and, on this ground, repelled the reasons of suspension (except as to the inferior Court expenses), and in the reduction and declarator they sustained the defences and assoilzied Baikie with modified expenses, which were afterwards taxed at £180, under deduction of £4, 16s. 11d. of Sheriff-court expenses. The House of Lords however, upon an appeal for Heddle *in forma pauperis*, reversed (March 9, 1843, 15 Scot. Jur. 559) the interlocutor which had thus been pronounced in the conjoined actions, ordered that Heddle should have his expenses in these actions, and remitted to this Court to proceed accordingly. This judgment was applied on 23d May 1843, and decree for expenses in the conjoined actions was thereafter given in Heddle's favour.

It was after all this that Heddle raised the new action in which the Court, on 14th January 1846, repelled the objections to the two first issues printed in the report of that date, including the objection of *res judicata*, which was the main one urged and discussed. But the position of Heddle when he obtained these issues was obviously very peculiar. After having been seven or eight years in possession as tenant he had been ejected under a decree and warrants which, at the lapse of ten years after the ejection, were set aside, as wrongous and illegal. According to the judgment of the House of Lords, Heddle ought never to have been removed from the farm. If he had been still in possession he might, at the worst, have referred the alleged agreement for a lease to Baikie's oath, and, if the oath was affirmative, he might then have proved the *rei interventus* by parole. Baikie's illegal and oppressive proceedings had, long before this time rendered any attempt of this kind useless, and it would have been most inequitable to have held that Heddle was thereby deprived of all redress. But it is material to observe that even the first issue granted in these circumstances was based on Heddle's "having entered as tenant into the lands and farm" at Martinmas 1825, and that the damage alleged to have resulted from the wrongful failure to grant a lease in his favour was not damage for breach of contract, but damage sustained after possession had been ceded to him, and while the illegal and oppressive proceedings just detailed were going on.

Then, as to the second issue, it affords a still better example of a relevant claim of damages, not for breach of an unproved contract, but for actual loss sustained in consequence of the unjustifiable representations and inducements made and held out by the one party to the other, contrary to all good faith.

The issue in Heddle's case was in these terms:— "Whether the said de-

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fenders induced the pursuer to enter into the possession and management of the said farm and to execute various meliorations and repairs, and to expend various sums thereon in improving and labouring the same, on the understanding that he was to receive from the defender a lease of the same for the period of nineteen years; and whether the defender is indebted and resting owing to the pursuer in the sum of £380, as per schedule annexed, or any part thereof, as the amount of said meliorations and expenditure."

That is obviously very different from an issue, which I am humbly of opinion could not be granted, whether the defender had verbally agreed to grant a lease (or, as the case might be, to grant a disposition) in favour of the pursuer, and, in breach of that agreement, had refused to grant such lease (or disposition) to the loss, injury, and damage of the pursuer.

There can, I think, in no correct sense, be an action of damages for breach of an agreement or contract where there is no legal evidence of such agreement or contract, and it is in order to make it clear that neither of the two cases I have cited are authorities for a contrary doctrine that I have gone into them, and particularly into the case of Heddle v. Baikie, so fully as I have done.

Even when the action is based upon the subsequent conduct of the one party in misleading the other to expend his money on illusory grounds, we have no instance of the claim being entertained for general damage, as distinguished from actual and specific loss, which was what the claim embodied in the first issue in Heddle v. Baikie involved.

The case of Bell v. Bell, 9th July 1841, 3 D. 1201, rested on a different and clearer principle than either of the two cases just mentioned, viz., that no man is entitled, *mala fide*, to enrich himself at the expense of another. The pursuer in that case had been induced, by the defender's promise to convey to him a certain piece of ground, to build a house on the ground at the cost of £270. The defender thereafter gratuitously conveyed the ground, with the house upon it, to a member of his own family, who raised an action of removing and ejection against the pursuer. The pursuer raised an action, not for damages for breach of bargain, but for payment of the £270, and the action was held relevant, on the footing that the defender had *mala fide* or fraudulently induced the pursuer to build. Here, again, the pursuer had been put in possession of the subject, and the sum claimed was not damages generally, but the specific sum expended. Any fraudulent inducement to expend the money would, equally with the promise of a conveyance, have supported the claim. In the case now before us, it is most important to observe that no possession is alleged. No specific sums of expenditure or even of loss are condescended on by the pursuer. He says there was a loan of £250 heritably secured over the property, and in order to the loan being continued he, being himself a law-agent, had prepared a discharge of the bond with a view to a new bond being granted by the defender. But he does not specify the expense of that discharge, nor explain why a new bond should have been thought necessary in place of allowing the existing bond to continue to affect the subjects. Neither does he explain why he did not first prepare the disposition (which he admits he was to do without charging for it) and get it executed, instead of prematurely preparing a discharge of the bond, which never became available. This claim can in no view give relevancy to the only conclusion which now remains in the action, and everything else set forth in support of that conclusion is still more obviously vague, general, and irrelevant.

But while I am of the opinion I have expressed as regards the heritable

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subjects, and the pecuniary conclusions connected with these subjects, I have to observe that the alleged bargain as to the moveable subjects, if it can be separately dealt with, may, of course, be proved by parole testimony, and it may be right to allow the pursuer to state in a minute, if so advised, what course he proposes to follow as to that part of his case.

LORD ARDMILLAN.—This action is laid on the footing that one contract was made for the sale of heritable subjects, and another contract for sale of good-will of business, and stock in trade. The price of the heritable subjects is said to be £450, and that sum is said to be due, or otherwise damages in place of implement.

That is the case on the summons and on the record. I do not think there are averments relevant and sufficient to support a conclusion for damages to the pursuers on any other footing. The record is not here framed to meet a case like the case of Walker v. Milne, 10th June 1823, which has been founded on. That decision is not in point. The circumstances in that case of Walker were peculiar, and were stated on record, and important admissions were there made. It appears to me that the case of Walker was very special, and that nothing but the very special and exceptional circumstances of the case can support the judgment. It is on its facts so peculiar that it is not a safe authority where the circumstances are different, and I think they are different in the case before us. Neither is the case of Bell, nor the case of Heddle v. Baikie, in point. On the pursuer's own averments the case before us and the cases referred to are quite different. The law applicable to the case as here stated is clear. A contract for sale of heritable property cannot be proved by parole. No other proof has been offered, and even if a verbal contract were proved, nothing really of the nature of *rei interventus* has been averred. A proof at large of the allegation of a contract for sale of heritage cannot, in my opinion, be allowed. That is well settled. I need only mention the case of Gowans v. Carstairs, 18th July 1862; but there are many authorities to the same effect. Then there being no proof of contract, written or verbal, there is no room for applying the principle that resiling is barred *rei interventu*. I concur in the views on that point expressed by all the Judges in this Division who decided the case of Gowans.

I think the interlocutor of the Lord Ordinary allowing proof should be recalled. No reference to oath has been proposed, and no *rei interventus* has been relevantly averred, and no foundation is laid for a claim of damages, unless on the assumption that a contract has been proved, and that implement is due.

In so far as regards the alleged sale of heritable property, or as regards the demand for damages in relation to that contract, I concur in the opinion just delivered, and in recalling the interlocutor of the Lord Ordinary.

In regard to an alleged separate or separable contract for sale of good-will, and of stock in trade, it is possible that the pursuer, Alexander Allan, may be in a different position. It occurs to me that if this pursuer, Alexander Allan, has, on this subject, a separate case which he can establish, he will succeed better in a separate action. But if he prefers to lodge a minute in this action to meet an objection to relevancy, and to undertake a separate proof apart from the alleged sale of heritage, I am disposed to allow him an opportunity of doing so.

LORD MURE concurred.

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The LORD PRESIDENT was absent, but Lord Deas stated that he was understood to concur in the judgment.

THIS interlocutor was pronounced on 5th March 1875:—"Recall the interlocutor of Lord Young reclaimed against: Find that so far as regards the heritable subjects libelled parole proof of the alleged verbal contract is incompetent: Find that no reference to oath is offered by the pursuer, John Allan, in regard to that alleged contract: Find that no relevant claim of damages is stated in the record in respect of or arising out of a breach of that alleged contract: Assoilzie the defender from the conclusions of the action for implement and damages in so far as relates to that alleged contract, and decern; but before answer as to the claim made by or for behoof of the pursuer, Alexander Allan, for implement of the alleged verbal bargain as to the good-will of the business and other articles libelled, appoint a minute to be lodged for the said Alexander Allan stating what course is now intended to be pursued with reference to that claim, and for that purpose continue the cause in the roll till Tuesday next: Find the pursuer, John Allan, liable to the defender in the expense hitherto incurred," &c.

The pursuer, Alexander Allan, accordingly lodged a minute stating that he insisted in his claim for damages in so far as regarded the good-will of the business, shop-fittings, &c.

At advising,—

LORD PRESIDENT.—In disposing of this case I think we must keep in view the interlocutor of 5th March. A minute has been accordingly put in, in which the pursuer, Alexander Allan, states that he insists in his claim for damages, in so far as regards the good-will of the business, shop-fittings, &c. By the minute lodged in the Outer-House the claim of the pursuers was restricted to a claim of damages. Therefore, the conclusion now insisted in is the conclusion for damages, and, as I understand it, damages incurred by the breach of that part of the alleged contract between the parties which relates to moveable subjects. Now, there cannot be a claim of damages for non-implement unless there could have been a claim for implement. Could there, then, have been a claim for implement of this part of the contract apart from the other part which related to the heritable subjects in which John Allan was interested? That may be tested in this way. Suppose that the Allans had wanted to get rid of their contract as regards the heritage, but asked implement of it as regards the moveables, they would thus be entitled to demand that the defender should purchase and pay for the good-will and fittings of a business carried on in premises of which he was not to get possession. That would be a strange demand, particularly looking to the position taken up by the pursuers on record. They say that as soon as the subjects were advertised the defender put himself into communication with them, and John Allan explained to him "that he would under no circumstances accept him as a tenant, and that he would only transact with him on the footing of his proposing to acquire the property of the subjects and the good-will of the business." Thus the two things were inseparably tied together according to the allegation of the pursuers themselves. Throughout the whole communings of the parties, as set forth on the record, the two things are treated as the subject of one indivisible contract. I have, therefore, no doubt that this claim is in

tirely irrelevant, and that we could not enforce this part of the claim separately from and independently of the other. No. 101.

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LORD DEAS and LORD ARDMILLAN concurred.

LORD MURE.—I agree with your Lordships that this bargain was indivisible, and that as implement of it could not have been enforced as regards the heritage, it could not have been enforced as regards any part of the contract, and I also agreed in holding, when the case was last before us, that no relevant claim of damage for non-implement had been stated on the part of the pursuer, John Allan, with reference to the heritable property. But the question which we have now to decide is, whether a relevant claim of loss and damage has been stated by the pursuer, Alexander Allan, for breach of contract in regard to the good-will of the business, stock in trade, and other things condescended on, and on this I have considerable difficulty in concurring, having regard to the rule laid down in the case of Walker v. Milne, and in the subsequent case of Bell, for, as I read those decisions, it was there settled that although a party may not be able to enforce implement of a bargain affecting heritage he is entitled to indemnification for any actual loss and damage he may have sustained, and for any expense he may have been put to, through failure to implement. And so standing the law, I am not, as at present advised, prepared to hold that there is nothing stated by Alexander Allan on this record, and particularly in the 11th and 16th articles of the condescendence (*vide supra*, p. 588), which amounts to a relevant averment of actual loss and expense arising out of, or occasioned by, the breach of that part of the contract which did not relate to heritage. If these averments had been stated specifically in a separate action it rather appears to me that the case would have fallen within the principles of Walker v. Milne, and I have difficulty, looking to the authority of that case, and of the subsequent decisions, in saying that these averments, even as put in the present action, are not relevant to go to proof.

THE COURT pronounced this interlocutor:—"Find the claim made by the said Alexander Allan, as stated in the said minute, is not founded on any relevant allegation of damages for breach of contract: Therefore assoilzie the defender from the whole conclusions of the summons, so far as not already disposed of, and decern: Find the pursuer, Alexander Allan, liable to the defender in expenses," &c.

GEORGE ANDREW, S.S.C.—ALEX. MORISON, S.S.C.—Agents.

WILLIAM FRASER AND OTHERS, Pursuers.—*D.-F. Clark—Asher.*
ROBERT CARRUTHERS AND ANOTHER, Defenders.—*Kinnear.* No. 102.

Mar. 11, 1875.
Fraser v. Carruthers.

Right in Security—Jus cedendarum actionum—Assignation.—A creditor in a debt, heritably secured, was also assignee of a liferenter of the burdened subject. The fiar having tendered payment of the debt and demanded an assignation, *held* (in deciding a question of expenses) that the creditor was entitled to qualify the assignation with the condition that if the interest were regularly paid the assignation should not be used in prejudice of the liferent right.

1ST DIVISION.
Ld. Mackenzie.

THE following narrative is taken from the Lord Ordinary's note:—"In 1844 William Bennet disponed certain subjects in Inverness to Mrs Fraser in liferent, and to Daniel Fraser, and the pursuers William Fraser

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and Margaret Fraser, her three children, share and share alike, in fee, under the real and preferable reserved burden of £700, part of the price. Mrs Fraser also granted a personal bond to Mr Bennet for the said sum of £700. Mrs Fraser for her right of liferent, and her three children as fiars in equal *pro indiviso* shares, were infeft in 1851 in the said subjects, but under the said reserved real burden. Mrs Fraser was sequestrated in 1853, and in 1855 the trustee in her sequestration sold and disponed for £480 her liferent right and interest in the subjects, but under the said reserved burden of £700, to Andrew Smith, who was infeft in 1855. On 20th July 1858, Mr Bennet, as in right of the said reserved real burden, obtained decree of adjudication against Mrs Fraser and her three children, whereby the subjects were adjudged from them to him for payment and satisfaction of the said sum of £700, with interest from Whitsunday 1858, and a fifth part more of said principal sum as penalty, amounting, the said sums as accumulated at the date of the decree, to £840, and of the annual rent of said accumulated sum during the not redemption. Mr Smith, who was in right of the liferent, thereafter acquired from Mr Bennet right to the reserved burden and to the decree of adjudication, and in 1869 Messrs Carruthers, the defenders, acquired from him under separate dispositions and assignations Mrs Fraser's liferent right and interest in the subjects, but under the real burden and the said reserved burden and accumulated sum in the adjudication, with the decree itself, and whole grounds and warrants thereof. The interest on the reserved burden has been paid, but the principal sum and penalty as accumulated in the decree of adjudication have not been paid.

"The defenders having threatened to obtain decree of declarator of expiry of the legal the pursuers tendered the defenders the sum of £700, along with the expenses incurred under the penalty and the interest thereof, and required, on payment of these sums, a disposition and assignation in their favour of the fee of the subjects and of the decree of adjudication, with its whole grounds and warrants. The defenders having refused to grant such a conveyance, on the ground that it would prejudicially affect their right to Mrs Fraser's liferent of the subjects, the pursuers consigned in bank, in name of their and of the defenders' agents, the sum of £700 on 5th March 1873, and offered to pay or consign the amount of expenses falling under the penalty, with interest thereon immediately upon the defenders' rendering an account of these expenses.

"In these circumstances the pursuers have raised the present action, in which they conclude for decree of declarator that the defenders are bound to grant in their favour a disposition and assignation of the decree of adjudication, with its grounds and warrants, and of the heritable subjects described therein (reserving Mrs Fraser's liferent interest) heritably, but under reversion according to law, and of the sums of money, principal, interest, and penalty, contained in the reserved burden; and also for decree ordaining the defenders, as holders of Mrs Fraser's liferent interest, to pay them the interest on the reserved burden of £700 from 5th March 1873 (being the date when they consigned that amount in bank), and during the subsistence of Mrs Fraser's liferent, together with the interest on the sum to which the penalty may be restricted in this action, from the date of payment or consignation thereof."

The defenders stated on record;—"The defenders have, since defences were lodged on 9th December 1873, been willing and desirous to assign to the pursuers the said real burden and decree of adjudication, provided the assignees would allow a clause to be inserted in the assignation to the effect that so long as the interest on the real burden was regularly paid the parties in right of said burden, decree, and personal bond.

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would not do anything or adopt any proceedings which might prejudicially affect or interfere with the liferent right and interest presently vested in the defenders. But the pursuers declined to allow such clause to be inserted."

The Lord Ordinary, on 26th May 1874, assoilzied the defenders.*

They reclaimed. After some correspondence, it was agreed, before the case came before the Inner-House, that an assignation should be granted, and a clause should be inserted to the effect "that so long as the interest on the real burden was regularly paid the parties in right of said burden, decree, and personal bond, would not use their said right, or the said assignation, to the effect of doing or adopting any proceedings which might prejudicially affect or interfere with the liferent right and interest presently vested in the defenders."

The question of expenses was argued in the Inner-House.

At advising,—

LORD PRESIDENT.—This is an important question, though it resolves itself into one of expenses. The defenders have acquired right to the liferent of these subjects, and also to a real burden over them for £700, and a decree of adjudication for payment of that sum and interest. The pursuers are in right of the fee. They were desirous of paying off the debt, and tendered payment, but in return they asked that instead of granting a discharge the defenders should assign to them the decree of adjudication. Now, I think they were entitled to ask for an assignation, but subject to the condition that the rights and interests of the other party shall not be prejudiced by its being granted. The right to an assignation is a right in equity, and he that asks equity must give equity. But the assignation would be inequitable if it had the effect of defeating or prejudicing the rights of one of the parties. Accordingly, the question between the parties is, In what terms is the assignation to be granted? or rather, as it has come to be, How is it to be qualified so as to protect the just interests of the defenders?

On the 26th December 1873 the defenders' agents wrote proposing that the

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* "NOTE— . . . . . The Lord Ordinary is of opinion that the pursuers are not entitled to decree as concluded for by them, because the assignation claimed by them would injuriously affect the defenders' right to Mrs Fraser's liferent of the subjects. The legal obligation of the defenders, as creditors in right of the reserved burden and under the decree of adjudication, is, on receiving payment of their debt, to grant a discharge. This they are willing to do. The right of the pursuers as debtors to demand an assignation is a mere claim in equity which the defenders are not bound to implement, if they can shew that such an assignation would be prejudicial to them, and that it is contrary to equity to compel them to grant it. Now, if the pursuers were to obtain such an assignation they might use the right thereby acquired against the defenders' right to the liferent, and not only give them annoyance and trouble, but also expose them to loss. The defenders judicially offer (defences, stat. 22) to assign the real burden and decree of adjudication, if the pursuers will agree to insert in the assignation a clause providing that, so long as the interest on the real burden is regularly paid, they will not adopt proceedings which might prejudicially affect or interfere with the liferent right. But the pursuers refuse to accept this very reasonable offer, and insist upon an unconditional assignation as their legal right. As the Lord Ordinary is of opinion that the pursuers have no such legal right, and are not in the circumstances entitled in equity to such an assignation, he has assoilzied the defenders from the conclusions of the summons. (Erskine, 3, 5, 11; 2, 12, 66; Mitchell v. M'Kinlay, 4 D. 634)."

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assignation should be qualified by "a clause freeing and relieving Messrs Carruthers of all risk and consequences of having granted it, and stipulating that the party in right of the real burden and adjudication shall not do anything or adopt any proceedings which can prejudicially affect or interfere with the liferent right and interest vested in Messrs Carruthers, so long as it subsists."

Now, the defenders were not entitled to ask for that qualification. It went a great deal too far. It would have prevented the assignee not merely from using the assignation, but any right or title vested in his person so as to prejudice the cedent. But all the cedent is entitled to is that he shall not be prejudiced by granting the assignation. The pursuers' agents do not appear at first to have understood the clause in that sense, but they ask to have it explained before finally concluding the transaction. The matter was made plain by the letter of the defenders' agents of 21st January, in which they say,—"It is easy to see your clients might attempt to raise actions of maills and duties, and otherwise interfere with and give our clients trouble in their possession and management of the property. Besides, though we are speaking from memory, we think you will find somewhere in course of our long correspondence you indicated that questions of relief might be raised as between fiar and liferenter. Against all these things our clients must be protected by the clause in question, otherwise they will prefer to allow matters to remain as they are."

Now, although the assignation might have enabled the pursuers to raise actions of maills and duties against the defenders, questions of relief between fiar and liferenter had nothing to do with the pursuers' character as assignees, but the possibility of their occurring arose from the fact that the pursuers possessed the character of fiars. I therefore apprehend that that is a risk against which the defenders were not entitled to be protected. Then, on 31st January, the pursuers' agents made a proposition which went beyond what they were bound to do. They agreed to bind "the holders of the assignation (1) not to raise an action of maills and duties so long as the interest on the reserved burden is regularly paid, and (2) not to raise the question of relief against Mrs Fraser (or the liferented rents)."

If that proposition had been accepted, I think the defenders would have got more than they were entitled to. But it was not accepted. It is plain from the correspondence that down to this time, January 1874, the defenders were taking up a position which they were not entitled to assume. Matters stood over for some time. Then, at the beginning of the winter session, when the case was about to come here on a reclaiming note, another proposition was made by the pursuers on 14th October 1874, "that the pursuers shall accept the assignation tendered, on the clause insisted on by the defenders being altered so as to limit the obligation on the assignee to not using the assignation or rights thereby assigned to the prejudice of the liferent right."

I think that was just the clause which the defenders were entitled to, and so they came to think themselves on reflection, for they then agreed to it on 15th October. But down to this date they had asked for a clause different in meaning and effect, both in the correspondence and on record. The question occurs, what ought to have been the end of the case at that date. The dispute was settled, and only a question of expenses remained. As at that date it appears to me both parties were to blame. The pursuers had come into Court demanding an absolute and unqualified assignation. On the other hand, the defenders, besides maintaining other pleas, said they were entitled to a clause to which

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they were not entitled. In these circumstances, as at that date, I think neither party were entitled to expenses. But further expenses were incurred. Why was the matter not settled then? On 14th, and again on 26th October, the pursuers proposed that each party should pay their own expenses. Being of opinion that that proposal was right, I think the expense which was incurred by further and useless discussion must be borne by the party who caused it, and therefore that the pursuers are entitled to their expenses from 20th October, that is to say, the expenses in the Inner-House.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THIS interlocutor was pronounced:—"Recall the interlocutor of Lord Mackenzie, Ordinary, of date May 26, 1874, reclaimed against: Dismiss the action as now unnecessary, and decern: Find the pursuers entitled to the expenses incurred by them since 26th October 1874, and remit to the Auditor to tax the account of the said expenses, and report: *Quoad ultra* find no expenses due to or by either party."

MACARA & CLARK, W.S.—ADAM & SANG, W.S.—Agents.

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Mar. 13, 1875.
Cofton v. Cofton.

1ST DIVISION.
Ld. Craighill.

MRS JANET RITCHIE OR COFTON, Pursuer.—*Rhind.*
JOSEPH COFTON, Defender.

Process—Lost Interlocutor Sheet—A.S. 28th December 1838, *sec.* 11—*Statute* 31 *and* 32 *Vict. c.* 100, *sec.* 15.—In an undefended action of divorce, after decree had been pronounced, the interlocutor sheet, kept in terms of A.S. 24th December 1838, sec. 11, was improperly lent out by the clerk, and was lost. *Held*, on report of Lord Craighill, that the lost interlocutor sheet was not an "original writ" which could be replaced under the provisions of the Court of Session Act, 1868, sec. 15.*

WILLIAM OFFICER, S.S.C.—Agent.

No. 104.

Mar. 13, 1875.
Young v. Robertsons.

1ST DIVISION.
Ld. Craighill.
M.

CHARLES DENOON YOUNG, Complainer.—*J. P. B. Robertson.*
D. and W. ROBERTSON, Respondents.—*D.-F. Clark—Balfour.*

Suspension and Liberation—Bankrupt—Caution for Expenses.—A bankrupt is entitled to bring and prosecute a suspension of diligence which has attached or may attach his person without finding caution for expenses, although it may raise large and intricate questions of accounting between him and the incarcerating creditors.

THIS note of suspension and liberation was brought at the instance of C. D. Young, ironfounder, Perth, a sequestrated bankrupt, against D. and W. Robertson, iron merchants, Dundee.

The complainer set forth that on 24th June 1874 he had been charged on a bill for £692, 16s. 3d. drawn by the respondents upon and accepted by his firm of C. D. Young and Company on 31st January 1874; that

* 31 and 32 Vict. c. 100 (Court of Session Act, 1868, sec. 15).—"Where a summons, petition, or other original writ or pleading is lost or destroyed, a copy thereof, proved in the cause to the satisfaction of the Court before whom the cause is depending at the time, and authenticated in such manner as he or they shall require, may be substituted, and shall be held equivalent to the original for the purposes of the action."

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subsequent to the date of the said acceptance the respondents, in security of the sum contained in the bill, were put in possession of goods, the nature and amount of which were specified in detail, and which largely exceeded in value the amount of the said acceptance; that these goods had been realised and the proceeds received by the respondents; that, further, by memorandum of agreement, entered into in March 1874 between C. D. Young and Company on the one hand, and the respondents and certain other firms on the other, it was agreed that large remittances due to C. D. Young and Company should be received by the respondents, and that the respondents should discharge C. D. Young and Company of all their claims; that such remittances had accordingly been received by the respondents, but they had not yet executed a discharge in favour of C. D. Young and Company; that there was not at the date of the charge any sum due by the complainer under the bill; and that notwithstanding these facts he was, on 1st July 1874, imprisoned at the instance of the respondents.

The complainer pleaded;—(1) The complainer is entitled to immediate liberation, in respect his detention in prison is illegal and wrongful. (2) No debt having been due at the date of the charge complained of, the said charge is wrongous and illegal, and ought to be suspended. (3) In virtue of the agreement libelled, the respondents were not entitled to charge the complainer as aforesaid.

The note was passed on 16th July 1874, and a record was made up in the Court of Session, and closed on 3d November 1874.

On 16th December 1874 the Lord Ordinary allowed both parties a proof of their respective averments, and to each a conjunct probation, and fixed the diet of proof for 4th February 1875.

On 6th January 1875 a motion was made by the respondents for an order on the complainer to find caution for expenses before further procedure in the cause. The Lord Ordinary refused the motion, and his interlocutor was acquiesced in.

On 19th January 1875 the diet of proof was postponed from 4th February to 11th March 1875.

On 3d March 1875 the respondents renewed their motion for an order on the complainer to find caution before further procedure. This motion the Lord Ordinary again refused.

The respondents reclaimed on leave obtained.

Argued for them;—This was not the ordinary case of a bankrupt suspending to protect his person from diligence. It was an attempt by a bankrupt to raise, under this form, and without finding caution, a large and intricate question of accounting between him and one of his creditors. The cases which had hitherto occurred did not cover circumstances such as the present.[1]

Argued for the complainer;—The mere fact that a question of accounting was raised between him and the incarcerating creditors did not prevent the action being one purely to protect his person from diligence. And a debtor was entitled to prosecute such action without finding caution for expenses.[2]

Lord President.—There can be no doubt of the general rule that a sequestrated bankrupt cannot sue without finding caution for expenses or sisting his trustee. But this general rule is subject to exceptions, and one recognised and

[1] M'Alister v. Swinburne, Nov. 7, 1873, *ante*, vol. i. p. 166.
[2] Bell's Com., M'Laren's ed. ii. 324.

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established exception is the case where a bankrupt seeks to suspend diligence which has attached, or may attach, his person (see Bell's Com. M'Laren's ed. ii. 324). He is allowed then to litigate without finding caution for expenses.

Now, it seems to me that the complainer here falls entirely within that exception. His object is to free his person from incarceration, which has already taken place. No doubt, in order to establish the ground on which he seeks suspension and liberation it may be necessary to go into the merits of the respondents' claim, and the parties may become involved in a somewhat complicated accounting. But that cannot interfere with the right of the bankrupt to defend himself against incarceration on all competent grounds, without being called on to find caution for expenses.

I say nothing about the time and stage of the case at which the respondents' motion is made, both of which are most unfavourable to its success. For, apart from that matter altogether, I think the motion should be refused.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT adhered.

LINDSAY, PATERSON, & HALL, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

No. 105.
Mar. 17, 1875.
Smith Brothers and Co. v. Scott.

SMITH BROTHERS AND COMPANY, Pursuers.—*Balfour—Brand.*
THOMAS SCOTT, Defender.—*J. Guthrie Smith—R. V. Campbell.*

Contract—Timeous Rejection.—A firm of engineers contracted to make and deliver a machine consisting mainly of two heavy pieces of cast iron, "the whole to be of the best description, and warranted." The two parts of the machine were transmitted to a railway station—the place of delivery—on 7th February. On 17th February the purchaser, after removing one of the pieces, discovered serious defects in it, and at once intimated rejection to the sellers. On 28th February an agreement was entered into between the purchaser and the sellers that the purchaser should then take delivery of the machine and pay the price, the sellers undertaking to pay half the expense of replacing the defective portion of the machine if it should break within twelve months. Five days afterwards the purchaser removed from the railway station the remaining portion of the machine, and on the same day intimated that he had discovered defects in this part also. *Held* (*rev.* judgment of Lord Curriehill, *diss.* Lord Gifford) that the purchaser was precluded by the agreement from rejecting the machine for defects which he might have discovered by examination before the date of the agreement.

2D DIVISION. Ld. Curriehill. I.

THOMAS SCOTT, iron merchant, Edinburgh, having received an order from James Tod and Son, engineers and machine makers, Leith Walk, Edinburgh, for a 1¼th inch punching and shearing machine, advertised in November 1873 for a machine of that description. On 24th November 1873 Messrs Smith Brothers and Company, engineers and boilermakers, Glasgow, wrote to Scott offering to furnish and deliver at the railway station, Glasgow, one of their "improved punching and shearing machines," with engine and other appurtenances, for the sum of £418. Scott went to Glasgow and saw one of Smith Brothers' machines at work, and on 3d December wrote accepting the above offer, adding in his letter, "the whole to be of the best description, and warranted." * The machine

* The offer and acceptance are given in full in the Lord Ordinary's note, *infra*, p. 604.

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was then proceeded with, and on 22d January 1874 Scott, along with Mr Blackie, one of the partners of Tod and Son's firm, went to Glasgow and inspected the machine, which was then nearly completed. On 7th February the machine, which consisted of two main portions, viz., the punching cheek and the shearing cheek, and was of great weight, was delivered at the Caledonian Railway Station at Glasgow addressed to Tod and Son, Leith Walk, the persons for whom the machine was wanted, and way-bills were forwarded to Scott.

On 17th February Tod and Son directed the railway company to send the punching cheek to their works, and on its arrival there it was inspected by their manager, who discovered that the cross centre-web of the hollow interior of this part of the machine was cracked in several places. He, the same day, wrote to Scott, stating these defects, and asking him to attend to the matter at once. This letter Scott forwarded to Smith Brothers, who sent through one of their partners to inspect the machine. Mr Smith, after seeing the machine, maintained that the cracks made no difference in the strength of the machine, but failed to convince Tod and Son of this. Negotiations were then entered into as to how the matter could be arranged, in the course of which (on 23d February) Smith Brothers offered to take back the machine. Scott also advertised the machine as for sale. Finally, on 26th February, Scott wrote to Smith Brothers stating that he had arranged with Tod and Son that they should keep the machine on the understanding that in the event of the machine failing at the faulty place within twelve months, he should pay one-half of the expense of a new headstock, and they the other half. To this Smith Brothers, on 27th February, replied,—"To avoid disputes we will consent to this arrangement, viz., that you take delivery of the machine now, and pay the price. Should the headstock break in consequence of the cracks now visible in the centre web within twelve months, we will put in a new headstock, you paying one-half the expense thereof, and we paying the other. Please let us have your answer by telegraph.—Yours respectfully." Scott telegraphed on 28th February,—"Agreed. Please send me invoice by first post." The invoice for the whole machine was sent next day.

On 5th March Tod and Son got the shearing cheek from the station, and while unloading it discovered that it also was cracked in two places, one crack being in a portion of the interior called the "box," and the other at a part called the "bracket." They at once wrote to Scott as follows:—"Dear Sir,—Since the adjustment with you as to broken cheek (punching) of machine, we have got in the shearing cheek, and were begun to take it off when we discovered that it also was and is sprung inside in two places. Please see this at once, as we cannot put it up, and oblige." Scott telegraphed to Smith Brothers, and Mr Smith again came to Edinburgh and inspected the machine. He denied the existence of these cracks at all, and maintained that what were called cracks were merely slight ruts in the skin of the casting. Smith Brothers wrote on 6th March to Scott saying that the faults complained of were trifling, and did not affect the strength of the machine. To this letter they received no answer. Tod and Son made some experiments with naphtha to ascertain whether these really were cracks or not, but nothing further passed till 4th April, when Smith Brothers wrote Scott for payment of the price of the machine. Scott wrote Tod and Son for payment, and when they demurred, wrote again as follows:—"Dear Sirs,—I am in receipt of yours of yesterday, and in reply beg to remind you that on the 26th February I offered to relieve you entirely of the punching machine, when you resolved to retain it under the condition embraced in the latter

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clause of your letter of the same date, which I am prepared to carry out. Therefore you can have no reasonable excuse for withholding the bills, but if you still wish to get rid of the machine, I will do my best to get a purchaser."

On 13th April Scott wrote Smith Brothers saying that the machine was useless, and that they must take it back. This Smith Brothers refused to do, and relied upon the arrangement of 27th and 28th February. Scott then referred them to his law-agents.

On 20th May 1874 Smith Brothers raised an action against Scott for payment of the price of the machine. Scott defended the action. On 15th July 1874 Scott moved the Lord Ordinary to remit to a man of skill to report on the alleged defects in the machine, but this was resisted by the pursuers. The Lord Ordinary (Gifford), on the ground that such a report would not exhaust the case, refused the motion, but noted the fact of its having been made in a note to his interlocutor allowing a proof. In the course of the proof, in addition to the facts given above, it appeared, from the evidence of numerous skilled witnesses, that cracks did exist in both portions of the machine, which were of a serious nature. There was some evidence to shew that the shearing cheek was inspected by Mr Wight, Tod and Son's manager, while it was lying at the railway station, although Wight himself denied this.

The following were the pleas for the pursuers;—(1) The pursuers having sold, and the defender having bought and taken delivery of the said punching machine and cranes at the price of £418, and the defender having refused to make payment thereof in terms of the contract, the pursuers are entitled to decree as concluded for. (2) Even although the centre-web was defective, the objection on that ground was obviated by the arrangement of 27th and 28th February 1874, and the machine being otherwise sound and sufficient, the defender is bound to implement the said arrangement, and to pay the price. (3) The foresaid contract of sale and purchase having been duly completed by the pursuers, and delivery taken, the defender is liable in the price, being the sum sued for, with expenses.

Pleaded for the defender, *inter alia*;—The alleged arrangement of 27th and 28th February 1874 having reference solely to the only defects then known to the defender, and admitted by the pursuers, and the machine being otherwise unsound and insufficient, the defender is not barred by the said arrangement from rejecting the whole machine.

On 28th December 1874 the Lord Ordinary (Curriehill) pronounced this interlocutor:—"Finds that the pursuers agreed to furnish and deliver to the defender at Edinburgh on or about the 16th January 1874, and the defender agreed to purchase one of the pursuers' improved punching and shearing machines, suitable for punching and shearing 1¼ inch thick plates for the sum of £330, and fitted with angle-iron cutter for the sum of £70 additional, the whole to be of the best description, and warranted: Finds that the pursuers, on or about the 7th February 1874, forwarded to the defender a punching and shearing machine, with angle-iron cutter, but that the same was not of the best description, and was defective and cracked in material parts: Finds that the defender was entitled to reject, and did timeously reject, the said machine: Therefore assoilzies the defender, and decerns: Finds the defender entitled to expenses," &c.*

* "NOTE.—In this action Messrs Smith Brothers and Company, engineers and boilermakers in Glasgow, claim from Thomas Scott, iron merchant and wholesale ironmonger in Edinburgh, the sum of £418 sterling, being the price of a punching and shearing machine, fitted with an angle-iron cutter and two

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Smith Brothers reclaimed.*

At advising,—

LORD JUSTICE-CLERK.—This is a narrow and difficult case. It appears that the pursuers contracted, in November 1874, to supply the defender with a punch-

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cranes to be used in working the machine, all of which were ordered by the defender from the pursuers, but have been rejected by the defender on the ground of certain alleged defects in the machine.

"The defender acted in the transaction as a middleman, the machine having been ordered by him, not for himself, but for Messrs James Tod and Son, Leith Walk, Edinburgh, who had contracted for the iron work connected with the widening the North Bridge, Edinburgh, and required a punching and shearing machine for that and other purposes of their business. Mr Scott advertised for such a machine, and on 24th November 1873 Mr Osborne Smith (one of the pursuers) handed to the defender, in his office in Edinburgh, the offer, No. 65 of process, which is in the following terms:—'Glasgow, 24th November 1873. —Thomas Scott, Esq., Edinburgh.—Sir,—We offer to furnish and deliver here in Glasgow a punching and shearing machine, as described below, at the price stated.

"'One of our improved punching and shearing machines, suitable for punching and shearing 1¼ inch thick plates; punching 28 inches, and shearing 24 inches from the edge, eccentric shaft made of best tilted scrap malleable iron; machine fitted with double power spur gear. The whole of the wheels having capes for strengthening, cast on both sides of teeth, heavy fly-wheel; fitted also with a steam-engine for driving; machine is supplied with one punch-holder and bolster, and one pair of steel shears,—all complete, for the sum of £330.—Yours respectfully, SMITH BROTHERS & COMPANY, p. T. PATERSON.

"'*P.S.*—The above machine to be fitted with angle-iron cutter for the additional sum of £70 sterling, and to be delivered at the railway station in Glasgow about the 16th January 1874. SMITH BROTHERS & Co.'

"Mr O. Smith at the same time advised the defender to go to Glasgow, telling him that his brother (Hugh Smith) would take him to see one of the machines in operation in the shipbuilding yard of Messrs John Elder and Sons. The defender accordingly went to Glasgow on 3d December 1873, and in company with Mr Hugh Smith he visited John Elder and Sons' yard, where he saw one of the pursuers' punching machines at work. This machine was one of what the pursuers term in their offer their 'improved' machines, and it contained in the hollow interior of the punching apparatus a web of iron, called throughout the proof 'the centre web.' This web, which is a plate of iron about an inch and a-half thick, is designed to add firmness and strength to the machine. And the pursuers admit that it constitutes one of their 'improvements' in the manufacture of punching machines.

"The defender was satisfied with what he saw of the machine, and he on the same day (3d December 1873) wrote and handed to the pursuers an acceptance of their offer in the following terms:—'Glasgow, 3d December 1873.—Smith Brothers and Co.—Dear Sirs,—Referring to your offer of 24th ultimo. I hereby agree to accept of your offer to furnish the machine as therein specified for the sum of £330, and with angle-cutting apparatus for £70 sterling additional. The whole to be of the best description, and warranted, and delivered at Edinburgh on or about the 16th day of January 1874. The above price includes free delivery at railway station, Glasgow.—Yours truly, THOMAS SCOTT.'

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* The following pleas for the pursuers were tendered at the bar during the debate:—"(3) The defender, having agreed to take delivery of the machine, and pay the price under the said arrangement, was barred from afterwards rejecting the machine on any of the grounds stated, or on any ground whatever. (4) The defender is, in any event, bound to pay the price of the machine, in respect the same was not duly and timeously rejected by him."

ing and shearing machine of a description fully narrated in a written offer and acceptance. This machine was stipulated to be "of the best description, and

"This acceptance, it will be observed, is not precisely in terms of the offer, because in it the defender expressly stipulates that the whole apparatus is to be of the best description, and 'warranted,' and that the delivery is to be at Edinburgh, and not at Glasgow, as was proposed in the original offer. These variations upon the offer were not objected to by the pursuers, who thereupon proceeded to manufacture the machine for the defender.

"It appears to me that the introduction of the stipulation as to warranty had the effect of making that warranty an inherent condition of the contract, so as to entitle the defender to rescind the contract and reject the machine unless it came up in every particular to the warranty. The law on this point is well summarised as follows in Smith's Leading Cases, ii. 27,—'But where the subject-matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because the existence of these qualities, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted.'

"The first questions, therefore, to be answered are,—Did the machine forwarded to the defender possess the qualities which it was guaranteed to possess? Was it of the best description? I think these questions must be answered in the negative.

"As the machine was to consist chiefly of cast-iron, and as the pursuers themselves are not founders, they had the necessary castings made at the foundry of Messrs Allison, and sent to their own works to be fitted together. When the work was nearly complete (viz., on 22d January), the defender, accompanied by Mr Blackie, a partner of the firm of James Tod and Sons, for whom the machine had been ordered, went to Glasgow and inspected the machine in the works of the pursuers, and neither of them then observed any defect. But as the machine, which is of great weight, was then standing on its base, no flaw in the interior of the machine could be seen; and as cracks visible on the outer surface were not to be expected, it is not wonderful that the defender and Blackie did not look narrowly for such faults. The machine was not completed until more than a fortnight after that visit, and it was not sent out of the pursuers' works until 7th February, when it was addressed to Messrs Tod and Sons, Leith, and given by the pursuers to the Caledonian Railway Company for conveyance to Edinburgh. The whole apparatus arrived in due course at the Edinburgh station of the Caledonian Railway, and was taken off the trucks and deposited in the station, as Messrs Tod, owing to the crowded state of their yard, could not take immediate delivery.

"It is necessary here to explain that the machine consists of several parts, two of the largest and most important of these being what are termed the 'punching cheek' and the 'shearing cheek,' the angle-iron cutter being attached to the latter. These cheeks are of great weight,—the one weighing 96 cwt., and the other 110 cwt. The centre web, already spoken of, occupies the centre of the hollow interior of the punching cheek, and what is called the 'box,' occupies part of the hollow interior of the shearing cheek, and is designed to give strength and internal support to that part of the machine.

"On the 17th February 1874 Messrs Tod and Sons directed the railway company to bring the punching cheek to their works. It had not previously been examined at the railway station, but before it was taken off the lorry which brought it to the works it was examined by James Wight, Messrs Tod's manager, who discovered the centre web to be cracked and sprung in more than one place. He reported the matter to his principals, who at once communicated with the defender, at whose request the pursuer, Mr Osborne Smith, went to Edinburgh on the following day (18th February) and examined the cracks, which it is admitted were then quite visible, and of considerable extent. There is some con-

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warranted." The pursuers accordingly furnished a machine, which was duly forwarded by the Caledonian Railway to Edinburgh, on 7th February 1874, to

flict in the evidence as to whether such cracks so materially affected the soundness of the machine as to warrant the defender in rejecting it; but I am of opinion that the great preponderance of the evidence is in favour of the defender's view, that the existence of such cracks in the machine before it had ever been tried at work would have justified its rejection, unless they had been caused by undue violence after delivery. Not only is there no evidence of such violence having been used, but I think it is satisfactorily proved that no violence to which it could have been exposed, during or after the transit by railway, not even in a collision of trains, could have produced either the cracks in the centre web of the punching cheek, or those to be afterwards noticed in the shearing cheek, without shattering the whole machine.

"I am further of opinion that it is proved that the crack in the centre web of the punching cheek had begun to shew itself before it left the pursuers' work. Indeed, one of the founders (Archibald Allison) admits that the cross bar which is connected with the bottom of the centre web was slightly cracked before it was sent from the foundry to the pursuers' works at all; and he also admits, and other witnesses corroborate him, that the main crack in the centre web is continuous with that crack in the cross bar. It is also proved that, before the machine was sent off by the pursuers, it was painted on the side which would be visible while the machine was in a horizontal position before being erected for work. This appears to be an unusual thing with the interior parts of large castings; but if the defender is to be believed—and I see no reason to doubt his veracity—the crack in the cross bar and the crack at the lower part of the centre web had been filled with putty before the paint had been applied. This was, indeed, pointed out by him to the pursuer, Osborne Smith, on his visit to Tods' works on 18th February. It is, therefore, quite clear that the centre web was partially cracked before it left the pursuers' works; and as it is proved that the tendency of such cracks in large castings is to extend indefinitely (as indeed the cracks in question appear to have done since they were first seen by the defender), it is obvious that the existence of such a crack must destroy all confidence in the machine, and the defender would therefore have been justified in at once rejecting the machine as being undoubtedly not of the best description.

"The machine was not, however, at once rejected, and some correspondence took place between the parties; and an arrangement was ultimately made, which is embodied in two letters, dated respectively 26th and 27th February 1874, by which the defender agreed to take delivery of the machine at once, and pay the price, on condition that if the headstock should break within twelve months, in consequence of the crack then visible in the centre web, the pursuers should put in a new headstock at the joint expense of them and of the defender.

"Two points here deserve attention, viz., (1) that up to this date (27th February) the defender had not taken delivery of any part of the machine; and (2) that the one-half of it, viz., the 'shearing cheek,' was still lying at the railway station in Edinburgh, and was not known by the defender to be cracked or in any way defective. It is true that Wight had seen it at the station between the 17th and 27th February; but it is not wonderful that he failed there to discover the cracks presently to be noticed, seeing that the pursuers themselves and some of their witnesses deny to the present hour the existence of any cracks in that part of the machine. It cannot be doubted that the agreement of 26th and 27th February was entered into on the part of the defender in ignorance of the existence of any defect in the shearing cheek, and in reliance upon the warranty of the pursuers that the machine was of the best description; and I am of opinion that if that part of the machine, on being brought to the works, was found to be materially cracked, this agreement cannot bar the defender from rejecting the whole machine.

"What, then, was in point of fact the condition of the 'shearing cheek'? It was brought to the works of Messrs Tod by a railway lorry on or about 5th March 1874, and before it was completely unloaded, the workmen who were en-

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the order of the defender. On 17th February Tod and Son, who had ordered the machine from the defender, wrote to him complaining of a crack or defect in

gaged in taking it off the lorry discovered that it was cracked in two places. Wight and William Tod (a son of one of the partners of James Tod and Son) then examined the cheek and found the cracks referred to, one being in the front of the 'box,' and penetrating through and through the front web of the cheek, and the other being at what is called the 'bracket.' The pursuers deny the existence of any such cracks, either at 5th March or even at the present day. But the evidence of the defender and of his witnesses, among others, of Professor Fleeming Jenkin, all of whom tested the machine with naphtha, places it beyond doubt that the crack extending from the box and through the centre web, not only does exist, but was in existence on 5th March; and it is, I think, equally clear from the evidence that the crack is owing, not to any violence used after the cheek left the pursuers' works, but to some defect in the casting, —probably some parts of the box and front web having been made too slight relatively to the other parts of the machine, and thus creating great inequality in the thickness, and consequently in the rapidity in cooling of the casting, and thus giving rise to unequal strains which naturally result in cracks.

"The next question is, were these cracks so material as to justify the rejection of the machine? The pursuer and his witnesses all answer this question in the negative; but as these gentlemen deny the existence of the cracks, their evidence on this point is of no weight. The defender's witnesses, on the other hand, are all clearly of opinion that the cracks are in dangerous proximity to an important part of the machine, viz., the angle-iron cutter, and that the strain, when that cutter is in use, would tend to enlarge the crack and break up the whole machine. I have no doubt whatever that the existence of this crack constitutes a material defect in the machine.

"A great deal of so-called scientific evidence was adduced by the pursuers for the purpose of proving that, even assuming the existence of the cracks, the machine had so much superfluous strength that its breaking strain could never be reached, or even approached. But the simple answer to all such speculative opinions is contained in the following words of Professor Fleeming Jenkin:—'All our formulæ deal with sound machines; we have no formulæ for cracked metal. The view I take is, that I should accept no machine with cracks in it, whatever the calculations might shew.'

"I am therefore of opinion that the defender, on discovering the existence of the crack in question, was entitled to reject the machine.

"The only question which remains is, was the defender's rejection timeously and effectually made.

"On this point I have no doubt. Immediately on making the discovery the defender telegraphed to the pursuers on 5th March.—'Shearing cheek of machine sprung in two places; come through and see it.' The pursuer, Osborne Smith, went to Edinburgh on 6th March and saw the machine; but he disputed the existence of the cracks, and would not admit that the machine was in any way defective. The defender and Messrs Tod and Son then consulted skilled professional men, whose examination and experiments made it clear that the cracks did exist; and on 13th March the defender wrote the pursuers stating that the cracks had increased in number and in size and extent, and that 'I can see nothing for it but that you take it away, as the opinions of several of the most eminent practical men who have seen it is, that the machine is faulty, and very far from being what it should be. Waiting your instructions, yours truly.' The pursuers replied on the 15th March objecting to take back the machine, and maintaining (in my opinion erroneously) that the defender was barred from rejecting it by the arrangement of 27th February. The defender on the same day answered that letter by another, in which he positively declined to retain the machine, and desired all further communications to be addressed to his law-agents. This was a distinct, and, in my opinion, a timeous rejection of the machine; and on the whole matter I am of opinion that the defender is entitled to absolvitor, with expenses."

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a portion of the machine of which they had taken delivery from the railway company, the remainder of the machine lying at their order, or that of the defender, at the railway station. The defender forwarded their letter to the pursuers. After some negotiations, which are said to have resulted in a new agreement, Tod and Son removed the rest of the machine from the railway company's premises, and then said that they had discovered a defect in this part of the machine also, in consequence of which they stated that the machine was not according to contract, and consequently refused to retain it or to pay the price. The question now is, whether the defender is bound to pay the price or is entitled to return the machine. I am of opinion that the machine was not according to the original contract, and that the purchaser was not bound to accept delivery of it if he had at once rejected it. There can be no doubt that there was a crack in the web of the punching cheek, that part of the machine which was first removed, and that the defect was of such a nature as to entitle the purchaser to reject it. But, as will be seen, he did not exercise that right. The alleged defect in the other part of the machine gave rise to a serious dispute.

A long and voluminous proof was taken, which I observe with great regret. The machine was open to inspection, and the defects were alleged to be evident, and the proper procedure would have been to obtain a report from a person of skill on the extent and nature of the defects complained of instead of entering into a proof at large. But, on the matter of fact, I am of opinion that the alleged defect in the second part of the machine has been established, and that it was serious.

The next question is, whether, admitting that the purchaser at one time had the right to reject the machine, he has deprived himself of that right. In order to answer that question it is necessary to consider the actings of the parties. The original contract having been of the nature which I have already mentioned we have, first, the letter of 17th February from Tod and Son to Scott, to which I have already referred, and which was forwarded to the pursuers. That was an intimation by Scott of the purchaser's objections to the machine. On 19th February, after inspecting the machine, Smith Brothers wrote as to the crack and the effect it would have on the efficiency of the machine, the ground taken up being that as the web was unnecessary a crack in it made no sort of difference in the strength of the machine. Then, after some further correspondence, Smith Brothers again wrote, on 23d February, reiterating their former assurances as to the strength and efficiency of the machine, but offering, in answer to a suggestion contained in a letter to them, either to cancel the contract or to take back the machine and make another. Up to this time no fault had been found with the other portion of the machine, viz., the shearing cheek. In the view I am inclined to take of this case I consider this letter of 23d February of great importance. The offer either to cancel the contract or to take back the machine and make another—the machine being at the time in the possession of the purchaser, or those representing him—bound the purchaser either to reject the machine altogether or to take it with all apparent faults. That offer was, however, not accepted; the purchaser did not cancel the contract; and the negotiations continued till, on 27th February, Smith Brothers wrote offering, on condition that delivery was accepted and the price paid, that if the headstock broke in consequence of the cracks then visible in the web within twelve months they would put in a new headstock, they paying one-half and Scott the other half of the expense thereof. On 28th February Scott

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answered by telegraph shortly but quite to the point,—"Agreed; please send me invoice by first post." The invoice for the whole machine was forwarded to him next day. That was a specific agreement, entirely outside the original contract of sale. It was an agreement to accept an article not in the possession of the sellers but of the purchaser.

I am of opinion, although the point is a narrow one, that this agreement applied to the whole machine. The price of the whole machine was to be paid, and therefore the whole machine was to be taken delivery of. It may be quite true that it was known, at the date of this agreement, that the shearing-cheek, in which defects were afterwards discovered, was lying at the railway station, but I think that the purchaser, entering into a compromise of this nature, was bound to examine the article, and is not now entitled to reject for defects which then existed and could be seen. That seems to have been the understanding at the time, because it appears that Scott had been endeavouring to sell the machine to a third party, but his advertisement was withdrawn whenever this agreement of 27th and 28th February was entered into.

A week after this Tod and Son got the shearing-cheek brought to their works and then discovered cracks in it, and immediately wrote to Scott saying that they could not put it up on account of these defects. If my view be correct it was then too late to make any claim on the makers; and even if the extent of the defects was as great as they said, any remaining question lay between Tod and Son and Scott. Scott at once telegraphed to the pursuers, and one of the partners came to Edinburgh and examined the shearing-cheek, and afterwards embodied his opinion as to the trifling nature of the defects complained of in a letter dated 6th March. No notice was taken of that letter by Scott for upwards of a month. It is said, and to a certain extent truly, that investigations were going on during that month as to the extent of the defect. These investigations, however, could not have taken a whole month; at all events, Scott was bound to answer that letter of 6th March, which he never did. In my judgment, as already indicated, it was then too late to go back on the agreement; but his delay in answering that communication adds great force to the plea.

On 10th April Scott wrote Tod and Son pressing for payment of the price of the machine. That letter proves conclusively that Scott, during the interval between 6th March and 11th April, held himself as having taken delivery of the machine, and as not entitled to throw it back upon the makers.

If I had been of opinion that the agreement only related to the punching-cheek, and was limited—that is to say, to a part of the machine, and not referring to the whole contract—I should have come to a different result. But I cannot doubt that it was understood by the defender, as well as by the pursuers, to apply to the contract as a whole, as indeed the correspondence shews. The pursuers were not responsible for the delay in testing the other part of the machine, and the defender must be held to have satisfied himself, as the defect was not latent.

Where a purchaser, who is entitled to reject an article, elects to retain it on certain conditions, he is bound to retain it with all faults not latent. If, to be sure, the article turned out to be wholly useless on experiment, owing to a defect only to be discovered by experiment, the case would be quite different. In this case, I think, to sustain the rejection would be contrary to the good faith of the agreement, and that therefore the interlocutor of the Lord Ordinary should be

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LORD NEAVES.—I have had considerable difficulty with this case, but I am on the whole inclined to concur with your Lordship.

The question is, whether the right to reject this machine was waived by the correspondence and actings of the parties. The defender's letters are very remarkable, and particularly the one of 11th April to Tod and Son, when he plainly took up a position with regard to them the very opposite of that which he now takes with regard to Smith Brothers. The shearing portion of this machine had not been critically examined when the agreement founded on was made, but it was and had been in the power of Scott and his constituents to have examined it. In these circumstances Smith Brothers, in consequence of letters from Scott enclosing others by Tod and Son, offered to cancel the contract altogether, or otherwise to take back the machine objected to and to make another. Then followed a letter from Scott on 26th February, saying that he had arranged with his constituents that they would consent to take the machine on condition that, in the event of it failing at the faulty place within twelve months, they were to be relieved of one-half of the expense of a new headstock. To this, on 27th February, Smith Brothers assented, and Scott confirmed the agreement the same day by telegram.

Considering that all the parts of the complete machine were within the power of Scott and his constituents, we must hold that this agreement was one waiving all ground of rejection for apparent faults. The whole machine had apparently been inspected by servants and friends of Scott and Tod and Son, and after that they agreed to accept delivery of it, and to pay the price instantly.

The letter of 11th April was written by Scott after the discovery of the defects in the shearing portion of the machine, and in it Scott reminds Tod and Son that before the agreement he had offered to relieve them of the machine altogether, but they had resolved to retain it under the conditions in the letter of 27th February. That we must hold to be the authoritative exposition of what Scott understood and meant at the time when the agreement was made. No other construction can be put on the agreement of 27th February than Scott's own, as explained by himself in that letter of 11th April, and in that case Scott's mouth is closed as regards the claim here made. He must take the machine and pay the price.

As to the proof, a great deal of trouble and expense has been involved by it, which, as it was unnecessary, must be taken into consideration in deciding the question of expenses.

LORD ORMIDALE.—(After narrating the facts)—The case undoubtedly presents some questions of importance and difficulty. After a careful consideration of the argument and of the voluminous proof I am of opinion, in concurrence with the Lord Ordinary, that the weight of the evidence as regards the cracks and consequent faulty character of the machine, as furnished by the pursuers, is on the side of the defender, and if there had been nothing else in dispute the interlocutor of the Lord Ordinary now under review would fall to be adhered to.

But, although not without considerable hesitation and difficulty, I have come to be of opinion that the defenders are barred and precluded by the arrangement of 27th and 28th February from rejecting, on any of the grounds now found

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on by them, the machine in question, and refusing to pay its price. It must be borne in mind that the machine was despatched from Glasgow to Edinburgh on the 7th of February, and arrived at the station there next day. From that date the machine must be held to have been delivered to and at the risk of the defender and under his control exclusively, and this I did not understand to be disputed. It can hardly be questioned therefore that the defender had ample time and opportunity, between the 8th and 28th of February when the arrangement was entered into upon which the pursuers found, of fully examining the machine in all its parts and satisfying himself as to its efficiency and freedom at least from patent and visible faults, which, on the defender's own shewing, the cracks in question were. Nor am I able to see how in this matter it can affect the pursuers that the defender for his own convenience or that of his constituents, Messrs Tod and Son, allowed the machine, or a portion of it, to remain for between two or three weeks at the railway station, where it is said a proper examination of it could not be made. Neither can I find any satisfactory evidence to the effect that the pursuers were aware that the machine in all its parts had not, prior to the arrangement being entered into on the 28th of February, been removed from the railway station to the works of Tod and Son and thoroughly examined. I am not indeed satisfied that the machine, or such parts of it as had been allowed to remain at the railway station till after the date of the arrangement might not have been examined there, to the effect at least of the cracks on which he now founds being seen by him. All these cracks were, according to his shewing in the proof, capable of being observed, and therefore it cannot well be taken from him that they were latent. Mr Blackie, one of the two partners of Tod and Son, says that "I was a party to the arrangement of 27th and 28th February. I think that Wight" (the managing clerk) "had been sent to look at the shearing-cheek at the railway station before that arrangement was come to." Mr John Tod, again, says, "The machine in question was intended for our firm. After it arrived at Edinburgh railway station it was examined there, and delivery was refused because it was found to be faulty." It is true that this witness afterwards says, "I do not know of my own knowledge about the machine being examined at the railway station. I knew it from Mr Wight." And it is also true that Mr Wight, when asked if he inspected the machine at the railway station, says, "I inspected nothing at all," but he adds, what appears to me to be very important, "I knew about the arrangement of 27th and 28th February. At that time I had ample opportunity of examining the whole machine."

It was in these circumstances that the arrangement was come to between the parties on the 27th and 28th of February. It relates unquestionably not merely to the punching portion of the machine but to the whole together,—the shearing as well as the punching portion of it. The machine was in the arrangement treated as a *unum quid*, and was of a description, as well from its construction as otherwise, which required that it should be accepted or rejected as a whole. Accordingly, the price of the whole was asked for by the defender, and requested to be at once transmitted to him. Now, in this view, viz., that the agreement was entered into in reference to the whole machine, it is very important that, except what is said in it about the headstock breaking, the arrangement is quite general and absolute, and is not made subject to any condition or qualification whatever. In particular, it contains no condition or qualification to the effect of reserving the rights of the defender to reject the machine, and to refuse

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to pay its price should it be found by him on further examination that the shearing portion of it should turn out to be cracked or defective. Just suppose that the parties had in the interval between the 28th February, when the agreement was entered into, and the 5th of March, when it is said the shearing portion of it, as well as the punching portion, was discovered to be cracked, left it to an arbiter to say whether the pursuers were not entitled to immediate payment of the whole price, I cannot doubt that it would be so determined.

I cannot therefore see anything either in the terms of the arrangement itself, or in the circumstances in which it was entered into, to warrant the interpretation of it contended for by the defender, viz., that it had reference solely to the defects in the punching portion of the machine. It appears to me, on the contrary, that the terms of the arrangement import a settlement by compromise or transaction of all disputes regarding cracks or faults in the machine or any part of it, or regarding at least all cracks or faults which were not then latent. As already noticed, the machine in all its parts had been delivered and out of the possession and power of the pursuers, and was lying at the risk and under the control exclusively of the defender. And as I have also already noticed, the defender, or, what is the same thing, his constituents, had, previous to the arrangement of the 27th or 28th February, an opportunity of examining the whole machine. Having regard to these circumstances, and to the fact that at and prior to the date of the arrangement the parties had been disputing about the machine and the nature and effect of the cracks which had been observed on it, the cause or reason of their entering into the arrangement, as expressly stated in it, viz., "to avoid disputes," is very material as shewing that it must now be held to bar or preclude the defence. To arrive at any other result would be tantamount to nullifying entirely the arrangement in question. The defender may have been rash or imprudent in entering into it, but as he has not attempted to get it set aside on the ground of fraud or any other ground, I can see no alternative but to allow to it its full effect, for I do not see how it can be read as limited merely to the cracks in the punching portion of the machine, which I understood was the contention of the defender, without materially altering its terms. It is a different matter altogether what would be the rights and liabilities of the parties if the machine, after being put up and in operation, turned out to be wholly insufficient owing to cracks or defects which could not be observed previous to the arrangement. The warranty of the pursuers might then come into operation, and a different question from that at present before us would arise, in regard to which I can say nothing at present.

For the reasons I have now referred to I am of opinion that it ought to be found that the defender is, by the arrangement of 27th and 28th February, barred from rejecting the machine in question and from now refusing to pay its price on any of the grounds stated by him, and therefore that the Lord Ordinary's interlocutor ought to be recalled, and decree pronounced in favour of the pursuers as concluded for.

Lord Gifford.—My Lords, I agree with all of your Lordships that this is a case of considerable nicety. I have come to the conclusion that the Lord Ordinary's interlocutor is well founded, and ought to be adhered to.

This is a contract of an executorial nature, in which the pursuers, who are machine makers, became bound to make and to deliver a punching and shearing machine, along with certain other appliances to be connected with it, "th-

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whole to be of the best description, and warranted." The pursuers undoubtedly were bound to deliver a perfect and a warranted machine.

A machine was made by the pursuers and despatched to Edinburgh, apparently about 7th February 1874, and it arrived a day or two afterwards at the Caledonian Railway Station for Messrs Tod and Son, who had been disclosed to be the parties for whom it was made and by whom it was required. The machine consisted of two main portions—the punching-cheek and the shearing-cheek—both of which were very heavy and cumbrous.

The punching-cheek was first taken to Messrs Tod's yard, and arrived there somewhere about 17th February, for in their letter of that date Messrs Tod state that "the cheek of the punching machine got from railway to-day is sprung or cracked in both the inside cross webs," and that they had not taken it off the railway waggon until Scott or the pursuers should have examined it.

No point has been made, or attempted to be made that the purchaser was not then entitled to reject the machine. The persons for whom it had been ordered objected to it as not according to contract, and Scott forwarded their letter to the pursuers on the same day. The result was that one of the partners of the pursuers' firm came to Edinburgh and inspected the machine. He argued that the cracks were of no importance, but without succeeding in convincing the purchasers of this. Scott afterwards wrote practically rejecting the whole machine, because in the portion sent to Tods' yard, a fatal defect—viz., these cracks—had been discovered. The machine, therefore, lying partly at Tods' yard and partly at the railway station, was then a rejected machine, and the rejection was undoubtedly a valid rejection if the cracks constituted a material defect.

Some negotiations were entered into, and these lasted for some time, but all that time the machine was a rejected machine. In the circumstances of the case Messrs Tod and Son, who were to get the machine, were not bound to inspect the other portion which was still at the railway station. They had rejected the whole machine in consequence of a fatal defect in the portion which had been brought to their works. The machine was a whole and indivisible, and if Messrs Tod were right in maintaining that the cracks in the punching-cheek constituted a fatal defect they needed to go no farther; their rejection was justifiable and conclusive. It is true they might have gone and inspected the rest of the machine at the railway station, but they were not bound to do so till they had arranged about the flaw in the portion they had seen.

Now, it is admitted that the purchaser's objection to the cracks in the punching-cheek was well founded. They were not bound to take the machine with these cracks in it, and the result of the communings which followed the rejection was that an arrangement was come to on 27th and 28th February. I am of opinion that arrangement related solely to the punching-cheek of the machine, and had no reference to the shearing-cheek, which had never been examined, and which was assumed to be all right.

This conclusion I have come to upon a consideration of the letter by Smith Brothers on 27th February, and Scott's telegram in reply.

These documents, fairly read, shew that no delivery had been taken up to that date, indeed, they shew that hitherto the machine had stood rejected. Smith Brothers stipulated that delivery of the machine be taken now; and they also allude to cracks now visible, which shews that these cracks were the only matter in dispute between the parties up to this date.

Having thus come to an arrangement about the cracks in the web of the

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punching-cheek, Messrs Tod and Son proceed to get the shearing-cheek brought down to their works. This was done on or before 5th March, as we see by their letter to Scott of that date, wherein they complain that it also is sprung in two places in the inside. Scott at once telegraphed the objection to Smith Brothers. I apprehend that this challenge also, if material, was timeous. They had challenged the crack in the punching-cheek—that had been arranged; they then proceed to get the shearing-cheek into their works, and at once challenge it also as defective.

I agree with your Lordships that the defect now founded upon,—that is, the defect in the shearing-cheek,—which was only discovered about 5th March, was also a material defect, and one which, apart from peculiar circumstances, would entitle a purchaser to reject.

The cheek was disconform to contract, it was not perfect, it was defective.

The question, therefore, comes to be, were these purchasers barred from rejecting the machine on account of the fatal flaw in the shearing-cheek? Were they bound, although the machine was disconform to order and fatally defective, yet notwithstanding to take it as perfect and pay the full price? Now, this may be so. A purchaser may pass from objections, however strong they are, and he may bind himself to accept an article, however defective, but when once it has been established that the machine was defective, it will require a very strong case to compel a purchaser to accept the machine and pay for it. Surely a very strong case is necessary before you will compel a purchaser, who has stipulated for a perfect machine, to accept a defective one.

In the present case, I do not think that the purchasers have in any way barred themselves from objecting to the defect in the shearing-cheek, or have bound themselves to take and pay for an admittedly defective machine. In the first place, it is urged that there was too great delay in rejecting. But the delay was caused by the discovery of the cracks in the punching-cheek, and so the interval between 7th February and 28th February must be deducted, because the purchasers were not bound to search for other faults when they had already discovered a fatal one. The subsequent delay cannot be said to be sufficient to have the effect contended for by itself. I therefore conclude that the purchasers were not barred by lapse of time.

The case, then, must come to this, that by the agreement of 27th February the purchaser agreed to waive all objections to the shearing-cheek as well as to the punching-cheek.

Now, I agree with the Lord Ordinary that it is clear the purchaser, or his constituents, did not at that time know of the flaws in the shearing-cheek. If they did not know of them, then the agreement must be held to be a waiver of all defects, known or unknown. I think, however, that the agreement had reference solely to the cracks in the punching-cheek.

Some doubts exist on the evidence as to whether the shearing-cheek had ever been examined by the purchaser or his constituents, or any one on their behalf. Wight, Messrs Tod and Son's manager, is said to have done so, but he himself denies that he did. Moreover, whether the defect in the shearing-cheek be latent or not, it is, at all events, not very patent. Up to the present moment, Smith Brothers deny that there is any crack in it at all. The flaw being of that nature, can we hold that the purchaser must have seen the defect and waived his objection to it?

I cannot hold that the agreement of 27th and 28th February, the origin.

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extent, and object of which are perfectly clear, is to be read as a waiver of all right to object to all flaws in any part of the machine not absolutely latent.

Supposing that the cracks in the shearing-cheek break, will an undertaking to pay half the expense of a new headstock for the punching machine give any satisfaction to the purchasers?

On the whole case, I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

THE COURT pronounced this interlocutor:—"Recall the interlocutor complained of: Find that the machine in question was transmitted by the pursuers, the sellers in Glasgow, on the 6th day of February 1874, and arrived at the railway station in Edinburgh on the 7th of the same month: Find that the machine was, on the 17th of February, found to be defective in the centre web of the punching-cheek, and that the defender thereon intimated to the sellers that he declined to accept delivery thereof: Find that after some negotiation, during which the pursuers offered to cancel the contract, the parties agreed, on the 27th and 28th of February, that the defender, on the terms mentioned in the pursuers' letter of the 27th, should accept delivery and pay the price: Find that this agreement related to the whole machine: Find that on the 5th of March the defender intimated to the pursuers that the shearing part of the machine was defective, and that this defect has been proved: Find that the defender is precluded by the agreement of the 27th and 28th of February from rejecting the machine, or refusing to pay the price, on the ground of defects which were then apparent: Therefore repel the defences, and decern against the defender in terms of the conclusions of the summons, and find him liable in expenses (with the exception of the expenses of the proof), subject to modification, reserving the question as to the amount thereof until the account is taxed; and remit," &c.

The Auditor taxed the pursuers' account (excluding the expenses of proof) at £115, 7s. 4d.

The defender's counsel maintained, that as the judgment of the Court proceeded on grounds not pleaded by the pursuers, he was entitled to a large modification.

THE COURT pronounced this interlocutor:—"Approve of the Auditor's report on the pursuers' account of expenses; and having heard counsel on the question of modification thereof, modify the same to £85, 7s. 4d., and decern against the defender for payment thereof to the pursuers."

A. KIRK MACKIE, S.S.C.—MACNAUGHTON & FINLAY, W.S.—Agents.

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ROBERT BROWN AND OTHERS, Complainers.—*J. C. Smith.*
JAMES S. SUTHERLAND, Respondent.—*D.-F. Clark—Thorburn.*

Bill of Exchange—Suspension—Joint Adventure—Partnership—Summary Diligence.—The three trustees of an unregistered joint stock building association, who had signed a bill drawn on and addressed to them, B., U., and S., "trustees of the New Imperial Building Association," by one of the members of the association for the amount of an account for plaster work done on the association's buildings, presented a note of suspension of a charge on the bill, on the ground that the charger was not entitled to use summary diligence, in respect (1) that the complainers were only liable *qua* trustees, and (2) that the drawer was a partner of the association, and

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as such was, under the articles, liable *pro rata* along with the whole members for the amount in the bill. *Held* that the charge was competent, in respect (1) that the acceptors' signatures were unqualified, and (2) that, even if their liability could be held to be *qua* trustees merely, they had not averred that there were no funds of the association in their hands.

2D DIVISION.
Ld. Curriehill.
I.

ROBERT BROWN, Robert Utterson, and John Smith, who were trustees of an unregistered joint stock building association, called the "New Imperial Building Association," and Joseph R. M'All, chairman of the association, employed James S. Sutherland, plasterer, Leith, who was a member of the association, to execute the plaster work required for the buildings which the association was erecting in Prince Regent Street, Leith. On 23d September 1874 Mr Shiells, the architect of the association, certified that Mr Sutherland had executed such portion of the plaster work as to entitle him to a payment of £200. In consequence of this certificate Brown, Utterson, Smith, and M'All granted Sutherland the following bill, which was written out by the then agent of the association:—

"Due 2d January.

"Edinburgh, 30th October 1874.

"£200 sterling.

"Two months after date pay to me or my order, within the British Linen Company Bank, St Mary Street, Edinburgh, the sum of £200, for value received.

"Messrs Robert Brown, 10 East Norton Place, Edinburgh, Robert Utterson, contractor, Leith, and John Smith, spirit merchant, Leith, trustees of the New Imperial Building Association, and Mr Joseph R. M'All, builder, Lutton Place, Edinburgh.

JAMES S. SUTHERLAND.
ROBERT UTTERSON.
JOHN SMITH.
ROBT. BROWN.
JOSEPH R. M'ALL."

The bill was not retired at maturity, and on 15th January 1875 Brown, Utterson, Smith, and M'All were, by Sutherland's instructions, charged upon the bill.

Brown, Utterson, and Smith (M'All having absconded), presented a note of suspension of the charge, which, on 22d January, was ordered to be seen and answered in eight days on caution, and execution was in the meantime sisted. The complainers failed to find caution, and on 8th February they referred "the whole matters, statements, and others to the oath of the charger."

The grounds of suspension set forth in the note were—(1) That under the articles of association* the complainers were appointed trustees to

* "Fourth. . . . . ; and the said trustees, surviving, acting, and assumed, are hereby authorised and empowered to sue for and uplift, by legal process or otherwise, all sums of money due or which may become due to said association, and they are also hereby authorised to grant all deeds, writs, or others on behalf of the said association; and it is hereby declared that all deeds and others granted by the said trustees for behoof of the said association shall be valid and binding on the association, without the concurrence of the other members thereto; and all deeds and others granted in favour of the said association shall be granted in favour of the said trustees, and the survivors and survivor of them, and the heir-male of the last survivor.

"Tenth. The said trustees are hereby authorised and empowered to borrow such sums of money as may be necessary to finish said buildings, and the parties hereto hereby agree and bind and oblige themselves, and their heirs and assignees, to grant their personal obligations, if required, along with the said trustees, in bonds, bills, notes, and other securities, and the said trustees are hereby authorised and empowered to assign, dispone, convey, and make over the said piece of

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grant deeds on behalf of the association, and these deeds were to be binding on the whole association; this bill had been granted by the trustees as trustees, and the association was bound by it, not the trustees personally. (2) That the charger being a copartner with the complainers in a joint adventure in the building association, for behoof of which the bill was granted, was not entitled to do summary diligence on it; and (3) that the bill was granted for the accommodation of the charger, and without consideration.

The charger in his deposition, which was taken on 19th February, admitted that he was a member of the association, but denied that the bill was granted for his accommodation and without consideration. The value given he stated to be his plaster work. He denied having come under any agreement not to use diligence against the trustees personally should the bill not be retired, and stated that he had refused to give a receipt, in which there had been inserted an obligation on his part, if the bill was not met at maturity, to accept a renewal thereof. This receipt, which he had retained in his own hands, he produced, signed by himself, but afterwards scored through.

On 25th February the Lord Ordinary pronounced this interlocutor:—"Finds the oath negative of the reference: Therefore recalls the sist: Finds the letters and charge orderly proceeded: Refuses the note of suspension, and decerns: Finds the respondent entitled to expenses: Appoints an account thereof to be lodged," &c.*

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ground, with the said tenement erected thereon, or part thereof, in security of the sums so borrowed: Declaring always the whole parties hereto shall pay the law expenses of procuring said loans, and of discharging the same, and any other expense connected therewith."

* "NOTE.— . . . I am of opinion that, according to the sound construction of the articles of association, and of the bill, apart from the oath of the respondent, the complainers would not be entitled to prevail in this suspension, and that the oath is negative of the grounds of suspension, in so far as these are not founded upon the terms of the articles and of the bill.

"By the 4th head of the articles of association, the respondents, Brown, Utterson, and Smith, are named trustees for behoof of the association; and they are authorised and empowered to sue for and uplift, by legal process or otherwise, all sums of money due or to become due to the association; and they are authorised to grant all deeds, writs, or others on behalf of the said association; and all deeds and others granted by the said trustees for behoof of the association are to be valid and binding on the association without the concurrence of the other members.

"By article 10 of the articles the members bind themselves and their heirs and assignees to grant their personal obligation, if required, along with the trustees, in bonds, bills, notes, or other securities; and accordingly the bill in question was, at the request of the trustees, signed by the complainer M'All as acceptor along with them.

"I think that the true meaning of the articles of association is, that as the trustees are appointed the sole collectors and holders of the funds of the association, not only are they to bind the association and its funds for the proper debts of the association, but that unless they expressly limit their liability by the terms of the obligations granted by them they will be personally liable for the amount of such obligations. In the present case there is no such limitation in the bill in question. They are merely designed as trustees in the address upon the bill; but the obligation to pay the amount of the bill is undertaken by them and M'All absolutely as individuals. It is quite settled by many cases, both in this Court and in England, that although a bill is addressed to a person in a fiduciary or factorial character, his acceptance, unless expressly qualified, binds him personally for the amount—see Webster v. M'Calman, 10 D.

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The complainers reclaimed, and argued;—The bill was for a company debt, and the charger was a partner of the company. The question came to be one of accounting, which should not be decided in a summary process. If the bill had passed into the hands of the bank, the charger here would, under the articles of association, have been equally bound with the complainers and the other partners, and he would thus have been both debtor and creditor in the bill. It had been held to be incompetent for one partner to do diligence against another, even after the dissolution of the partnership, where an accounting was still pending.[1] The receipt which had been produced shewed what the intentions of the parties had been in granting the bill. The trustees never meant to bind themselves personally. Moreover, the bill was addressed to them as trustees.[2] The cases relied on by the Lord Ordinary were none of them cases of partnership.[3] In the report of Dutton v. Marsh[4] in the Law Reports it was not said that the holder of the note was a shareholder of the company.

Argued for the charger;—Full value had been given for the bill, as was shewn by the architect's certificate, and the charger had therefore a right of action against the association. The trustees had granted the bill to prevent an action, and they were now bound to meet their bill.[5] The trustees had not stated that there were no funds of the association in their hands. The oath was clearly negative of the reference.

1131; and Chiene v. The Western Bank, 10 D. 1523. And in the recent case of Dutton v. Marsh, 40 L. J. (Q. B.), p. 175, it was held that where the directors of a joint stock company granted to one of the shareholders of the company a promissory-note for money lent by him in the following terms:—'We, the directors of the Isle of Man Slate Company (Limited), do promise to pay to J. D. £1600, with interest at 6% till paid for value received,' the note, though sealed with the company seal, and admittedly granted for a loan to the company, bound the directors personally to pay the amount.

"It appears to be of no importance in such questions that the receiver of the bill or note knew of the fiduciary or administrative character of the granters, or that he happens to be a partner of the company, if, in fact, the consideration for which it is granted is onerous, and has been given *in bona fide*.

"The terms of the respondent's oath distinctly negative the allegations of the complainers that the bill was granted for his accommodation—that it was taken by him on the footing that the acceptors were not to be individually liable to him for the amount—and that, by his agreement with the association, he was only to receive payment by instalments as the funds of the association were realised by the trustees; and on this part of the case it may be noticed that the complainers have neither averred nor attempted to prove that they are not possessed of funds belonging to the association, or that the association and remanent members are insolvent.

"On the whole matter, I am of opinion that the note must be refused, with expenses."

[1] Caven v. Mackie, May 18, 1832, 10 S. 550, 4 Scot. Jur. 437.

[2] Alexander v. Sizer, Jan. 26, 1869, L. R. 4 Exch. 102; Lindus v. Melrose, Feb. 23, 1858, 3 Hurlst. and Norm. 177; Aggs v. Nicholson, June 10, 1856, 1 Hurlst. and Norm. 165.

[3] Webster v. M'Calman, June 3, 1848, 10 D. 1131, 20 Scot. Jur. 417: Chiene v. Western Bank, July 20, 1848, 10 D. 1523, 20 Scot. Jur. 576.

[4] Dutton v. Marsh, May 8, 1871, L. R. 6 Q. B. 361, 40 L. J. (Q. B.). 175.

[5] Preston v. Strutton, May 21, 1792, 1 Anstruther, Exch. Cases, 50; Beecham v. Smith, May 28, 1858, Ellis, Blackburn, and Ellis, 442; Bedford v. Brutton, Nov. 25, 1834, 1 Bingham (N. C.), 399; Lindley on Partnership, vol. ii. 915.

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LORD JUSTICE-CLERK.—This suspension belongs to a category in the law in which difficult questions may arise, but the case before us presents no such difficulties. It is a suspension of a charge on a bill signed by the suspenders in their own names. The bill in favour of Sutherland runs as follows :—(reads bill, *ut supra*). The address on the bill is to these suspenders, in their individual capacities and designations, but it also designs them as trustees of the New Imperial Building Association. This bill is signed with the simple signatures of the parties.

The suspension is brought upon two grounds—(1) the obligation undertaken is not an individual one, and so summary diligence is not competent; (2) the obligation being by the association, summary diligence is not competent by the holder against these individual partners, in respect he is himself a partner.

In regard to the second of these reasons the case does not fall under the category at all. This is not an action against individual partners in one association at the instance of another partner. These individuals are not charged as members of the association. The charge is on the direct obligation in the bill under which they are bound to the charger.

The question truly comes to be, is it an individual obligation, or only an obligation to make forthcoming the funds of the association? I have very great doubts whether on this record, and in face of the fact that the case has been referred to the oath of the charger, we can go into this question of funds or no funds of the association. The individual responsibility is admitted, if there be no funds, and also that there can be no defence against this summary diligence if there be funds in the hands of these trustees. In the absence of any allegation that there are no funds, and in the absence of all proof on the point, I do not see how we can suspend this charge on the grounds urged. I am, however, prepared to go further, and to hold that the subscription of this bill by the suspenders was not *factorio nomine*, as trustees for this association, but actually as individuals. Wherever signatures to documents of this sort are not expressly qualified they must be held to bind the parties as individuals. This distinction was clearly brought out by Lord Chief-Justice Cockburn in the case of Dutton v. Marsh, which was cited to us at the debate.

The obligation here is not a company obligation, it is a personal obligation by individuals who purposely did not qualify their signatures, and that for the excellent reason that the creditor would not have accepted the bill if so qualified. They undertook an individual obligation to pay this charger £200, and they must now implement it.

LORD NEAVES.—I am of the same opinion.

The parties here can never have intended to grant this bill as a nullity. Certainly Sutherland never would have given his plaster work for a piece of moonshine. It is incredible that people would enter into a document of debt knowing it to be useless. The intention of the parties, as shewn by the probabilities of the case and confirmed by the oath of the charger, was that this should be an additional guarantee to Sutherland for payment of his work. It is not stated that there are no funds of the association.

The most favourable view for these suspenders is, that they have powers under which they are entitled to borrow money in order to finish the buildings.

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They undertook to borrow and pay Sutherland, and if they have not done so or are not prepared with an explanation why they have not done so, that is enough to enable us to decide the case.

This is a personal obligation by these trustees. If they have funds they can pay, but if not they should explain why they have not.

If they are compelled to make this money forthcoming out of their own pockets they can get relief against the association in an action of count and reckoning. *Hoc statu*, and on the face of this document, I think it seems one on which a charge is justified.

LORD ORMIDALE.—I am of the same opinion. The complainers have referred their case to the oath of their opponent, the charger. And what does their case consist of? According to the statements on record three points appear to be relied on by the complainers, 1st, that the bill was an accommodation one; 2d, that no single member of the association can be proceeded against for full payment of the bill, but only rateably for his own share; and, 3dly, that, according to the form and terms of the bill, the association alone became bound, through their trustees, in payment, and not the complainers as individuals.

In regard to the first of these points, it is sufficient to remark that the oath is so clearly negative that no attempt has been made in argument to shew the contrary. In regard to the second point, again, the strict answer is that the complainers did by the terms and form of the bill undertake an individual and personal liability which they must satisfy. The English as well as the Scotch precedents cited in the course of the argument are conclusive to this effect. And as to the third point, which is very much the second repeated in somewhat different language, the same answer applies. Besides, even supposing that the complainers could be held to have accepted the bill merely as trustees for and as representing the association, it does not follow that they are not themselves individually and personally liable, the more especially seeing that it cannot be maintained that there are not association funds or estate to meet the bills. The complainers may possibly have their relief against the association and all its members, but clear it is, in my opinion, they are bound and liable in the meantime to pay the bill themselves, in respect that by accepting the bill as they did they came under a new and independent obligation to that effect.

LORD GIFFORD.—I have no difficulty in coming to the same result. I quite agree that it is enough for the decision of this case that these suspenders, who admit and plead that they are liable as trustees only, have not averred that they have no trust-funds in their hands. The principle which Lord Chief-Justice Cockburn laid down in the case of Dutton v. Marsh is entirely applicable to the present case, and is really conclusive of it. That doctrine was derived from a great number of cases, including some of those which have been quoted at the bar. It is admitted that the bill would be good to a bank, and would create a personal obligation against the suspenders in favour of the bank. Indeed this was the very purpose for which it was granted. It was meant to be discounted on the credit of the granters; but if the granters were to be only liable as trustees, and *in valorem* of the trust-funds, no bank would have discounted the bill, knowing nothing of the state of the trust. Now, if the bill would bind the suspenders personally and individually to the bank, it must have the same

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effect to the drawer. Its terms are the same, and the obligation arises from its terms. If the drawer had discounted it the bank could have made these acceptors pay, because they had not limited their liability on the face of the document itself. Whenever a man means to bind another and not himself he should take care to say so. I think this is never to be implied. Even if a trust character is mentioned it will be held in general that this is merely descriptive of the obligant, but does not exempt him from personal liability. A trustee who does not mean to be personally bound should take care to use words which will exclude his personal liability,—for example, "I bind not myself, but the trust-estate;" "I bind not myself, but my constituent, or my client, for whom I act." If he binds "himself" it will not in general limit his responsibility that he adds, "as agent for so and so," or "as trustee." This may indicate that he claims relief, but, in general, he himself will be liable in the first place.

As to the other plea that the charger is a partner of the association, there was a good deal of subtlety used in arguing it, but there is no authority to the effect that one partner may not enter into a contract with another partner, or even with the whole association, and become their creditor. We must hold the oath negative of the reference.

THE COURT adhered.

This judgment ruled two almost precisely similar suspensions at the instance of the same complainers against two other tradesmen (members of the association) who had done work for the association, and had obtained similar bills on which they had charged the trustees.

T. & W. A. M'LAREN, W.S.—WALLACE & FORSTER, L.A.—G. V. DUNCAN & MANN, S.S.C.—Agents.

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Mar. 18, 1875.
Mackie's Trustees v. Martins.

WILLIAM GRAY COCHRANE AND OTHERS (John Mackie's Trustees), First Parties.—*A. T. Innes.*
MRS JANE ELIZA MACKIE OR MARTIN AND HUSBAND, Second Parties.—*Balfour—Moody Stuart.*
MICHAEL WELLDON RICE AND OTHERS (Mr and Mrs Martin's Marriage-Contract Trustees), Third Parties.—*Balfour—Moody Stuart.*

Process—Special Case—All Parties not called—Statute 31 *and* 32 *Vict. c.* 100, *sec.* 63.—Circumstances in which the Court dismissed a special case on the ground that certain persons interested were not parties to it, although the parties to the case craved a judgment as between themselves.

1ST DIVISION. B.

THE late Mr John Mackie, by his trust-disposition and settlement, thus disposed of the residue of his trust-estate.—"Ninth, I appoint my said trustees to invest the whole residue and remainder of my said means and estate hereby conveyed, in heritage, bank stock, or other safe investment, and to convey and make over the same to my daughter, Jane Eliza Mackie, and the children to be procreated of her body, whom failing to the said Isabella Mackie or Murray and the heirs of her body; but declaring that if my said daughter Jane Eliza Mackie shall die without issue of her body she shall have power by any writing under her hand to leave, bequeath, or dispose of one-half of the whole sums, means, and effects hereby specially as well as generally directed to be paid or made over to her, but no more." This residue clause became operative on the death of the truster's widow.

There being a difference of opinion between Mr Mackie's trustees, Mr

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and the said Jane Eliza Mackie, now Mrs Martin, and the trustees under Mr and Mrs Martin's contract of marriage, as to the construction and effect of this ninth clause of Mr Mackie's settlement, a special case was laid before the Court with the following queries:—

"1. Are the first parties, the testamentary trustees of the late Mr Mackie, bound to make over the residue of Mr Mackie's estate directly to Mrs Martin, excluding the *jus mariti* of Mr Martin or any future husband? 2. Are they bound to make it over to Mr and Mrs Martin's marriage-contract trustees, to be held and applied for the purposes, subject to the conditions, and with the powers expressed in the marriage-contract? Or, 3. Are they bound to invest the said residue upon investments or securities taken in favour of Mrs Martin in fee, whom failing, of the children of her body in fee, whom failing, of the said Isabella Mackie or Murray, and the heirs of her body, but with the declarations (1) That, if Mrs Martin shall die without issue of her body, she shall have power by any writing under her hand to leave, bequeath, or dispose of one-half of said residue, but no more; and (2) that Mrs Martin shall not be entitled to disappoint the succession by any gratuitous deed, except in so far as authorised by the above declaration; and in this event must the investments or securities be taken with a power to Mrs Martin, if she shall die without issue, to leave, bequeath, or dispose of one-half of the said residue? Or, 4. Are the trustees of Mr Mackie bound to invest the said residue upon investments or securities taken in favour of Mrs Martin, in liferent for her liferent use only, exclusive of her husband's *jus mariti* and right of administration, and of her children, *nati et nascituri*, in fee?"

Before hearing counsel the Court drew attention to the fact that all persons interested were not made parties to the special case, and continued the case to allow Mrs Murray and her children an opportunity to appear. Intimation of the dependence of the case, with a copy of the papers, was sent to Mrs Murray, and her children, who were in minority.

After a lapse of some weeks the case was again put out for hearing, when no appearance was made for Mrs Murray or her children.

Counsel for the parties to the special case stated that they were desirous of having the question decided as between themselves, and were prepared to undertake any risk there might possibly be of its again being opened up in the interest of Mrs Murray and her children, or their representatives.

LORD PRESIDENT.—The questions which are raised by this special case all depend upon the construction of that portion of the settlement which disposes of residue. "Ninth, I appoint my said trustees to invest the whole residue," &c.—(reads clause quoted, *supra*, p. 621).

The single question on which the disposal of the whole case depends is, whether Mrs Martin is entitled to an unlimited fee of the residue of the trust-estate, or whether she is entitled to a liferent only with a fee to her children, or whether there are interests beyond in the person of her sister, Mrs Murray, and her children, of the nature of a protected succession, which Mrs Martin is not entitled to defeat?

The parties to the special case are, first, the late Mr John Mackie's trustees; second, Mrs Martin and her husband; and third, the trustees under Mr and Mrs Martin's contract of marriage.

Mrs Murray and her children are unrepresented, for it is in vain to say that the trustees under Mr Mackie's trust-settlement represent Mrs Murray and her family. So far as they represent any one in this matter, they represent Mr-

Martin and Mrs Murray, and their respective families,—that is to say, they represent opposite and conflicting interests. No. 107.

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I am, therefore, of opinion that the Court has not the whole parties properly before them, and can pronounce no judgment in this special case.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT accordingly dismissed the special case.

PEARSON, ROBERTSON, & FINLAY, W.S.—BOYD, MACDONALD, & LOWSON, S.S.C.—Agents.

SARAH MASON or JARVIE and HUSBAND, Pursuers.—*Macdonald—Millie.* THE CALEDONIAN RAILWAY COMPANY, Defenders.—*D.-F. Clark—R. Johnstone.* No. 108.

Mar. 18, 1875. Jarvie v. Caledonian Railway Co.

Reparation—Damages—Negligence—Railway Company—It is the duty of a railway company to warn intending passengers of the existence of a block on the line, or other circumstances inferring unusual risk in the journey, before entering into the contract of carriage, and if they fail to do so they may render themselves liable to such passengers for injury caused by accidents, for which otherwise the company would not have been responsible.

1ST DIVISION. Ld. Craighill. M.

THIS was an action of damages at the instance of Mrs Jarvie and her husband, residing in Stirling, against the Caledonian Railway Company for personal injury received by Mrs Jarvie on the night of 19th September 1873, during a journey from Glasgow to Greenock.

On the afternoon of the 19th September 1873 an accident had occurred to a coal train on the Glasgow and Greenock line at Boghead, about a mile west of Paisley, the result of which was to block both lines of rails for a considerable time. Telegraphic intimation of this block was received in Glasgow at about 4 o'clock in the afternoon. Considerable inconvenience and delay was experienced in working the traffic during the remainder of the afternoon and evening, it being necessary to run the trains from Glasgow up to the east side of the block, and there oblige the passengers to get out and walk about 100 yards along the line to the west side of the block, and again enter carriages which had brought passengers from Greenock, who, in like manner, had to walk along the line to the carriages vacated by the passengers from Glasgow.

Mrs Jarvie left Glasgow that evening by the 7 P.M. train for Greenock. The injury she complained of was alleged to have been received by her in getting out of the carriage in which she had travelled when required to change trains at the site of the block.

The case was tried before Lord Craighill and a jury, and a verdict was returned for the pursuers, assessing the damages at £100.

The defenders obtained a rule.

Mrs Jarvie's own evidence was as follows:—"On 19th September 1873 went to Glasgow from Greenock on a visit. Was to return by 7 P.M. train. Went to station. The train did not start at time. Asked one of the porters the reason. M'Kean the name of the porter. He said there had been an accident. I then asked was anybody hurt? He said, no. I asked if line clear. He said it was, and all safe. I replied that if it was not I would rather remain in Glasgow. Another porter was by at the time, and he said, Come, you're all right, here's the train. My sister got a ticket for me. The door of the carriage locked after I got in. The train went a good bit beyond Paisley and then stopped. It would be twenty minutes to twelve when I jumped out. We had left Glasgow at half-past seven. A little before twelve one of the porters told me to jump out. I looked out and said it was too high. He said, Jump out,

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and I'll kep you. Giving him my bag and umbrella, I jumped. He kepped me, and we both staggered, but neither fell. My arm was round his neck. My right foot came to level ground, my left went into a hollow. I felt very ill; something came over me; there came a pain in my left side; I grew sick. I felt I had suffered a shock. The porter then said, Do you see these fires? Go over there. I got to the other train. This train pointed out by a guard. I asked him, how am I to get in? and the guard said, The best way you can. A gentleman helped me in. Got to Greenock at one o'clock. Had got very wet, and felt very ill. Dr Shortridge was called in next morning. Previously I had been very strong. The doctor came daily for some time, Suffered severe pain for some time. Could not say how long; a good while. . . . . I was the first that jumped out. I did not know there were steps on the carriage. I knew there was one step on this carriage. It was a third class. I jumped because the man told me. I did not come down on the step. He did not ask me to go on the step. I did not use the step. I jumped on the ground, trusting to his catching me and keeping me from falling. When I jumped I knew I was to jump to the ground. He did prevent me from falling. . . . ."

On the other hand, M'Kean, the platform porter at Glasgow station mentioned by Mrs Jarvie, denied having told her or any other passenger that the line was clear, though admitting that he did not give them notice that it was blocked, he himself having no certain information on the point.

Mrs Jarvie was unable to identify any of the railway porters as the one alleged by her to have asked her to jump from the carriage, while the railway company denied Mrs Jarvie's statement on this point.

It was further proved that precautions were taken by the railway officials and platelayers engaged at the block for the safety of the passengers, and assistance given in transferring them from one train to the other.

At the hearing on the rule, argued for the pursuers;—The verdict was according to evidence,—for (1) it was not proved that Mrs Jarvie had been made aware of the exceptionally perilous nature of the journey she was undertaking; (2) it was proved that at the site of the accident no sufficient assistance was afforded her to alight and pass from the one train to the other; and (3) she was entitled to rely upon the directions given her by a railway official, and the direction to jump from the carriage, which was so given, was, in the circumstances, most improper, and led directly to the injury she had sustained.[1]

Argued for the defenders;—(1) It was proved that if no special warning was given to Mrs Jarvie at Glasgow before taking her ticket she was, at any rate, aware before getting into the carriage of what had occurred along the line, and received no assurance that the line was clear. Had she desired she might have declined to proceed, and would have received back her fare. (2) That she was invited to jump from the carriage rested entirely on her own statement, unsupported by any other evidence; but even if true, it was so manifestly careless and inconsiderate of her to accept such invitation that she must be held guilty of contributory negligence.[2]

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[1] Foy v. London, Brighton, and South Coast Railway, Jan. 14, 1865, 18 Scott's Common Bench Rep. 225; Potter v. North British Railway Company, June 7, 1873, 11 Macph. 664, 45 Scot. Jur. 413.

[2] Siner v. Great Western Railway Company, May 1, 1868, L. R. 3 Ex. 150, Feb. 9, 1869, L. R. 4 Ex. 117.

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LORD PRESIDENT.—The circumstances of this case are somewhat peculiar, and raise a question of some novelty and importance. The verdict of the jury is challenged on two grounds,—(1) that there is no evidence of fault on the part of the defenders; and (2) that, assuming fault on their part, there was contributory fault on the part of the pursuer.

On the 19th December 1873 there was a block on the defenders' line between Glasgow and Greenock, caused by an accident, which is not attributed to any fault on the part of the railway company, but which produced great disturbance of the traffic. I am not disposed to hold that the occurrence of such a block on their line disables a company from carrying on their traffic. On the contrary, though a certain amount of additional risk must necessarily be incurred, I am disposed to think that the company are entitled, and even bound, to carry on their traffic, even though at inconvenience to themselves, because the entire cessation of all traffic might involve still greater loss and inconvenience to the public. But, then, under such circumstances, the company must necessarily carry on their traffic with great risk to the public. That implies that they must use unusual precaution and care.

Now, it appears to me, that if this railway company start a train under such circumstances, to carry passengers from Glasgow to Greenock, they are bound to let those passengers know the risk attending their journey—the risk which must necessarily attend a journey where the passengers, in order to reach their destination, must change trains at the scene of the accident, must get out of their carriages at a place where there is no platform, walk along the line where it is blocked, and get into fresh carriages at the other side. There is considerable risk attending such an incident in a railway journey, particularly when it occurs at night. There are many persons very ill fitted to encounter such risks, who are yet constant travellers by railway. The old, the infirm, and the nervous are averse to all such risks, and, in the general case, would avoid travelling under such circumstances, and decline to start if they were in full knowledge of what was before them.

The first duty, therefore, that lies upon the company when entering into the contract of carriage, under such circumstances, is to make their passengers fully aware that it is not a usual journey on which they are going to embark, but one of an unusual and dangerous character.

Now, it is proved without a doubt that Mrs Jarvie was not made aware that she was to encounter any such unusual risk. I do not say that it is proved that the railway porter told her the line was clear from Glasgow to Greenock, but there can be no doubt that she was not informed that the line was blocked, and that she would have to run the risks attending the passage from one train to another at the scene of the accident. She declares that if that had been made known to her she would not have gone on her journey, but would have remained in Glasgow, where she had the option of remaining the night with her sister. I see no reason to disbelieve this statement; on the contrary, I think it would have been the most natural thing for her to do.

That the railway company gave no special notice to their passengers of the state of matters along their line amounted, in my opinion, to negligence on their part, which exposed Mrs Jarvie to risks which, in her circumstances, it was quite unnecessary she should run. And if in encountering these risks Mrs Jarvie did receive any injury, they must be held responsible, for this reason,

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that, but for their negligence at the commencement of the journey, she would not have incurred them at all.

But there was another duty incumbent on the railway company, and that was, at the scene of the block to use every reasonable precaution to ensure the safety of the passengers in changing from one train to the other. It is dangerous for most people to get out of a railway carriage at the side of the line without a platform to alight upon, and, therefore, I think the railway company were under obligation to give the passengers assistance in alighting, and that if they failed to do so they were guilty of additional negligence. But, in so far as that part of the evidence goes, the verdict is not so unimpeachable as on the first point. If the case depended upon that alone I should have much greater difficulty in supporting the verdict. The evidence at this point of the case depends entirely upon the pursuer's own statement, for I do not think there are either any witnesses or any circumstances corroborating her testimony. Though the defenders make much of this point now, they did not ask the presiding Judge to direct the jury that the evidence of one witness was insufficient. And I do not think he would have taken a sound view of the law if he had so directed them. This was just a part of the history of the case, of the *res gestæ*, and it is not every fact in a case which requires to be proved by more than a single witness. For my own part I doubt whether there is anything very far wrong in the pursuer's evidence. The place was dark—the light unsteady. To get out under these circumstances where there was no platform was necessarily attended with risk. It is a question whether it was safer to jump into the arms of a porter, or to try and climb down the side of the carriage by means of the steps. That question I do not pretend to decide. It is sufficient for this question that the railway company did not give the pursuer warning of the risk she was to incur in prosecuting her journey, and they are therefore responsible for the injury sustained.

But it is said that there was contributory negligence on the part of the pursuer. Unless, however, it can be said that the jump was any very great mistake and blunder, it can hardly be said that there was contributory negligence on the part of the pursuer any more than that there was negligence on the part of the defenders. But it is not necessary to enter upon that question, because the only evidence on that subject is the evidence of the pursuer, and I do not think it will do to take out of her mouth, as evidence against her, the statement that she did jump, without taking all the circumstances into consideration, and especially her own qualification of the statement, viz., that she jumped, on the invitation of one of the railway officials. If, on his invitation, she did jump, that could not amount to contributory negligence.

Lord Deas.—It is not disputed that there was a block on the line, and that the company's officials at Glasgow knew of it and of its nature at an early hour of the evening in question. I am of opinion that, knowing of that block, and of its nature, it was their duty to have informed intending passengers, at the Glasgow station, of the fact, so that they might go forward or not as they chose. Some might have done so, and some not. Some might have been old or feeble, or lame, or timid. Some might have been children. The burden of proving that notice was given lay on the defenders, and they have not proved it. On the contrary, it appears that no notice was given.

I am further of opinion that it was not necessary for the pursuer to prove that

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if she had received notice she would not have started on the journey. It is probable enough that she would not, but she did not get the opportunity of considering whether she would or not. Through this neglect the railway company took upon themselves an unusual responsibility for what might happen at the scene of the block. They misled the pursuer into an unforeseen position of anxiety and excitement, without the option which they ought to have given her. That being so, a want of coolness and presence of mind on her part, which, in other circumstances, might have founded a plea of contributory negligence, may not do so in the actual circumstances.

If notice had been given, the passengers who, nevertheless, chose to start, would have taken on themselves much of the responsibility of what might afterwards happen, and I should have hesitated very much to hold that there was any such negligence at the scene of the block on the part of the company as to have rendered them liable to such passengers. That, to say the least of it, would have been a very narrow question. But the negligence of the company at the outset of the journey affects the question very deeply, and, taking that into view, I see no ground for disturbing the verdict of the jury.

LORD ARDMILLAN, LORD MURE, and LORD CRAIGHILL concurred.

RULE discharged.

THOMAS LAWSON, S.S.C.—HOPE, MACKAY, & MANN, W.S.—Agents.

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JOHN FERGUSON AND JOHN MAXWELL FERGUSON, Pursuers.—*D.-F. Clark—Asher.*
CHARLES FERGUSON AND OTHERS, Defenders.—*Sol.-Gen. Watson—Keir.*

Liferent and Fee—Heir.—Where an estate was conveyed *mortis causa* to a father in liferent for his liferent use allenarly, and to the heirs-male of his body and other substitutes in fee,—*held* (*rev.* judgment of Lord Craighill) that a fiduciary fee was vested in the father during his life for behoof of his heirs-male and the other substitutes, and that he was not entitled to dispone with the concurrence of his eldest son, who could not be during his father's life, and might never be, his father's heir-male.

Observations on the case of Newlands, April 26, 1798, 3 Ross' L. C. 634.

1ST DIVISION.
Ld. Craighill.
M.

BY disposition and settlement, dated 24th March 1855 the Rev. James Ferguson of Easter Dalnabreck, Perthshire, gave and disponed to and in favour of the pursuer, John Ferguson, his brother, and the heirs-male of his body; whom failing, to the Rev. Donald Ferguson, also his brother, in liferent for his liferent use allenarly, and the heirs-male of his body in fee; whom all failing, his own nearest heirs whomsoever, heritably and irredeemably, the town and lands of Easter Dalnabreck and others.

The granter, on 18th July 1855, executed a codicil in the following terms:—"I . . . do hereby restrict the interest of John Ferguson, within designed, my brother, in the lands and others within disponed to an alimentary liferent in the same manner and to the same effect as if the said lands and others had been disponed to the said John Ferguson in liferent for his liferent use allenarly (such liferent being strictly alimentary, and exclusive of his debts and deeds, and the diligence of his creditors), and to the heirs-male of his body in fee, whom failing, to the substitutes within mentioned, and subject to the burdens and declarations within specified: Moreover (in lieu of the precept of sasine contained in the foregoing disposition, which I hereby recall), I desire any notary-pub-

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lic to whom these presents may be presented, to give to the said John Ferguson, and the heirs-male of his body, in liferent and fee respectively, whom failing," &c.

The granter having died in 1855, John Ferguson entered upon possession of the estate, and was infeft. He had two sons, the elder, John Maxwell Ferguson, and the younger Charles Ferguson. At the date of the settlement John Maxwell Ferguson was about fifteen years of age.

John Ferguson and his eldest son brought the present action against Charles Ferguson and other persons, either named in the settlement, or who might be considered to have an interest under it, in order to have it declared that the father as liferenter, and the son as fiar, were entitled to sell or dispose of the estate either onerously or gratuitously.

The defenders pleaded;—(1) The destination in the disposition and settlement of the deceased James Ferguson, and codicil thereto, being to the pursuer, John Ferguson, in liferent for his liferent use allenarly, the said John Ferguson has only a liferent interest in the lands and others thereby disponed, and holds a fiduciary fee for behoof of those to whom the succession may open at his death, and he has no right or title to execute a conveyance of the fee of said lands and others, and any such conveyance by him is inept. (2) The liferent interest of the said John Ferguson in said lands and others being declared in said codicil to be strictly alimentary, and exclusive of his debts and deeds, he is not entitled to make a conveyance of the same, and any such conveyance is inept. (3) The pursuer, John Ferguson, being still alive, and it being as yet undetermined who may be the persons entitled to succeed to the fee of said lands and others under said disposition and settlement, the pursuer, John Maxwell Ferguson, has no right or title to obtain a conveyance of said lands and others, or to grant a conveyance thereof to a third party, and any such conveyances are inept.

The Lord Ordinary pronounced this interlocutor:—"Repels the defences, and finds, decerns, and declares in terms of the conclusions of the summons: Finds no expenses due to or by either party, and decerns."*

* "NOTE.—This action has been raised to have it found that the pursuer John Ferguson, and his eldest son, John Maxwell Ferguson, representing themselves to be respectively liferenter and fiar of the lands of Easter Dalnabreck, are entitled to dispose of that property at their pleasure. Of course, if both possessed the characters to which they severally lay claim, their right is undeniable. That the pursuer John Ferguson is liferenter the defenders admit, but they deny that the pursuer John Maxwell Ferguson is fiar, and contend that neither he nor any brother of his can be fiar till their father's death. This is the dispute now presented for the decision of the Court.

"The question is raised upon the dispositive clause of a testamentary disposition of the late Reverend James Ferguson, read in connection with a codicil endorsed upon the principal deed. By the principal deed the disponer disponed to the pursuer, John Ferguson, his brother, and the heirs-male of his body, whom failing, to the defender, the Reverend Donald Ferguson, another brother, in liferent, for his liferent use allenarly (and which liferent was declared to be strictly alimentary and exclusive of his debts and deeds and the diligence of his creditors), and the heirs-male of his body in fee, whom all failing, to the disponer's own nearest heirs whomsoever, heritably and irredeemably, All and Whole the town and lands of Easter Dalnabreck. By the codicil the disponer restricted the interest of the pursuer, John Ferguson, 'in the lands and others within disponed to an alimentary liferent, in the same manner and to the same effect as if the said lands and others had been disponed to the said John Ferguson in liferent, for his liferent use allenarly (such liferent being strictly alimentary, and exclusive of his debts and deeds and the diligence of his creditors), and to the heirs-male of his body in fee, whom failing, to the substitutes within mentioned.' The effect of the clause in the disposition and of the clause in the codicil which

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The defenders reclaimed. They argued;—The term "heir" might be restricted by the context, but it could not be extended beyond its proper

have now been presented, when these are read, as they must be read, together, is, in the opinion of the Lord Ordinary, the same as it would have been if in the principal deed the disposition to the pursuer, John Ferguson, and the heirs-male of his body, had been engrossed in the very words employed in the codicil. The pursuers' counsel at the debate demurred to this result, though rather faintly; but upon this point the Lord Ordinary's opinion has been formed without any hesitation, and is now expressed without any doubt. The other question debated, which is truly the question in this case, is far more difficult, and the Lord Ordinary has felt some anxiety as to the decision which ought to be pronounced. His reasons for the judgment he has given will now be explained.

"The question upon which parties are at issue is, as already mentioned, whether, by virtue of the destination to the pursuer, John Ferguson, for his liferent allenarly, and to the heirs-male of his body in fee, his eldest son, the other pursuer, John Maxwell Ferguson, has become fiar of, or in other words has acquired a vested right in the lands of Easter Dalnabreck, his father not being dead. The pursuers maintain the affirmative, and seek to have this declared. The defenders urge the contrary, and ask to be assoilzied from the action. Upon this controversy the Lord Ordinary observes, in the first place, that there is no doubt that by the clause, the effect of which is in dispute, the pursuer, John Ferguson, was constituted fiduciary fiar for behoof of the heirs-male of his body. This was settled once for all in the case of Newlands v. Newlands' Creditors, Ross' L. C., vol. 3 (Her. Rights), p. 634. In the second place, the reasons for which the pursuer, John Ferguson, is regarded as fiduciary fiar are material in this inquiry. Two things had to be provided for. The first was the rule of feudal conveyancing that a fee cannot be *in pendente;* and the other, that the will of the disponer must, so far as legal principles will allow, receive effect. Both requirements were thought to be fulfilled by ascribing to the liferenter allenarly under such a clause the character of fiduciary fiar. Possessed of that, he represents his children unnamed, and, it may be, unborn; and this is the only function, the Lord Ordinary thinks, which, as fiduciary fiar, he performs. In the third place, the duration of the fiduciary fee is not a thing which is defined by the disposition. It may be long, or it may be short; that depends on circumstances, and especially on the time when the true fiar appears. Certainly there is nothing in the constitution of such a trust which suggests that, however soon there may be a son to take, the father is not bound, nay, is not entitled, to make over the fee, but may or must retain it so long as he lives. In the fourth place, as there is a trust, the presumption is that it shall not be kept up after the purpose for which it was constituted has been served. Has the purpose for which the pursuer, John Ferguson, was made fiduciary fiar been accomplished? This must be the result if the reason for his getting the character of trustee was that he might represent the true fiar till the latter appear. In the fifth place, the use of the words 'heirs-male of the body,' in the clause in question, does not necessitate the result for which the defenders contend. No doubt we do not usually seek for a man's heirs before he is dead, but when we put off the search till that time, we look for them in the end, that they may inherit property which he has left. Here the fee does not belong to John Ferguson. All he can do by dying is to disburden the fee of his liferent. The fiar, take the fee when he will, takes that which had belonged to none but him since the death of the disponer. And why, the trust not being created to postpone a vesting, or to protect for a time the contingent interests of ulterior beneficiaries, is there to be no fiar, no vesting of the fee till the death of the liferenter? The Lord Ordinary is at a loss to imagine a reason for such an anomaly. In the sixth place, it seems to have been assumed, in the case of Newlands v. Newlands' Creditors, that there was a vesting of the fee in the true fiar in the lifetime of the liferenter and fiduciary fiar. The eldest son, as heir-male of the body of his father—for he had no other character in which he could sue—was the litigant with his father's creditors, and his title was not objected to; but, if the contention of the defenders be sound, all that the son had was a *spes succes-*

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meaning so as to apply to a person who was not an heir, otherwise a person might be served heir to his own heir.[1]

The pursuers argued;—The question was one of intention. The disponer had restricted John Ferguson's right to a mere liferent, and nothing but the exigencies of feudal conveyancing had given rise to the legal fiction of a fiduciary fee. In any view the fee was merely fiduciary, and when a male child was born he became the sole beneficiary under the trust. To suspend the vesting of the beneficial interest would be as much at variance with the principles of feudal conveyancing as to keep a fee *in pendente*. The natural construction of the conveyance was to the father in liferent, and his eldest son in fee. The term "heir" was used in this general sense.[2]

At advising,—

LORD ARDMILLAN.—This action has been brought by John Ferguson and his son, and their object is to have it found that the one as liferenter and the other as fiar have right validly to convey, onerously or gratuitously, certain lands. Now, the question is, what were the rights of the parties under the disposition and settlement of the Rev. James Ferguson, executed in 1855, and the relative codicil executed in the same year. These two documents, the deed and codicil, must be read together. By the deed of settlement the Rev. James Ferguson conveyed the lands in question to his brother, John Ferguson, and the heirs-male of his body, and then to certain others. The codicil is in these terms:—"I . . . . . do hereby restrict the interest of John Ferguson, within designed, my brother, in the lands and others within disponed to an alimentary liferent in the same manner and to the same effect as if the said lands and others had been disponed to the said John Ferguson in liferent, for his liferent use allenarly (such liferent being strictly alimentary, and exclusive of his debts and deeds, and the diligence of his creditors), and to the heirs-male of his body in fee, whom failing, to the substitutes within mentioned, and subject to the burdens and

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sionis. This is not the view taken by any one in that case, and the words now to be quoted express the opinion of Lord Braxfield upon the point:—'It is said, where is the fee after the father's death, and during the son's life before the son has children? I have no difficulty in answering that. There was here a fiduciary or trust fee in the son for behoof of the children of the son when they should exist. This is a mere trust, no more than a name, as a fee cannot be *in pendente;* but the moment children of the son exist the fee is in them.' This passage will be found at page 644 of vol. 3 of Ross' L. C. (Her. Rights). The Lord Ordinary will only add that the destination or clause of disposition in Newlands' case was similar to that with which we have here to do, being to 'the said John Newlands in liferent for his liferent use allenarly, and to the heirs lawfully to be procreated of his body in fee.'

"Lastly, the view of the case to which effect has been given is supported so far by the decisions and the opinions delivered in the case of Douglas v. Thomson, 7th January 1870, 8 Macph., p. 374. The destination of the fee no doubt in that case was to children, and not to heirs or heirs-male of the body of the liferenter; but this, in so far as the application of a principle is concerned, is a distinction without a difference."

[1] Ewart v. Cottom, Dec. 6, 1870, 9 Macph. 232; M'Kinnon v. Macdonald, Feb. 14, 1765, M. 5279; Preston Bruce, March 6, 1874, *ante*, vol. i. p. 740.

[2] Erskine's Inst. iii. 8, 38; Todd v. Mackenzie, Jan. 18, 1874, *ante*, vol. i. p. 1203; Martin's Trustees v. Milligan, Dec. 24, 1864, 3 Macph. 326, 37 Scot. Jur. 155; Pearson v. Corrie, June 28, 1825, 4 S. 119; and the cases cited in the Lord Ordinary's note.

declarations within specified: Moreover (in lieu of the precept of sasine contained in the foregoing disposition, which I hereby recall), I desire any notary-public to whom these presents may be presented to give to the said John Ferguson, and the heirs-male of his body, in liferent and fee respectively, whom failing," &c. The effect of this codicil would be to restrict the right of John Ferguson to a liferent even if, at the date of the deed, he had had no children. But at the date of the deed John Maxwell Ferguson, the son, must have been alive. This appears from several statements on the record, and I understand that the fact is so, and that there is no doubt about it.

I shall first take the case as one depending on the granter's intention. Was it meant that John Maxwell Ferguson should, from the granter's death, be fiar. He was alive when the deed was made, and he could have been named. It is a reasonable presumption that if the granter had intended to make him fiar he would have named him in the deed. The conveyance would in that case have been otherwise expressed. But, being to John Ferguson in liferent allenarly, and the heirs-male of his body in fee, it cannot be ascertained who succeeds as heir-male of the body in fee until the death of John Ferguson. It is quite possible that he might die without heirs of his body; that he may still die without heirs of his body. But if you suppose that the fee vested in John Maxwell Ferguson during his father's lifetime, then if he, being the only son, should die before his father, the father would succeed to the fee, and so would be entitled to break in on the investiture, and to cut out the other persons substituted in the deed. Yet the father is unquestionably only liferenter, and he cannot take the fee under this conveyance. Viewing the case as one of intention, I think the deed cannot be read as conferring an immediate fee on John Maxwell Ferguson.

But it is said that we are compelled to come to this result by the principles of feudal law. This has been very ably argued. But I am not convinced by it.

The case of Newlands, as reported in Ross' Leading Cases, has been referred to. But that case was not intended to decide a point like the present. It was a case with creditors, attaching the interest of a liferenter with a fiduciary fee. It is difficult to understand what the meaning of Lord Braxfield was—"I hold that a fee cannot be *in pendente* by the law of Scotland, either in heritable or moveable subjects. It is said, suppose a subject was abandoned, derelinquished, there would be no fee. I deny that. It remains with the person who abandons during his life, and is in his *hæreditas jacens* after his death, and there it must remain till regularly taken up by heirs, or attached by creditors. No length of time can, by the law of Scotland, give a right by negative prescription, if not acquired by positive prescription. But that will not determine this case; for there is another principle that must have effect, that where the intention of the maker of the deed appears, that must have effect; but then every man must be presumed to know that in law a fee cannot be *in pendente*, and therefore where a conveyance is by a father to a son in liferent, and children to be born in fee, no more is given to the children than a *spes successionis*, and the solid right of liferent and fee is in the father, who may spend and dilapidate the subject, and disappoint the children. But this is a different case. Here it is given to the son for his liferent use allenarly, which makes this a mere trust in the father, and gives the son the fee, and the father a liferent, and no more. A father may make his son a trustee as well as a stranger. A trustee's debts cannot affect the trust-estate, no more can the son's debts here, where the estate is conveyed for his liferent use allenarly. Therefore the creditors of Newlands cannot affect this

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estate, nor have they reason to complain, as if they had looked into their debtor's right they must have seen that he had nothing but a liferent. It is said, where is the fee after the father's death and during the son's life, before the son has children? I have no difficulty in answering that. There was here a fiduciary or trust-fee in the son for behoof of children of the son, when they should exist. This is a mere trust, no more than a name, as a fee cannot be *in pendente*; but the moment children of the son exist the fee is in them." Until you come to these last words there is nothing contrary to the view here taken by the defenders, and these words are not necessary for the decision of the point involved in the only question raised between the parties in the case of Newlands. But I must also say, that although highly appreciating the ability and industry of Mr Ross, I am not quite satisfied that Lord Braxfield used the precise words attributed to him, and a slight variation of expression would materially alter the meaning. The case is of high authority in other respects. It decided that in a conveyance to a parent in liferent, for his liferent use allenarly, and to his children *nascituri* in fee, the parent has a liferent only, and a fiduciary fee, for behoof of the children,—not a fee which could be attached by his creditors. But the point now before us was not even raised, and certainly was not decided, in the case of Newlands. This is a case of succession as heir-male of the body of the liferenter. But is there an heir-male of the body of the liferenter till the date of his death, when, and not previously, it appears who is his heir-male of the body? That is a very different question from any raised in the case of Newlands.

We had lately a case more in point than the case of Newlands. That was the case of Todd v. Mackenzie. In that case the point here raised, and to which I am now adverting, was considered by the Court, and your Lordship in the chair disposed of the question on principle; and your Lordship's opinion is clearly expressed. Concurring in it entirely, I quote a part of it. "The destination is, failing the heirs of the body of Janet Todd or Mackenzie, to the nearest heirs whomsoever of John Todd; and it is maintained that as soon as Mrs Mackenzie died without issue and without having disposed of the estate, it passed in terms of the destination to the nearest heir of John Todd. To this there is a double answer made by the defender, (1) that the destination was exhausted when Janet Mackenzie died, because Mr Todd being then alive there were no heirs of Mr Todd in existence, and could not be, and therefore the destination, although it had not run out in the proper sense, had lapsed and become unavailing, and consequently the estate passed to the heir-at-law of Mrs Mackenzie. But, secondly, they contend that, suppose the destination is to be held as not exhausted or become void, then it must be read as if it contained the name of John Todd himself, because it is unreasonable to suppose that the parties could intend that the heir of John Todd should take in preference to John Todd himself if he was alive when his daughter died." Farther on your Lordship observed,—"But we cannot possibly give effect to that intention, because what is sometimes called the logic of facts prevents it. The fact is undoubted—John Todd is alive, and therefore the event that is contemplated by the parties has not occurred, but the very opposite has occurred." "We must construe this destination according to its true legal construction, and the question comes to be, whether, when Janet Mackenzie died, without issue, and without disposing of the estate, there was anybody in a position to serve heir of provision to her in the character of the next-heir of John Todd. Now, it appears to me that there was not. I do not think anybody can fulfil the part of a man's heir during that

man's lifetime. A man's heir has no existence until he dies, and it never can be ascertained, till he dies, who will be his heir." Upon this broad ground, so well explained by your Lordship, that the heir-male of the body of John Ferguson could not serve heir, and cannot be ascertained to be heir, till the death of John Ferguson, I think that this case may most safely and satisfactorily be decided.

The fee had not vested in John Maxwell Ferguson when he, professing to be fiar, granted a disposition. If he were now held to be fiar, and to be entitled to dispose of the estate, and if he should predecease his father, he might by gratuitous disposition defeat the right of the person who was, at John Ferguson's death, really entitled to the character of heir-male of the body of John Ferguson.

I am of opinion that, both in respectof intention and in respect of feudal principle, that result cannot be sanctioned.

LORD DEAS.—I agree with the Lord Ordinary that we must take the destination in the codicil as substituted for the destination in the deed. Taking it so, the lands are to be held as disponed to John Ferguson in liferent for his liferent use allenarly (such liferent being strictly alimentary and exclusive of his debts and deeds, and the diligence of his creditors), and to the heirs-male of his body in fee, whom failing to the granter's brother, Donald Ferguson, in alimentary liferent, for his liferent use allenarly, and the heirs of his body in fee, whom failing to the granter's own heirs whomsoever. The question is, whether the eldest son of John Ferguson is fiar during his father's lifetime in such a sense as will enable him, with consent of the father as liferenter, to dispone the property onerously or gratuitously at their pleasure.

I am of opinion that John Ferguson is fiduciary fiar for behoof of whoever may become entitled to the beneficial fee, and that the first beneficial fiar will be John Ferguson's eldest son, John Maxwell Ferguson, if he survives his father, but that whether he will or will not be the heir-male of his father's body, and consequently the beneficial fiar, cannot be ascertained till his father's death. If he predeceases his father without male issue, leaving a younger brother who survives his father, that younger brother will be the heir-male of the body under the destination. A question of feudal rights can never be safely determined without considering how, according to established practice, a feudal title would fall to be made up. Here the appropriate course would be to serve the son as heir-male of the father's body, and thereby heir of provision of the granter of the deed. But in such a service the first step would be to prove the death of the father. It would be a novelty to find the father alive and perhaps present at the service of his own heir-male. If the fiar had been described as the liferenter's eldest son (although not named) the effect might have been different. A declarator might have ascertained that A B was the eldest son. But it could not be ascertained by a declarator that A B is the heir-male of his father's body in his father's lifetime, because this would not be the fact.

I agree with Lord Ardmillan that the observations attributed to Lord Braxfield in the case of Newlands cannot be safely assumed to have been actually used by his Lordship, or used in a sense applicable to this case. They would have been foreign to anything he had to consider in the case before him. The father was bankrupt, and the question was whether the subjects should be struck out of the schedule of the property to be sold for his debts. The son, supposing the beneficial fee had not then vested in him, had a sufficient contin-

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gent interest to raise that question, and it was enough to warrant the subjects being struck out that the subjects were in no view the property of the father.

The granter in the present case was, of course, quite entitled to postpone the vesting of the beneficial fee, and he did so. He satisfied the legal rule that a fee cannot be *in pendente* by creating a fiduciary fee. His destination of the beneficial fee is no doubt to be regarded as a question of intention, but the intention is to be ascertained by construing the words used according to legal rules. No other principle can be safely admitted in a question of heritable rights.

It is satisfactory, however, to see that the true intention of the granter must really have been that which the law attributes to him. It appears that the son who claims the beneficial fee was in existence and past pupillarity at the date of the deed. The granter was evidently familiar with the state of the family, and if he had wished to give a present fee to the son the familiar course was (as every conveyancer knew) to have conveyed the subjects to the father in liferent allenarly, and to the son *nominatim* in fee. But in place of this the granter, failing an heir-male of the father's body, destined the beneficial fee to a succession of other substitutes,—creating in fact a sort of tailzied destination.

My opinion is that the beneficial fee has not yet vested in the son, and consequently that, although with the father's consent, he cannot at present deal with the estate.

Lord Mure.—I concur with your Lordships in holding that, under the destination in this deed of settlement, the words "heirs-male of his body" must be held to mean the heirs-male at the date of the death of John Ferguson, the liferenter, and that the defenders are therefore entitled to be assoilzied from the conclusions of the action. That, I think, is the fair natural meaning of the words; and in the passage from Ersk. iii. 8, 38, referred to in the argument, it is expressly laid down that where, in a marriage-contract, an heritable subject is provided to the heirs-male of the marriage, and a special provision is granted to a daughter, failing such heirs-male, the daughter is entitled to it although a son should exist of the marriage, unless he shall also survive the father; and the reason given for this is, that "one cannot with any propriety be called heir while the ancestor to whom he ought to be heir is alive." Now, although this is laid down with reference to a marriage-contract, the heirs under which, Mr Erskine says, are, in the ordinary case, more favourably regarded than heirs substituted in a simple destination, the reason given, viz., that a party cannot with propriety be called heir while the ancestor is alive, seems to me to apply with equal force to the present case; and such appears to have been the view taken of the meaning of the word "heirs" in disposing of the case of Todd v. Mackenzie, which has also been referred to. I am therefore of opinion that the same rule ought to be here applied; and in coming to this conclusion I do not think that we are in any respect trenching on the decision in the case of Newlands referred to in the Lord Ordinary's note. For there the destination was in some respects different, and there was no decision, as I read the case, that the fee belonged to the eldest son, to the extent of being subject to his immediate disposal, but simply that he had an interest, and was entitled, to object to the fee being sold under the ranking for behoof of the creditors of his father, the liferenter, by whom it was appointed to be held in trust for the benefit of his children.

But, apart from the strict meaning of the words used, there are, I think, in the circumstances of the present case, pretty distinct indications of intention on the

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part of the testator that the fee of the estate was not to vest in any of the heirs-male of John Ferguson, the liferenter, during his life, so as to be at their absolute disposal even with his concurrence. The destination is not to children *nascituri*, but to the "heirs-male of the body" of the liferenter. Now, at the date of the execution both of the deed of settlement and of the codicil, John Maxwell Ferguson was in existence. If therefore it had been the intention of the granter to endeavour to vest an immediate fee in him, when he made the alteration on the terms of the original destination in favour of "John Ferguson, and the heirs-male of his body," and restricted the right of John Ferguson to one of liferent allenarly, his course was to have conveyed the estate to John Maxwell Ferguson *nominatim* in fee. But he did not adopt that course. He created a fiduciary fee in the person of John Ferguson for behoof of the "heirs-male of his body," and the other substitutes called by the destination, thereby, I think, shewing, regard being had to the ordinary meaning of the words used, that the intention was to settle the fee of the estate, not absolutely upon John Maxwell Ferguson, the heir-male then in existence, but upon the heir-male who might be in existence at the date of the liferenter's death.

LORD PRESIDENT.—The conveyance which we have to construe is "to the said John Ferguson in liferent for his liferent use allenarly, such liferent being strictly alimentary, and exclusive of his debts and deeds, and the diligence of his creditors, and to the heirs-male of his body in fee, whom failing," to certain substitutes mentioned. Now, one thing is beyond dispute, that while there is no person in existence who takes the fee, there is a fiduciary fee in the liferenter, even in a case when he has a liferent of a limited kind. But the question here is whether under this destination a person entitled to take the fee can come into existence during the lifetime of John Ferguson. I agree with all your Lordships that no such person can come into existence, and I do not think the case is attended with any difficulty. There is no other part of the deeds referred to as explaining the dispositive clause, and so the intention of the granter must be gathered from the dispositive clause alone. The words are of common use and well ascertained meaning. "Heir-male of the body" is a person who cannot be ascertained until the death of the liferenter. One can quite understand that when words, such as "children," which have a flexible meaning, are used, the granter's intention may be gathered from other parts of the deeds. But here there is no reason why we should give to the words used any meaning but the ordinary one. The destination is to a father in liferent, and to his heir-male of the body in fee. There must be a fiduciary fee for some time, and there is no reason why it should not subsist till it has been ascertained who the heir-male of the body of John Ferguson is, and that cannot be ascertained till John Ferguson's death.

The Lord Ordinary has been misled by the case of Newlands. He thinks that according to the view of the defenders the heir-male of the body would have had no title to sue in the case of Newlands. But that case was a ranking and sale, and the estate, which the father only liferented, was subject to a destination which gave the eldest son an interest to object although he was not fiar. I must say that I have some doubts whether the observations attributed to Lord Braxfield are authentic. They have been collected by Mr Ross from MS. notes on Lord Elphinstone's session papers. It would be strange if on such observations so recorded we were to found our judgment. Therefore I cast the *dicta* altogether aside.

I am of opinion that the Lord Ordinary's interlocutor should be recalled.

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THE COURT pronounced this interlocutor:—"Recall the said interlocutor, sustain the defences, and assoilzie the defenders," &c.

M'EWEN & CARMENT, W.S.—PEARSON, ROBERTSON, & FINLAY, W.S.—Agents.

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JAMES WILLIAM GAMMELL KENNY, Pursuer.—*D.-F. Clark—Asher.*
MRS ROSA ANN BERTRAM OR GAMMELL OR TAYLOR AND HUSBAND AND OTHERS, Defenders.—*Sol.-Gen. Watson—Lee.*

Entail—Destination—Entail by two Deeds—Fetters.—A proprietor entailed his estate upon A, and the heirs-male of his body, and a series of substitutes, reserving to himself power to revoke and alter by any writings under his hand, "which writings shall be taken as a part of the present deed of entail, and shall be as effectual" "as if the same had been inserted herein." In a subsequent deed the granter revoked the destination in the former deed in so far as regarded the substitutes following the heirs-male of the body of A, and disponed the estates to A, and the heirs-male of his body, and a series of substitutes entirely different from those in the deed of entail. The second deed contained an obligation to infeft A, whom failing, &c., "in manner and on the terms specified in the previous deed of entail," with and under the burden of the provisions, conditions, restrictions, limitations, clauses irritant and resolutive, expressed in the said deed of entail, and an assignation to the procuratory and precept in the deed of entail. The deed further contained a declaration that the institute and substitutes should be entitled to possess the estates on the deed of entail and these presents, and on no other title whatever. The entailer recorded the deed of entail, and A recorded the deed of revocation and new destination in the Register of Entails, and completed a title by infeftment and crown charter of confirmation, each bearing to proceed upon both the entailer's deeds.

In a question *inter hæredes, held*, in accordance with the Countesswells case,[1] that the deed of 1823 must be read as a new and substantive conveyance, superseding that in the entail of 1816, and free from the fetters of an entail.

Question, whether, after the passing of the Rutherfurd Act, the distinction between questions under entails with creditors and questions *inter hæredes* could any longer be maintained.

Entail—Fetters.—A deed of entail cannot effectually impose fetters by reference to another deed.

1ST DIVISION. Ld. Mackenzie. M.

JAMES GAMMELL of Countesswells, on the narrative that his then deceased son, Lieutenant-General Andrew Gammell, left four sons, William, James, Andrew, and Ernest Gammell, and four daughters, Martha, Mary, Margaret, and Jessie Gammell, executed a deed of entail of his estate of Portlethen, dated 15th March 1816, containing this destination,—"I hereby, with and under the burden of the declarations, reservations, provisions, restrictions, limitations, conditions, and clauses irritant and resolutive after specified, give, grant, alienate, and dispone to and in favour of myself in liferent, and to the said Ernest Gammell and the heirs-male of his body in fee; whom failing, to the said Andrew Gammell, son of the said Lieutenant-General Andrew Gammell, and the heirs-male of his body; whom failing, to the said James Gammell, also son of the said Lieutenant-General Andrew Gammell, and the heirs-male of his body; whom failing, to the said William Gammell, and the heirs-male of his body; whom failing, to the heirs-female of the body of the said Ernest Gammell; whom failing, to the heirs-female of the body of the said

[1] Gammell v. Cathcart (Countesswells entail), Nov. 13, 1849, 12 D. 19, and 21 Scot. Jur. 593, and H. L. Dec. 13, 1852, 1 Macq. 362, and 25 Scot. Jur. 146.

Andrew Gammell, son of the said Lieutenant-General Andrew Gammell; whom failing, to the heirs-female of the body of the said James Gammell, also son of the said Lieutenant-General Andrew Gammell; whom failing, to the heirs-female of the body of the said William Gammell; whom failing, to the said Martha Gammell and the heirs-male of her body; whom failing, to the heirs-female of her body; whom failing, to the said Margaret Gammell and the heirs-male of her body; whom failing, to the heirs-female of her body; whom failing, to the said Mary Gammell and the heirs-male of her body; whom failing, to the heirs-female of her body; whom failing, to the said Jessie Gammell and the heirs-male of her body; whom failing, to the heirs-female of her body; whom failing, to my own nearest heirs whatsoever."

The deed of entail contained all the clauses and fetters of a strict entail directed against Ernest Gammell, as well as against the heirs of entail substituted to him, as also an obligation to infeft, and a procuratory of resignation and precept of sasine. (Quoted in the opinion of Lord Deas, p. 642.)

The deed of entail was further granted "with and under this condition, that the said Ernest Gammell and the whole heirs of entail appointed to succeed to him in the order above specified shall take and possess the lands and estate above written upon this deed of entail only, and upon no other right or title whatever, and that they shall use any other right which they may happen to acquire thereto as additional and collateral titles thereto, for strengthening and supporting the deed of entail only, and for no other purpose whatever."

The deed contained this reserved power of alteration,—"But saving and reserving nevertheless full power and liberty to me, at any time in my life, and even on deathbed, not only to alter the said course and order of succession as to the said Ernest Gammell, and all the heirs of entail before specified, and to revoke or alter all or any of the conditions, provisions, restrictions, irritancies, and others before written, and to revoke this disposition in whole or in part at my pleasure, but also to sell, alienate, wadset, or dispone the said lands and estate, or any part thereof, or contract debts thereon, or even gratuitously to dispose thereof as I think proper, and likewise to empower and authorise the said Ernest Gammell, or any of the said heirs of entail, or any other person or persons whom I shall please to name, to suspend or dispense with the foresaid conditions, restrictions, and irritancies, or any of them, after my death, in the same manner as I could have done during my life, all which revocations or alterations so to be made by myself, or any other person so to be appointed by me as aforesaid, shall be made and done by writing under our several hands respectively, which writing or writings shall be understood and taken as a part of this present deed of entail, and shall be as effectual to all intents and purposes as if the same had been inserted herein."

The deed of entail was registered by the entailer himself in the Register of Tailzies on 9th July 1816.

In virtue of the reserved power above narrated, James Gammell, on 16th April 1823, executed a "deed of revocation of nomination of heirs of entail to Portlethen, and new disposition to heirs of entail to that estate."

Proceeding on the narrative of the original deed of entail and of the reserved power of alteration and revocation, this deed declared,—"And whereas I have now resolved to alter the foresaid course and order of succession, in so far as regards the said Andrew Gammell, James Gammell, William Gammell, Martha Gammell, Margaret Gammell, Mary Gammell, Jessie Gammell, and the heirs-male and female of their bodies, I have

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therefore revoked, and do hereby revoke, the foresaid disposition and deed of entail in so far as the same is granted in favour of the said Andrew, James, William, Martha, Margaret, Mary, and Jessie Gammell, and the heirs-male and female of their respective bodies, and in their place I do hereby nominate and substitute the persons after named, and I do by these presents give, grant, alienate, and dispone to and in favour of myself in liferent, and to the said Ernest Gammell, son of the said deceased Lieutenant-General Andrew Gammell, in fee, and the heirs-male of his body, whom failing, to the heirs-female of his body; whom failing, to William Gammell Kenny (the pursuer) youngest son of Mrs Mary Geils or Kenny and the late Kenny, her husband, and the heirs-male of the body of the said William Gammell Kenny—(Here follows a series of heirs differing entirely from that in the entail of 1816)—whom all failing, to the heirs whomsoever of the person who shall die last infeft and in possession of the said lands and estate of Portlethen in virtue of the foresaid deed of entail and of these presents . . . All and Whole—(Here follows description of lands)—and I bind and oblige me to infeft and seise myself, and the said Ernest Gammell, son of the said Lieutenant-General Andrew Gammell, whom failing, the heirs of entail hereby substituted to him as aforesaid, in the foresaid lands, in manner and on the terms specified in the foresaid deed of entail, with and under the burden of the provisions, conditions, restrictions, limitations, declarations, clauses irritant and resolutive, expressed in the said deed of entail, all which clauses I hereby confirm and do hereby assign to my said disponees and heirs of entail in their order, the procuratory of resignation and precept of sasine and whole other clauses in said deed of entail; declaring that the said Ernest Gammell, and the persons substituted to him as aforesaid shall be entitled to possess the said lands under the foresaid deed of entail and these presents, and upon no other right or title whatever, and also that the said Ernest Gammell, son of the said Lieutenant-General Andrew Gammell, and the heirs of entail hereby substituted to him in the order before mentioned, shall be obliged to record these presents in the Register of Taillies, as also in the Books of Council and Session, in case the same shall not have been done by myself."

James Gammell, the entailer, died on 15th September 1825, and this deed of revocation was recorded in the Register of Tailzies in 1828. He was survived by Ernest Gammell, who completed his title in 1830 to the estates of Portlethen, by taking infeftment upon the precept in the deed of entail. The instrument of sasine in his favour narrated the deed of entail and whole conditions and provisions, and clauses prohibitory, irritant, and resolutive therein contained, and also the deed of revocation and nomination. He thereafter, in the same year, obtained a charter of confirmation under the Great Seal confirming the deed of entail, deed of revocation and nomination, and instrument of sasine in his favour. Ernest Gammell continued during his life to possess the estate of Portlethen under the titles made up by him as above specified. He died on or about 23d February 1855 without issue.

Previous, however, to his death, being advised of the invalidity of the entail and deed of revocation under which he had made up his titles, he executed a disposition of the estate of Portlethen to and in favour of himself and the heirs-male of his body; whom failing, to the heirs-female of his body; whom failing, to Mrs Rosa Ann Bertram or Gammell, his wife, and her heirs and assignees whomsoever.

Mrs Gammell, after her husband's death, was on 2d July 1855 served

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nearest and lawful heir of provision to him, and was on 12th July 1855 infeft in the estate.

In 1857 she was married a second time to Mr James Taylor, in contemplation of which marriage she, on 19th August 1857, conveyed the estate to trustees, who held it at the date of this action.

The pursuer, Colonel James William Gammell Kenny, named in the deed of revocation William Gammell Kenny, brought this action of reduction of the disposition by Ernest Gammell of 23d December 1852, and the deeds which had followed thereon, as in contravention of the deed of entail and the deed of revocation, calling as defenders Mrs Rosa Ann Bertram or Gammell or Taylor, and her husband James Taylor, and the trustees under her trust-disposition of 1857.

The pursuer pleaded;—2. As the late Ernest Gammell held the estate subject to the fetters of a valid and effectual entail, constituted by the said deeds of 1816 and 1823, the disposition executed by him in 1852, being the writ first called for, was executed in contravention of the entail, and the pursuer, as heir of provision to the said Ernest Gammell under the said deeds, is entitled to have the same reduced and set aside.

The defenders pleaded;—3. The pursuer is not entitled to have the disposition executed by Ernest Gammell in 1852 reduced or set aside, in respect that Ernest Gammell did not hold the estate thereby conveyed under the fetters of a valid and effectual entail, or under any title effectually prohibiting him from executing such disposition. 4. The pursuer is not entitled to claim the estate, or to set aside the titles of the defenders in so far as these depend upon the entail of 1816 (1) in respect that said deed was revoked, and the conveyance of the lands therein contained was superseded by the new disposition of the estate contained in the deed of 1823; and (2), and *separatim*, in respect that the pursuer is not called to the succession by, and that he has no *jus crediti* under said deed of 1816. 5. The pursuer is not entitled to claim the estate, or set aside the defenders' titles in so far as these depend upon the deed of 1823, in respect that said deed was a new and substantive disposition of the entailed estate by James Gammell of Countesswells, and that it does not contain the prohibitory, irritant, or resolutive clauses in terms of the Act 1685, c. 22. Separately, The attempted assignation by James Gammell in the deed of 1823 of the procuratory of resignation and precept of sasine in the deed of entail of 1816 was wholly inept, and the disponees and substitutes called to the succession by the deed of 1823 could not competently use said assignation as a means of obtaining infeftment in the said estate under the fetters of the entail of 1816. 6. *Esto* that so far as regarded Ernest Gammell the entail of 1816 remained unrevoked, and that his infeftment was a valid infeftment under that deed, the pursuer is not entitled to prevail in this action, in respect that the destination contained in that deed in favour of all the heirs called to the succession after Ernest Gammell and the heirs of his body was effectually revoked by the deed of 1823, and that, as Ernest Gammell died without issue, the estate was effectually transmitted to his wife by his disposition of 1852.

The Lord Ordinary, on 1st December 1874, pronounced this interlocutor:—"Repels the reasons of reduction, assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses."*

* "NOTE.— . . . The Lord Ordinary is of opinion that this case must be decided on the principles given effect to in the case of Gammell v. Cathcart, 13th November 1849, 12 D. 19, and 1 Macqueen, 362.

"James Gammell was the granter of two deeds which formed the subject of decision in that case with reference to the estate of Countesswells. These two

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The pursuer reclaimed.

Argued for him;—The case of the Countesswells entail[1] was quite different. The deeds are similar to those granted by him in the present case with reference to the estate of Portlethen, having been prepared by the same conveyancer, and evidently on the same style. The second deed in both cases was executed on the same date. The only difference between the two sets of deeds is that in the Countesswells entail James Gammell revoked by his second deed the nomination of the institute and whole substitutes, with the exception of the nomination in favour of Andrew Gammell, the third substitute, and the heirs-male and female of his body, whereas by the second deed in the present case he revoked the entail of Portlethen in so far as the same is granted in favour of the whole persons substituted to Ernest Gammell, the institute, and the heirs-male and female of his body. The Lord Ordinary is of opinion that this variation between the two sets of deeds does not afford any sufficient grounds for pronouncing a decision in the present case different from that which was pronounced with regard to the Countesswells entail.

"Here there are two distinct deeds,—the first containing the fetters of entail and the other an unlimited conveyance, with a mere reference to the fetters as contained in the first deed. There is no conveyance or substitution in the first deed *hæredibus nominandis*, and the pursuer and the other persons substituted to him in the second deed do not take under the disponing words and fetters of the first deed as heirs of entail nominated in virtue of such a conveyance or substitution. The pursuer founded strongly upon the clause in the first deed reserving power to alter and gratuitously dispone, and declaring that all such alterations shall be understood and taken as part of that entail, and shall be as effectual as if inserted therein, and upon the clause in the second deed declaring that the institute and substitutes shall be entitled to possess the estate under the said entail and that second deed, and upon no other right or title whatever. That no doubt shews that it was the intention of the entailer that the two deeds should together make an entail as effectual as if the whole had been contained in one deed. But such an intention cannot make an effectual entail. The disposition of 1823, in favour of the pursuer and the other persons substituted to him, contain none of the fetters, and these fetters cannot be applied by reference to them as contained in the disposition and taillie of 1816, which is a separate deed. The pursuer has no right of succession, and is not an heir of tailzie under that deed of 1816. He has, therefore, the Lord Ordinary considers, no right to the benefit of the fettering clauses of that deed, or to insist in the present action.

"The Lord Ordinary is of opinion that the disposition of 1823, containing as it does a new and substantive disposition of the estate in favour of the institute and the heirs-male and female of his body, and of an entirely new set of substitutes, and an assignation in favour of the whole of these parties in their order, to the procuratory and precept inserted in the entail of 1816, entirely superseded the disposition in the deed of 1816, and constituted a new grant and title, and that Ernest Gammell was entitled to take the estate of Portlethen under that new grant as a fee-simple proprietor, seeing that it contains no fettering clauses.

"The case of Porterfield v. Stewart, 8 Shaw, 16, 5 W. and S. 517, does not, the Lord Ordinary thinks, apply, because the first deed in that case contained not only a power to alter the succession but also a substitution *hæredibus nominandis*, and the second deed contained no new disposition of the estate conveyed by the first deed, but only an alteration of the succession and nomination of heirs. That deed of nomination accrued to and became part of the first original deed. And the heirs thereby named were held to take under the conveyance in the original entail, with all its fetters, as heirs named under or in virtue of the substitution *hæredibus nominandis*. Without such a substitution a nomination would have been inoperative. In the present case there is no such substitution in the entail of 1816, and the deed of 1823 is not a deed of nomination, but a new and substantive disposition."

[1] Gammell v. Cathcart, Nov. 13, 1849, 12 D. 19, 21 Scot. Jur. 593, H. L. Dec. 13, 1852, 1 Macq. 362, 25 Scot. Jur. 146.

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ferent from the present. In that case a new disposition to the new institute was required, for without it he could not take up the estate. He was only a substitute heir under the original entail, and the whole destination was revoked in order to make him institute under the new destination. By the deed of alteration the feudal effect was entirely withdrawn from the original deed, and the new institute, Andrew Gammell, could only take up the estate with the assistance of the deed of alteration. In the present case the institute, Ernest Gammell, required no assistance from the second deed in order to make up his title. He was institute under the original entail, and remained so. The second deed revoked the destination to the substitutes after him and his heirs-male contained in the first deed, and replaced them by a new series of substitute heirs. But it left the destination to him and his heirs-male standing. It might be that it failed to place the new substitutes under the fetters of the entail. But it in no way removed those fetters from the institute and his heirs-male. Ernest Gammell possessed the estate as institute heir of entail during his life. Had he left heirs-male they would have succeeded as heirs of entail. It was not till his death that it became apparent that he was to have no heir-male to succeed him under the entail. On his death without issue the pursuer became entitled to succeed under the destination of the second deed. Whether he then fell under the fetters of the entail was a question between him and those substituted to him, not between him and the representatives of Ernest Gammell. Without admitting that he would not himself fall under the fetters of a valid entail, it was at least clear that he could not be debarred from enforcing the fetters against Ernest Gammell, on the ground that he himself would succeed as fee-simple proprietor.[1]

Argued for the respondents;—The question raised in the present case was settled *in terminis* by the previous case of Countesswells. The only difference was in the position in the destination in the original deeds of entail held by the first disponees in the deeds of revocation. But that introduced no distinction in point of principle. The second deed in both cases was quite good as a deed of revocation. Having revoked the destination to the prior heirs, the second deed just left Andrew Gammell in the Countesswells case in the position of institute. In the present case Ernest Gammell occupied that position from the beginning. Had the deed of revocation in the Countesswells case been a mere deed of revocation, the original entail would have stood, certain heirs being dropped out of the line of succession. But it went further, it made a new and substantive disposition, free from the fetters of an entail. Though the revocation might have affected the original deed of entail it was held that the new disposition could not in any way be imported into it for want of a conveyance *hæredibus nominandis* in the former deed. Nor could the fetters of the original entail be imported by reference into the new disposition. That the deed of revocation was in reality a new and separate disposition, free from fetters of entail, and that it superseded the disposition

[1] *Pursuer's Authorities.*—Bell's Lectures, p. 989; Padwick v. Stewart, March 4, 1874, *ante*, vol. 1, 697; Fraser v. Lord Lovat, Feb. 28, 1842, 1 Bell's App. 105; Mure v. Mure, Feb. 16, 1837, 15 S. 581, H. of L. May 18, 1838, 3 S. and M'L. 237; Farquhar v. Hamilton, Feb. 3, 1842, 4 D. 600, 14 Scot. Jur. 242; Gordon v. Gordon, March 1, 1862, 24 D. 687, 34 Scot. Jur. 344; Macgregor v. Gordon, Dec. 1, 1864, 3 Macph. 148, 37 Scot. Jur. 72; Porterfield v. Stewart, Nov. 18, 1829, 8 S. 16, H. of L. Sept. 23, 1831, 5 W. and S. 515; Dempster v. Dempster, H. of L. June 12, 1857, 19 D. (H. of L.) 14, 29 Scot. Jur. 391, 3 Macq. 62; Lord Charles Hamilton v. Duke of Hamilton, April 29, 1870, 8 Macph. (H. of L.) 48, L. R. 2 Sc. App. 12.

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in the original deed of entail, was the *ratio decidendi* in the Countesswells case, and equally applied to the present.[1]

At advising,—

Lord Deas.—By deed of entail dated 15th March 1816, and recorded in the Register of Entails 9th July same year, the late James Gammell disponed his estate of Portlethen and others to himself in liferent, and his grandson Ernest Gammell and the heirs-male of his body in fee; whom failing, to his grandson Andrew Gammell and the heirs-male of his body in fee; whom failing, to his other grandsons named and the heirs-male of their bodies in their order; "whom failing, to the heirs-female of the body of the said Ernest Gammell," and so on.

The deed contained procuratory of resignation and precept of sasine, and all the usual clauses of a strict entail, including an obligation to possess on the tailzied titles only. The deed also contained a power to revoke and alter the course of succession, as well as the disposition generally, by any writing or writings under the entailer's hand, "which writing or writings shall be understood and taken as a part of the present deed of entail, and shall be as effectual to all intents and purposes as if the same had been inserted herein."

The precept of sasine directed sasine to be given to the entailer, "and to the said Ernest Gammell, whom failing, to the other heirs of entail above mentioned appointed to succeed to him in the order before specified, for our respective rights of liferent and fee," subject to the conditions, and clauses irritant and resolutive, expressed in the deed, and held as repeated *brevitatis causa*, "but which are hereby expressly appointed as aforesaid to be *verbatim* inserted in the infeftments to follow hereon."

By a subsequent deed, dated 16th April 1823, and recorded in the Register of Entails 19th February 1828, the entailer narrated the deed of entail and the power of alteration and revocation thereby reserved to him, and then proceeded, —"And whereas I have now resolved to alter the foresaid course and order of succession in so far as regards the said Andrew Gammell, James Gammell, William Gammell, Martha Gammell, Margaret Gammell, Mary Gammell, Jessie Gammell, and the heirs-male and female of their bodies, I have therefore revoked, and do hereby revoke the foresaid disposition and deed of entail, in so far as the same is granted in favour of the said Andrew, James, William, Martha, Mary, Margaret, and Jessie Gammell, and the heirs-male and female of their respective bodies, and in their place I do hereby nominate and substitute the persons after named." At the end of the nomination of heirs there followed a description of the lands disponed, *verbatim* as in the original deed, together with an obligation to infeft the said Ernest Gammell, "whom failing, the heirs of entail hereby substituted to him as aforesaid in the foresaid lands, in manner and in the terms specified in the foresaid deed of entail, with and under the burden of the provisions, conditions, restrictions, limitations, declarations, clauses irritant and resolutive, expressed in the said deed of entail, all which clauses I hereby confirm, and do hereby assign to my said disponees and heirs of entail in their order the procuratory of resignation and precept of sasine, and whole other clauses in said

[1] *Defenders' Authorities.*—Porterfield v. Stewart, *ut supra;* Fowler v. Fowler, Jan. 28, 1869, 7 Macph. 420; Paterson v. Leslie, July 1, 1845, 7 D. 950, 17 Scot. Jur. 494; Lord Forbes v. Gammell, May 14, 1858, 20 D. 917, 30 Scot. Jur. 542; Stair, iv. 18, 8; Ersk. iii. 8, 32.

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The entailer died on 15th September 1825, and both deeds were thereupon duly recorded in the Register of Entails. Ernest Gammell completed a feudal title by infeftment on 17th April 1830, which was duly recorded in the Register of Sasines on 18th May same year, and obtained a crown charter of confirmation in the course of the same year. This infeftment bore to proceed upon both deeds, and it is enough to say in regard to it that, in its form, it appears to be unexceptionable as a tailzied investiture in his person, completed by confirmation, subject, however, to the questions now raised as to the import and effect of the two deeds on which the infeftment bore to proceed.

Ernest Gammell, who completed that title, subsequently executed a disposition in favour of himself and the heirs-male of his body, whom failing, the heirs-female of his body, whom failing, his wife, Mrs Rosa Ann Bertram or Gammell, now Taylor, the defender, and her heirs and assignees. The disposition proceeded on the footing that he was fee-simple proprietor of the estate. The ground on which he held himself to be fee-simple proprietor was that none of the heirs substituted in the entail after himself and his issue (of whom he had none), were effectually laid under the fetters of the entail; and consequently that, failing issue of his body, the entail was at an end. The question we have to decide is, whether this view was well founded.

Now, there can be no doubt that an effectual entail cannot be made by reference. That was decided in a question with creditors in Broomfield v. Paterson, 29th June 1784 (M. 15,618). In that case Sir John Paterson, in 1743, executed an entail, with the usual prohibitory, irritant, and resolutive clauses, in favour of his grandson as institute, and certain substitutes. Sir John recorded the entail in the Register of Tailzies, and caused infeftment to be passed upon it. He afterwards renounced the right to revoke and alter, which he had originally reserved. In 1758, with consent of the institute, he executed a new disposition of the lands, varying in material respects the destination, &c. in the deed of 1743, but, in place of repeating the fetters, referring to them thus,—"with and under the provisions, conditions, irritant and resolutive clauses, as contained in the original bond of tailzie, and in the charter and infeftment following thereon." On the death of the entailer the institute completed his title on the procuratory contained in the new deed, but in the instruments, both of resignation and of sasine, he engrossed *ad longum* the prohibitory, irritant, and resolutive clauses from the deed of 1743. The daughter of the institute, who succeeded to him, made up her titles in the same way. A creditor of the institute (Major Broomfield) thereafter brought an action against her as representing her father, on the footing that the deed of 1758 put an end to the entail of 1743, and was not itself an effectual entail, in respect—1st, that it was not recorded in the Register of Entails; 2d, that it only referred to, and did not

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Ernest Gammell, who completed that title, subsequently executed a disposition in favour of himself and the heirs-male of his body, whom failing, the heirs-female of his body, whom failing, his wife, Mrs Rosa Ann Bertram or Gammell, now Taylor, the defender, and her heirs and assignees. The disposition proceeded on the footing that he was fee-simple proprietor of the estate. The ground on which he held himself to be fee-simple proprietor was that none of the heirs substituted in the entail after himself and his issue (of whom he had none), were effectually laid under the fetters of the entail; and consequently that, failing issue of his body, the entail was at an end. The question we have to decide is, whether this view was well founded.

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contain the fetters. The following interlocutor (quoted 3 Paton's App. 51) was pronounced:—"Find that, in respect the disposition 1758 differs in several articles from the entail 1743, and, in particular, that certain heirs or substitutes called by the entail 1743 are omitted in the disposition 1758, and that the disposition was followed with charter and infeftment, therefore it is to be held a new infeftment of the estate; and not having contained the clauses prohibitive, irritant, and resolutive, and not having been recorded in the Register of Entails, is not an effectual entail: Find that, in respect the clauses irritant and resolutive in the entail of 1743 are not particularly inserted in the disposition 1758, the same, though held as a conveyance, is not effectual against creditors, and remit to the Lord Ordinary to proceed accordingly." This judgment was affirmed on appeal (3 Paton, 50). Passing from 1784 to 1842, we find the case of Lindsay v. the Earl of Aboyne (4 D. 843), where the question of reference was raised in relation to a supplementary deed of entail. The second head of the rubric correctly enough states the result thus:—"Held that an entail, described as supplementary to a previous entail of other lands, was ineffectual against the creditors of the institute of entail, in respect that it did not itself set forth the fetters under which the lands were conveyed, but made reference for them to the previous entail." I may refer to that part of the opinion of Lord Moncreiff (concurred in by a majority of the consulted Judges), which deals with this question, and which contains a careful discussion of the authorities. In this case of Lindsay, as well as in the case of Don (M. 15,591), the question was with creditors, while here it is a question *inter hæredes*. Assuming for the present that there is now no distinction between these two classes of cases, I take it to be clear that an entail cannot be made by reference, in one dispositive deed, to the fetters contained in another dispositive deed. But although this is so, there is nothing to prevent a nomination of heirs being made in a separate deed which does not contain the fetters, provided the original deed is properly drawn with the view to such power of nomination. It is a fundamental principle of our law of feudal conveyancing that in order to convey an heritable estate there must be a disposition of that estate in favour of the parties who are to take. But the substitutes who are to take do not require to be all named. They may be described as a class, or other distinct manner,—such as the heirs-male of the body of A B. On the same principle they may be described as the heirs to be named in any deed of nomination to be executed by the entailer. This description of them will place them within the dispositive clause of the deed,—will make them disponees under it,—and so satisfy the rule of law I have mentioned, that an heritable estate can only be taken by disposition.

There is nothing anomalous in this,—nothing more so than in holding that the substitutes in a deed of entail do not require to be existing persons at the time the deed comes into operation. They may never come into existence at all; but if they do come into existence, they are just as much disponees under the deed as those who are named in it. I had occasion to explain this fully in my opinion in the late case of Bruce, 6th March 1874 (*vide ante*, vol. i. p. 757, top). On the same principle the disposition in the original deed of entail is just as good to those nominated in the subsequent deed of nomination as to those nominated in the deed of entail itself.

But, as regards the present case, it is a fatal objection to the pursuer's contention that in the deed of 1816 we have no disposition to him at all. He is within the deed of nomination. But there is no conveyance in the entail to substitutes

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to be named in the deed of nomination. He is thus neither named nor described in the dispositive clause of the deed of entail. In other words, there is awanting that which is fundamental, namely, a disposition of the estate in his favour. He can consequently get no assistance from the deed of 1816.

When we come to the deed of 1823 we do find a disposition in his favour. We have, first, a revocation out and out of the disposition and deed of entail of 1816, so far as it is in favour of the whole line of disponees and heirs of entail, with the exception of Ernest Gammell, the institute, and the heirs-male and female of his body, and then we have a disposition to a new series of disponees, including Ernest Gammell and the heirs-male and female of his body. This is followed by an obligation to infeft. Whether the means of getting infeftment by assignation of the procuratory and precept in the entail would be good or not does not matter. Although inept for that purpose this would not prevent the disponees from coming in under the deed. The deed is a good disposition, but unfortunately for the pursuer it does not contain the fettering clauses of a strict entail. These clauses are attempted to be introduced by reference to the previous deed of 1816 in a manner quite contrary to the principles of the decisions in the cases of Broomfield and Aboyne. The position in which the pursuer stands is, that he is not a substitute under a valid entail at all. And that leaves Ernest Gammell in the position of holding under a destination, in which, failing heirs of his body, there are no heirs substituted to him.

But, then, a title was made up by Ernest Gammell upon the precept in the deed of 1816, and his sasine and charter of confirmation narrate the deeds both of 1816 and 1823, and engross all the fetters of the entail. The same thing, however, occurred in the case of Gammell v. Cathcart, and did not prevent the heir so infeft from asserting his right as fee-simple proprietor, he being the last person called under the entail. There is this difference undoubtedly between the present case and the case of Gammell v. Cathcart. There was there no tailzied disposition left standing in the original deed of entail at all, whereas here the entailer left standing the disposition, so far as Ernest Gammell and the heirs-male and female of his body were concerned. It was a good entail, so far as regarded Ernest Gammell and the heirs of his body, if he had left any, and it was quite possible that such a destination might have gone on for centuries, whereas in Gammell v. Cathcart there was no tailzied destination whatever left standing. The question is, whether that introduces any substantial difference to affect the result? The argument for the pursuer is, that the entail being a good entail, so far as Ernest Gammell and his heirs went, it could not be known until after his death whether he was to have an heir of his body or not, and that till that was ascertained he had no title to deal with the estate as fee-simple proprietor. But I am of opinion that that argument is not sound. In this case there is no substitution which can come into operation, except that to the heirs whatsoever of the granter. That leaves Ernest Gammell just in the position of a last heir of entail in possession, who is not fettered at all. This places the case on all fours with that of Gammell v. Cathcart, and the opinions and judgment in that case are, therefore, of binding authority in the present.

The only other observation I have to make is, that in several cases, particularly in the case of Don, Feb. 5, 1713 (M. 15,591), and Hope Vere, March 5, 1833 (11 S. and D. 520, affirmed July 14, 1837, 2 M'Lean, 817), it was held that an entail by reference was quite good *inter hæredes*. The question whether

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that is still the law depends on the construction of the Rutherfurd Act, and has not, so far as I know, been expressly decided. But although I brought the point under notice, it was not contended at the bar that, after the passing of that Act, the distinction between questions with creditors and questions *inter hæredes* could any longer be maintained. Waiving that question, I am of opinion, for the reasons I have stated, that the interlocutor of the Lord Ordinary should be adhered to.

LORD ARDMILLAN.—In considering the somewhat novel and interesting question here raised it is important to bear in mind the position of the pursuer in reference to the two deeds executed by the late James Gammell.

The pursuer is not named, described, or suggested in the first deed executed in 1816, which is a deed of entail. There is in that deed of 1816 no dispositive clause to the benefit of which the pursuer can make any claim. There is a reserved power to revoke or alter the order of succession, or generally to revoke the deed altogether; but there is no disposition to any who are not therein named or described. There is no substitution *hæredibus nominandis*, and no reserved power to introduce new heirs substitute of entail. Ernest Gammell is the institute under that deed of entail, and the usual fettering clauses of entail are there introduced.

In 1823 the second deed was executed by Mr James Gammell. By that deed he disponed to himself in liferent, and to Ernest Gammell in fee, and the heirs-male of his body; whom failing, to the heirs-female of his body; whom failing, to the pursuer, now Colonel Kenny, and the heirs-male of his body; whom failing, to other substitutes therein named. James Gammell, the entailer, died in September 1825, and was succeeded by Ernest Gammell, the institute under both deeds, who made up a title under both deeds, I think, in 1848, and possessed till he died without issue in 1855. In December 1852 Ernest Gammell, in order to defeat the entail, disponed to his wife, now Mrs Taylor. That disposition was recorded in April 1855, after Mrs Gammell's death. Mrs Ernest Gammell, now Mrs Taylor, is the defender in this action, having taken under that deed, and having been served heir of provision to her husband.

The question which the Court have to dispose of is, whether Ernest Gammell held the property under the fetters of the entail, since, if he did, his disposition in favour of the defender is of no force, and must be reduced. On the other hand, if Ernest Gammell held the estate in fee-simple, the pursuer cannot succeed in this action, and the defender, Mrs Taylor, is entitled to absolvitor.

The Lord Ordinary has repelled the reasons of reduction, and assoilzied the defenders. I am of opinion that he has rightly decided.

I concur generally in the views expressed by Lord Deas, and I have little to add.

It appears to me impossible, on any intelligible principles of legal construction, to read the two deeds, that of 1816 and that of 1823, as forming one deed of entail. I think the later deed superseded the earlier deed. It is well settled that the fettering clauses must be found within the body of a deed of entail. Of this there is no doubt in a question with creditors, and since the Rutherfurd Entail Act the same rule applies, as I think, in a question *inter hæredes*. In the very able argument for the pursuer this point on construction of the Rutherfurd Act was not disputed. Now, there are no fettering clauses within the deed of 1823; and unless the destination in the deed of 1823 can be brought within

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the fettering clauses of the deed of 1816 there is no entailed destination in the deed of 1823. But it is attempted to bring the destination within the fettering clauses of the earlier deed, so as to entitle the pursuer, who is not a disponee or a substitute under the earlier deed, to plead as against Ernest Gammell the fetters imposed by that earlier deed. Under the first deed this pursuer has no right whatever. There is no disposition to him. If there had been a clause reserving a right to name heirs of entail, and disponing to the heirs to be so named, and if, in the exercise of that right, a new deed of nomination of heirs had been executed bringing the pursuer within the scope of the previous deed, his position would have been very different. But the pursuer has no other right than what is conferred by the second deed, and the second deed is not an entail. The first disponee under the second deed is Ernest, and if there be no fettering clauses there is no entail, and if there be no entail within the second deed then Ernest held in fee-simple. A reserved power to alter the succession does not imply a power to bring a new substitute heir of entail within the first deed. A power to revoke the first deed may be exercised by direct revocation, or it may be exercised by the execution of a deed inconsistent with the first deed, but revocation is a very different thing from the introduction of new heirs into an entail; and indeed revocation will not answer the pursuer's purpose. If the deed of 1816 is revoked the deed of 1823 stands alone. If the deed of 1816 had permitted the nomination of new heirs, or if, to use an expression appropriately suggested in former cases, the first deed had constructed a niche in the line of succession under the entail into which a new heir could be planted in the exercise of that reserved power to nominate, then the new heir might have been brought within the first deed and within the fetters. But plainly there is nothing of the kind here. The deed of 1823, with its new structure and its new dispositive clause, and the introduction of new heirs, has been executed under a reserved power to revoke, and not under a reserved power to nominate. As a separate and independent deed it is a disposition to Ernest and the heirs-male or female of his body, whom failing, to the pursuer. But that disposition is not qualified by any fettering clauses. You cannot find the fettering clauses outside of the later deed; and you have no disposition to the pursuer in the earlier deed, so that, where the fetters are, there is no disposition, and where the disposition is, there are no fetters. The pursuer can only claim under a deed which gives a prior right in fee-simple to Ernest. The result is, in my opinion, that the pursuer has no right whatever except under the second deed, and under that deed he is postponed to Ernest, to whom the disposition, on which alone the pursuer founds, is made without any fettering clauses.

It was natural and proper for the pursuer to establish, if possible, a distinction between the present case and the case of Countesswells, and we have had ingenious argument in support of that distinction, an argument deserving careful consideration.

I do not say that the decision in the case of Countesswells is in all respects exactly in point, or is altogether conclusive of the present case (Gammell v. Cathcart, 12 D. p. 19, 13th Nov. 1849); but without holding it conclusive as a decision, I think that the judicial opinions in the case of Countesswells are extremely important, and that the leading points maintained by the pursuer in this action were then under consideration of the Court. In the note of Lord Wood, who was Lord Ordinary, and in the opinion of all the Judges, particularly of Lord Mackenzie, there is an exposition of law very valuable, and strik-

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ingly appropriate to the deeds now before us. Without dwelling on the opinions which were pronounced in the Countesswells case,—a case raised in regard to deeds made by the same granter as the present, and about the same time, though in reference to a different estate,—without quoting at length, I may mention that Lord Mackenzie says in the Countesswells case,—"The deed of 1823 is not a mere revocation of part of the prior deed. It contains a grant to new parties, not a grant *hæredibus nominandis* of the old deed. There was no such clause in the first deed. A power to alter does not imply a power to insert new grantees as named in the deed having the power." Lord Fullerton, concurring in the opinion, held the later deed alone to be effectual, and as entirely superseding the earlier deed. It is true that in the later deed in this case Ernest, who was the institute in the first deed, is again institute. But he is so under a new disposition, with new substitution of heirs, and without any fettering clauses. Now, I entertain no doubt that Ernest, taking under the later deed, as he was entitled to do, was free from the fetters of the entail, and consequently that his disposition in favour of the defender is not liable to reduction at the instance of the pursuer, whose only right is under the same later deed. In the deed which contains the fetters the pursuer has no right whatever.

Another view has been presented to us by the defender, proceeding on the assumption, for the sake of argument, that even if Ernest held under the entail still he held with no substitutes to follow, as he had no heirs of his body, and was the last heir previous to a destination to heirs whatsoever, and was therefore free. I do not think it necessary to deal with this plea, though there is some force in the argument from analogy by which it has been supported. My opinion rests on the broader view which has been already explained by Lord Deas, and in which I concur.

Lord Mure.—I agree with the Lord Ordinary in thinking that this case is ruled by the decision in the case of Gammell v. Cathcart, referred to in his note, and I have little to add to what your Lordships have stated as the grounds of your opinions. I was at first disposed to think that a distinction might be drawn between the cases, founded upon the circumstance that Ernest Gammell, whose deed is here under challenge, was the institute in the destination of the original entail, as well as in that of the deed of 1823, so that it was competent for him, by taking infeftment upon the precept in the entail, to place himself under fetters, without seeking to avail himself of the assignation in the deed of 1823 of the precept contained in the entail; whereas in the case of Cathcart, Andrew Gammell, the institute in the second deed, was a substitute in the original entail, and was only brought up to the position of institute by the operation of the deed of 1823. On farther consideration, however, I am satisfied that this is not such a substantial distinction as can be held to take this case out of the rules applied in the case of Cathcart; because, having regard to the decision in the case of Fogo, March 11, 1842, 4 D. p. 1063, and to the opinion of Lord Mackenzie in particular, which appears to have been concurred in by the majority of the Court, as to the meaning to be put upon the words "whom failing" in a destination, the effect of the second deed in the case of Cathcart, by which the nomination of the institute and the substitutes in the original entail prior in order to Andrew Gammell was recalled, was to make Andrew Gammell the institute in the entail; and there was not, I think, any objection, on feudal

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grounds, to his taking infeftment, which he did upon the precept in the entail, as institute, at the death of the maker of the deed. But the Court nevertheless held that Andrew Gammell, in respect of the operation of the deed of 1823, was precluded from making up a tailzied title under the deed of 1815, inasmuch as the second deed was held to operate as a new and substantive disposition of the estate, and was so worded as not to place the heirs under the fetters of an entail. Now, apart from this distinction as to the terms of the destination, the deeds here in question are almost verbatim the same as those in the case of Cathcart; and upon examining the session papers in that case I find that there was the same anxious argument there maintained upon the clauses declaring that the two deeds were to be read together, and that it should only be competent to possess the estates under the fetters of the original entail, as was addressed to us on the part of the pursuer in the present case. That argument was, however, rejected by the Court in disposing of the case of Cathcart, in which it was held that the deed of 1823 must be dealt with as a new deed, superseding the entail of 1815; and I have not been able to find any sufficient reasons for holding that the propositions stated by Lord Mackenzie in his opinion in that case as the grounds of his judgment do not here apply.

LORD PRESIDENT.—I concur in affirming the Lord Ordinary's judgment. I am unable to distinguish in principle between this case and that of Countesswells. There are some differences, indeed, in point of fact, but they do not interfere with the application of the principle of that judgment.

It is a circumstance to be remarked that, with the exception of the description of the lands and the names of the heirs called to the succession, the two deeds of entail are word for word the same, prepared by the same conveyancer, and executed at the same time. In the present case the deed of entail contains a conveyance of the estate of Portlethen to Ernest Gammell, the institute, and the heirs-male of his body, and to a series of substitutes. It contains no conveyance *hæredibus nominandis*, but it contains a very full and ample power of revocation in these words—(reads clause commencing, "But saving and reserving nevertheless," quoted *supra*, p. 637). Now, it appears to me that the entailer could not under this reserved power, by a mere deed of revocation and nomination, introduce new heirs into the destination contained in the original deed. But I have no doubt that by a deed of revocation he had power to strike out any heir or number of heirs from that destination. By the second deed, executed in 1823, he accordingly proceeds to exercise that power of revocation, and that he does in these words—(reads clause commencing "Whereas I have now resolved," quoted *supra*, p. 637-8). Now, the effect of that revocation, which I apprehend, was within his power, was to strike out all the substitutes except the heirs-male and female of the body of the institute, but to leave the institute and the heirs-male and female of his body standing. The nomination of a series of heirs in place of the substitutes so struck out is, I apprehend, utterly unmaintainable as a nomination of heirs-substitute of entail, for the simple reason that there is not in the original deed of entail any conveyance *hæredibus nominandis*. Therefore, if the revocation had stood alone, the effect would have been to leave Ernest Gammell as institute, with remainder over to the heirs-male and female of his body, as the sole subsisting destination under the entail. But the entailer does not stop here; he proceeds to convey of new, and he does not confine himself to doing so in favour of the new heirs attempted to be brought in only.

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Now, the question is, looking to the terms of both deeds, whether this was or was not a valid and effectual method of altering the destination in the deed of entail. On this question I should not hesitate to pronounce in this case just the judgment that was given in the Countesswells case, and having that authority before me I do not think it necessary to argue the matter further in point of principle.

Doubtless there are distinctions in point of fact between this case and that of Countesswells, but they are not material to the judgment. In the Countesswells case the deed of nomination and revocation proceeded to revoke the nomination of all the heirs originally nominated, with the exception of Andrew Gammell and the heirs-male of his body. Now, as Lord Mure has stated, Andrew Gammell stood in the Countesswells deed of entail in a different position from that occupied by Ernest Gammell in the present one. For Andrew Gammell was not the institute, but only the third *nominatim* substitute. But the deed of revocation swept away all the heirs that came before him, and if that deed of revocation had contained no new conveyance Andrew Gammell would then have stood as institute heir of entail just with the same legal effect as Ernest Gammell would have done in this case, and the entail would have been to him and the heirs-male of his body. But, then, the entailer proceeded just as here to convey the estate of new to the new series of heirs, including Andrew Gammell. Now, if the entail in that case would have stood good to Andrew Gammell and the heirs-male of his body had it not been for the new conveyance, it seems to me to be plain that the deed in the present case would have stood in the same position in point of law. The effect of the revocation was not entirely to destroy the destination, but to leave part of it standing and effectual.

Now, so in the present case, though the destination would have stood as a good destination in favour of Ernest Gammell and the heirs-male and female of his body, yet that comes to be over-ridden by the new conveyance. In short, according to the principle of the Countesswells case, the new conveyance superseded entirely the conveyance in the original deed of entail, and that, in my opinion, is the principle on which our judgment should proceed.

THE COURT pronounced this interlocutor:—"Adhere to the interlocutor, and refuse the reclaiming note: Find the pursuer liable in additional expenses."

M'EWEN & CARMENT, W.S.—JOHN AULD, W.S.—Agents.

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JAMES GALLOWAY (Collector of Poor-Rates in the Parish of South Leith), Pursuer.—*Sol.-Gen. Watson—Trayner.*
DAVID NICOLSON, Defender.—*D.-F. Clark—J. G. Smith.*

Poor—Poor-Law Amendment Act, 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 34—*Poor Assessments Act*, 1861 (24 *and* 25 *Vict. c.* 37)—*Assessment.*—In prescribing the manner in which the assessment for relief of the poor is to be imposed, the Poor-Law Amendment Act, 1845, sec. 34, as amended by the Poor Assessments Act, 1861, requires that "one-half of such assessment shall be imposed upon the owners and the other half upon the tenants or occupants of all lands and heritages within the parish or combination, rateably according to the annual value of such lands and heritages." *Held* that one-half of the sum to be raised by assessment falls to be laid upon owners as a class, and the other half upon occupants as a class.

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1ST DIVISION.

Ld. Curriehill.

M.

JAMES GALLOWAY, collector of poor-rates in the parish of South Leith, raised this action for recovery of poor-rates against David Nicolson, the owner of certain lands and heritages in the parish.

The real object, however, of the action was to have judicially determined the meaning of the clause of the Poor-Law Amendment Act, 1845, regulating the imposition of assessments for the poor.[1]

The 34th section of that Act provided three alternative methods according to which the assessment might be imposed. The first of these methods was adopted by the parish of South Leith, and was subsequently, by the Poor Assessments (Scotland) Act, 1861,[2] made the only legal method of imposing the assessment for the poor.

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[1] The clauses of the Poor-Law Amendment Act, 1845, 8 and 9 Vict. c. 83, bearing upon the subject are as follows:—Section 33 enacts that it shall be lawful for the parochial board of any parish or combination to "resolve that the funds requisite for relief of the poor persons entitled to relief from the parish or combination, including the expenses connected with the management and administration thereof, shall be raised by assessments."

Section 34 enacts that "when the parochial board of any parish or combination shall have resolved to raise by assessment the funds requisite, such board shall . . . . . resolve as to the manner in which the assessment is to be imposed; and it shall be lawful for any such board to resolve that one-half of such assessment shall be imposed upon the owners and the other half upon the tenants or occupants of all lands and heritages within the parish or combination, rateably according to the annual value of such lands and heritages, or to resolve that one-half of such assessment shall be imposed upon the owners of all lands and heritages within the parish or combination according to the annual value of such lands and heritages, and the other half upon the whole inhabitants, according to their means and substance other than lands and heritages situated in Great Britain or Ireland, or to resolve that such assessment shall be imposed as an equal percentage upon the annual value of all lands and heritages within the parish or combination, and upon the estimated annual income of the whole inhabitants from means and substance other than lands and heritages situated in Great Britain or Ireland; and when the parochial board shall have resolved on the manner in which the assessment is to be imposed, such resolution shall be forthwith reported to the Board of Supervision for approval; and if the manner of assessment so resolved upon shall be approved by the Board of Supervision the same shall be adopted and acted upon in such parish or combination, and shall not be altered or departed from without the sanction of the Board of Supervision."

Section 36 enacts that "where the one-half of any assessment is imposed on the owners and the other half on the tenants or occupants of lands and heritages it shall be lawful for the parochial board, with the concurrence of the Board of Supervision, to determine and direct that the lands and heritages may be distinguished into two or more separate classes, according to the purpose for which such lands are used and occupied, and to fix such rate of assessment upon the tenants or occupants of each class respectively as to such board may seem just and equitable."

Section 42 enacts "that it shall be lawful for the parochial board of any parish or combination to exempt from payment of the assessment, or any part thereof, to such an extent as may seem proper and reasonable, any persons or class of persons on the ground of inability to pay."

Section 43 enacts that "where the one-half of any assessment is imposed on the owners and the other half on the tenants or occupants of lands and heritages, it shall be competent for the collector of such assessments to levy the whole thereof from the tenants or occupants, who shall be entitled to recover one-half thereof from the owner, or to retain the same out of their rents on production of a receipt granted by the collector of such assessment."

[2] 24 and 25 Vict. c. 37.

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This method was thus described,—"One-half of such assessment shall be imposed upon the owners and the other half upon the tenants or occupants of all lands and heritages within the parish or combination, rateably according to the annual value of such lands and heritages."

The parochial board, as represented by the pursuer, contended that the meaning of this clause was that the rate per pound on the annual value of lands and heritages within the parish necessary to be imposed in order to produce the gross funds requisite for relief of the poor having been fixed, individual owners and occupiers alike were to be assessed at half the rate.

The defender, on the other hand, contended that the gross amount of funds required was to be divided equally, and one-half raised from the owners, as a class (rateably according to the value of the lands and heritages owned by them), and the other half from the occupiers, as a class (rateably according to the value of the lands and heritages occupied by them). In many parishes there are always a considerable number of subjects unlet and unoccupied during the year, on which no assessment can be imposed in respect of occupancy; and also a considerable number occupied by persons who are exempted from payment of the assessment on the ground of inability to pay, whereas in both cases the ownership rate can always be levied from the owners. The practical result therefore of imposing the assessment, according to the pursuer's interpretation of the statute, was that a considerably larger portion of the gross assessment was levied from the owners as a class than from the occupants as a class.[1]

The Lord Ordinary, on 28th December 1874, pronounced this interlocutor:—"Finds that by resolution of the parochial board of the parish of South Leith, sanctioned by the Board of Supervision, the funds requisite for the relief of the poor in that parish are to be raised by assessment, one-half of which is to be imposed upon the owners, and the other half upon the tenants or occupants of all lands and heritages within the parish, rateably according to the annual value of such lands and heritages: Finds that according to the sound construction of the Act 8 and 9 Vict., cap. 83, entituled 'An Act for the Amendment and better Administration of the Laws relating to the Relief of the Poor in Scotland,' such assessment must be imposed so that one-half of the whole assessment for each year shall be imposed upon the owners of the said lands and heritages as a class, and the other half upon the tenants or occupiers thereof as a class," &c.*

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[1] The total assessment required for the relief of the poor in South Leith for the year 1872-73 was £9110, 11s. 4d., of which, in consequence of the parochial board having imposed a uniform rate of 1s. 4d. per pound upon all the ratepayers indiscriminately, the sum of £4654, 0s. 8d., or more than one-half, was collected from the owners, and only £4456, 10s. 8d., or less than one-half, from tenants and occupants.

* "NOTE.— . . . I have felt the present question to be one of great importance, and to be not unattended with difficulty; but after the best consideration which I have been able to give to the case I have come to be of opinion that the mode of distributing the assessment adopted by the parochial board is not in conformity with the statute, and that the rule indicated by the Board of Supervision is that which ought to be adopted. It appears to me that throughout the whole of the sections of the Poor-Law Act which deal with the subject of assessment there is a marked distinction maintained between the class of ratepayers who are owners and the class of ratepayers who are tenants and occu-

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The pursuer reclaimed.

Argued for him;—The Lord Ordinary had gone wrong in interpreting the word "assessment" in the 34th section of the Act of 1845 as meaning the whole sum to be levied, and not the rate. The Act in this section carefully distinguished between these two things, "the funds requisite" to be raised, and the "assessment" or rate. It bore "that when the parochial board of any parish or combination shall have resolved to raise by assessment the funds requisite," &c. Now, the word "assessment," evidently meaning "rate" at the beginning of the clause, "such assessment" occurring a few lines further down must mean "such rate," and could not be interpreted to mean "such gross amount of funds requisite." Further, the 43d section, which entitled occupants, on paying the total assessment or rate, to recover one-half thereof from the owners, shewed that it was the rate which was to be

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pants, and that parochial boards must so adjust the imposition of the assessment that one-half of the whole amount shall fall upon the one class and the other half upon the other class. This is, I think, the natural necessary meaning of the word 'rateably' which occurs in section 34 already quoted. The assessment is to be imposed, one-half 'upon the owners, and the other half upon the tenants or occupants of all lands and heritages within the parish or combination, rateably according to the annual value of such lands and heritages.' I read these words as meaning that one-half of the amount is to be imposed upon the owners of lands and heritages rateably, *i.e.*, upon each in proportion to annual value of the lands, &c., belonging to him, and the other half upon the tenants and occupants of lands and heritages rateably, *i.e.*, upon each in proportion to the annual value of the lands, &c. of which he is tenant or occupant.

"It further appears to me that if it had been intended that a uniform rate should be imposed upon all the ratepayers alike, *i.e.*, upon owners, tenants, and occupants indiscriminately, the Legislature would have said so. And not only is such intention not expressed, but it would have been inconsistent with the provision of section 36, by which parochial boards may in certain cases fix different rates to be paid by different classes of tenants. That section assumes that, while one-half of the whole assessment is to be paid by a uniform rate imposed upon all owners irrespective of the purposes for which their lands and heritages are used or occupied, the other half of the assessment (*i.e.*, the tenants' or occupants' half) may be imposed upon the members of that class in such a way as to make the rate paid by each vary according to the purpose for which the subjects are used or occupied by him, and to that end the parochial board may subdivide the class of tenants and occupants into two or more classes.

"A little difficulty in the way of the construction of the Act which I am inclined to adopt may, at first sight, appear to be created by the language of section 43, which authorises the collector to levy the whole assessment made upon owners and tenants or occupants from the tenants or occupants alone, but entitles the latter to recover one-half thereof from the owners, or to retain the same out of their rents. And it may be argued that this section implies that the assessment upon each owner and each occupant is to be at one uniform rate. I think, however, that this is not the sound construction of the section. It appears to me that in this, as in the other sections referred to, the distinction already noticed between the owners as a class, and the tenants or occupants as a class, is kept up; and that, while the whole assessment may be levied, in the first instance, from the latter class, they, as a class, are to have right to recover from the owners, as a class, one-half of the whole assessment; but each tenant or occupant will have right to recover only that portion of the owner's half of the whole assessment which has been imposed upon and paid by him for his own landlord."

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divided, and not the gross amount imposed. This clause would be inapplicable and unworkable if the defender's contention was sustained, and a different rate imposed on the owner from that imposed on the occupant. Lastly, the mode of imposition contended for by the pursuer was the only practicable one. If that suggested by the defender were adopted it would require the board in fixing the rate to be imposed to forecast what tenements would be unoccupied, and what tenants would have to be exempted on the ground of poverty, a thing which they could not possibly do.

At advising,—

LORD PRESIDENT.—The question raised in this case is whether, in directing one-half of the assessment for relief of the poor to be imposed upon the owners and the other half upon the tenants and occupants of all lands and heritages within a parish, rateably according to the annual value of such lands and heritages, the Legislature meant that one-half of the funds required should be laid on the owners as a class, and the other half upon the tenants or occupants as a class, or whether the intention was that the amount of the percentage or rate per pound necessary to produce the required sum should be divided, and one-half of the rate be laid on each owner, and the other half on each tenant or occupant in the parish.

It is rather surprising that, although the Poor-Law Amendment Act, 1845, has been in operation for nearly thirty years, this question should never yet have been settled, but that the practice in different parishes should be, as I understand it is, various and inconsistent. The question itself, however, does not appear to be attended with much difficulty. On a consideration of the statute, I have arrived at the same conclusion as the Lord Ordinary, viz., that one-half of the whole assessment for the year is to be laid on the owners as a class, and the other half on the tenants or occupants as a class.

In considering the question, it is to be kept in view that the mode of assessment whereby one-half is imposed on owners, and the other half upon tenants or occupants of lands and heritages, is now, since the passing of 24 and 25 Vict., c. 37, the only legal mode of assessment. But in the 34th clause of the Act of 1845 two other alternative methods were given besides that now authorised, and it is necessary to consider the whole of these in dealing with the construction of that part of the clause more immediately in question.

An argument, which appeared at first sight very plausible, was stated for the pursuer to this effect, that it was impossible to read the word "assessment" when used in relation to the mode of imposition in question as equivalent to the aggregate amount of funds required, for the result would be to give two different meanings to the word "assessment" in the same clause. Now, in the first of the places where the word "assessment" is used in the 34th clause it means the act of imposing the tax. In the other places where it occurs, namely, in connection with the different modes of imposing the tax, it means the produce or expected produce of the tax, *i.e.*, the fund requisite to be raised. Thus, then, the word has at least two perfectly different meanings in the same section, and so, unfortunately for the pursuer, his argument may be used as well against him as for him. For assuming, as he contends, that the word "assessment," where used in relation to the modes of imposition, is equivalent to rate or percentage per pound, you have still a different meaning given to it in the

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body of the section from that which you have at the beginning. The one argument may, therefore, be very well set off against the other.

But, in considering the three modes of imposition given by the 34th section, it is important to notice that one mode is distinguished from the other two in an especial manner,—I mean the third. By it the assessment may "be imposed as an equal percentage upon the annual value of all lands and heritages within the parish or combination, and upon the estimated annual income of the whole inhabitants from means and substance other than lands and heritages situated in Great Britain or Ireland." Now, if in the first and second modes of imposition an equal rate or percentage had been intended, it is to be presumed that the same language would have been used. And finding a different language used, we may conclude that something different was meant than an equal percentage. By the first mode of imposition "one-half of such assessment shall be imposed upon the owners, and the other half upon the tenants or occupants of all lands and heritages," &c. According to the pursuer's argument, that means that if a shilling rate is necessary to raise the required sum you are to divide it into two halves, and lay 6d. on the owner and 6d. on the tenant or occupant. What is this in practical effect? Just that you lay a uniform rate of 6d. on every person interested in land whether as owner or occupant. That is simply laying an equal percentage upon these persons, and nothing else. But when you come to the second mode of imposition you find that the application of this construction produces a grave anomaly. The same language is used as in reference to the first mode,—"one-half of such assessment shall be imposed upon the owners of all lands and heritages," &c., "and the other half upon the whole inhabitants, according to their means and substance other than lands and heritages," &c. Now, if one-half of the assessment—that is 6d. out of the 1s.—is to be imposed on land, and the other 6d. on income from all other means and substance, the consequence would probably be that in one parish of large area and scattered population you would have a large produce from land, and next to nothing from means and substance; and in another parish of small area and large population you might have a comparatively small return from land, and a very large one from means and substance. That does not look a very likely result for the Legislature to have intended; still it is the result of so construing the words of the statute. But farther, it will be found that this interpretation reduces the second mode of imposition to the very same thing as the third, viz., an equal percentage on land, and on other means and substance. This anomaly is quite sufficient to lead to the conclusion that the statute did not mean by the term "assessment," as used in relation to the mode of imposition, a rate or percentage, but an aggregate sum required to be raised, and intended under the first mode of imposition that that aggregate sum should be divided, and one-half laid upon owners as a class, and the other upon tenants or occupants as a class. That is the only construction of the section which makes it consistent with itself, and distinguishes the second mode of imposition from the third. Therefore, upon a consideration of this 34th section alone, I think the argument of the defender is irresistible.

But there is obviously a very good reason why this should be the construction intended by the Legislature. For, consider how the assessment will fall on the owners and on the occupants. If owners and occupants necessarily represented the same value, and paid the same amount of tax, the result of the pursuer's

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and the defender's contention would be the same. But it is hardly possible that that should be the state of the facts. Occupancy is liable to many vicissitudes. Houses may be unlet and unoccupied. Tenants and occupants may be so poor that their taxes are irrecoverable. In the case of owners the assessment must always be paid in full, for the collector has always the value of the tenement to fall back upon. But in the case of occupants, the assessment may be much diminished by unoccupied houses and irrecoverable arrears.

The case of poverty amongst a large class of occupants is particularly provided for. By section 36 parochial boards are allowed to classify the tenements within the parish in two or more separate classes for the purpose of laying the tax unequally upon the tenants or occupants according to the classes to which they belong, so that the result would be that instead of the 6d. in the 1s. being laid on all occupants, 6d. would be laid on some, and perhaps 4d. or 3d. on others, and the produce of the assessment so laid upon occupants would be much less than that of the assessment laid upon owners. That would be an odd way of dividing a tax to be laid upon two different classes of persons in the way contemplated by the statute.

The only proper way of providing against the produce of the tax being less than is contemplated is to divide the total amount required, and lay one half on the owners, and the other half upon the tenants or occupants.

It only now remains to notice the 43d section, which gives power to "the collector of such assessment to levy the whole thereof from the tenants or occupants, who shall be entitled to recover one-half thereof from the owner." Now, the pursuer maintains that this clause supports his view, that by assessment is meant equal rate or percentage. That it should do so it is necessary that it should apply to every case and every property in the parish, and not only to those cases where the amount to be levied on owners and occupants happens to be the same, otherwise it will not avail him. But how is it possible to make it universally applicable? In one case the collector comes to an occupant, and finds him exempted from poverty. He cannot levy the whole tax on him. In another case he comes to a tenement, and finds it unoccupied; there is there no person to levy the whole tax on. In a third case he comes to an occupant who, by reason of the classification provided for by section 36, pays a threepenny or fourpenny rate, say, instead of a sixpenny. How can the 43d clause be made to apply to his case. The conclusion, therefore, is that the 43d section is not intended to be of universal application, but is meant only for those cases in which the assessment on owners and occupants is an equal rate. I am informed that, in point of fact, in parishes where a classification has been made under the 36th section, no attempt has been made to act upon the 43d section.

On the whole matter, I have little difficulty in concurring with the Lord Ordinary.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT adhered.

J. C. IRONS, S.S.C.—D. CRAWFORD & J. Y. GUTHRIE, S.S.C.—Agents.

No. 112.

BARROW MOSS, Pursuer.—*Asher—R. V. Campbell.*
CUNLIFFE AND DUNLOP, Defenders.—*D.-F. Clark—Balfour—Readman.*

Mar. 20, 1875.
Moss v. Cunliffe & Dunlop.

Agent and Principal—Ship—Shipbroker—Commission.—A broker sued a shipbuilder for 2½ per cent commission on the price of a ship built by the defender, on the ground that the order had been obtained through the pursuer's introduction and recommendation. *Held* upon a proof (*diss.* the Lord Justice-Clerk upon the facts, and *rev.* judgment of Lord Curriehill) that the pursuer had failed to prove any contract between him and the defender for payment of the commission sued for, or to shew that the order was the direct result of his intervention, and consequently that he was not entitled to commission.

THIS was an action at the instance of Barrow Moss, a commission merchant in Liverpool, in which he sought to recover from the defenders, Cunliffe and Dunlop, shipbuilders, Port-Glasgow, the sum of £782, 10s., being, as he alleged, commission at the rate of 2½ per cent upon the price (£31,300) of a steamer sold by the defenders to the Rio Grande do Sul Steamship Company, in consequence of the pursuer's having introduced the defenders to the purchaser.

2D DIVISION. Ld. Curriehill. M.

The defence was that the pursuer was not instrumental in any way in procuring the order for the steamer in question, and that he was therefore not entitled to any commission. The defenders, however, stated that the pursuer did introduce them to a Captain Le Couteur, in the employment of Louis Karl Beckmann, who, it was said, was then contemplating the purchase of a small steamer, of which the price was to be £13,850, that the negotiations for the purchase of that steamer were still in dependence, and that if the said small steamer should be ordered they were ready to pay to the pursuer commission on the price thereof at £2, 10s. per cent.

The pursuer pleaded;—(1) The pursuer having performed services for the defenders, on a contract for a commission upon the order obtained by the defenders through the pursuer's introduction, the pursuer is entitled to decree in terms of the summons. (2) The order for the large steamship having followed on and been obtained through the pursuer's introduction, the pursuer is entitled to the sum sued for as a reasonable commission for his services; and the defences being unfounded in fact and in law, the same should be repelled, and decree granted in terms of the conclusions of the summons, with expenses.

The defenders pleaded;—(3) The order for the large steamship at the price of £31,300 not having been obtained through the instrumentality of the pursuer, the defenders are not liable for the sum sued for. (4) The negotiations for the vessel, in regard to which the defenders agreed to pay the pursuer commission, being still pending, and the commission sued for not being the commission agreed to be paid upon the order of said vessel, the defenders should be assoilzied. (5) The defenders being ready to pay to the pursuer the commission agreed on with him as soon as it is earned, the present action is groundless and untenable, and the defenders should be assoilzied, with expenses.

The material facts admitted or proved were shortly as follows:—

About the end of the year 1873 certain persons connected with the Brazil trade began to promote the formation of a company for the establishment and maintenance of a line of large ocean steamers between London and other European ports, on the one hand, and the port of Rio Grande do Sul and other Brazilian ports, on the other hand. The person most actively concerned in the promotion of the company, and in developing the expected business, was Louis Karl Beckmann, sole active partner

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of Julius Beckmann and Company, who were to be the general agents of the company in London.

Although the company was not incorporated until the 19th February 1874, the arrangements for its formation had been in progress for some months previously, and in January, or early in February, Beckmann, on behalf of the promoters, had entered into a provisional contract with Messrs William Hamilton and Company, shipbuilders, Port-Glasgow, for the construction of four ocean steamers for the embryo company, but with power to cancel the order for one of the steamers.

About the same time some of the promoters of the company started the project of establishing a smaller steamer of light draught and capable of burning Brazilian coal, for the purpose of river traffic on the Rio Grande. This smaller steamer was intended as a private speculation and not as part of the proper business of the Rio Grande Company, although the two schemes were calculated mutually to aid and develope one another.

Beckmann, having undertaken to procure estimates for the smaller steamer, applied to John Bennett junior, shipbroker in London, who was afterwards appointed broker to the company, to see if he could furnish a small steamer of the kind required. Bennett at the time did not himself know where such a steamer could be got, but mentioned the pursuer's name to Beckmann as a person who, from his large connection with shipbuilders, was likely to be able to furnish the required information; and after repeated communings with Beckmann he wrote to the pursuer on 16th February 1874 sending him a specification for a twin screw steamer of light draught, with furnaces adapted for burning Brazil coal, and other particulars as supplied by Beckmann, and asking him to quote a price therefor.

The pursuer, on receipt of that letter on 17th February, at once wrote to the defenders, who had about two years before introduced themselves to him as shipbuilders, the following letter:—"I have principals open to build an iron twin screw steamer, dimensions and particulars as per enclosed, and shall be glad to receive your lowest price per return, subject to 2½%." He enclosed a copy of Bennett's letter of 16th February, omitting Bennett's name.

The defenders on 18th February answered the letter, informing the pursuer that they had just completed a steamer for an African company, which was to go on a trial trip on 21st February, and a duplicate of which would probably suit, and suggested that if the pursuer's principals were in earnest they should go down to Port-Glasgow and see the trial.

The pursuer upon receipt of the defenders' letter went to London and saw Bennett, and handed him the letter, which Bennett took to Beckmann, who was at the time in the office of the Rio Grande Company. After consultation on the subject between Bennett and Beckmann, the latter sent Captain Le Couteur (who was then desirous of being appointed, and was ultimately appointed, marine superintendent of the Rio Grande Company) to Port-Glasgow, with instructions to inspect the vessel, and if possible to be present at the trial trip. Le Couteur accordingly left London by the night mail on 20th February, and the pursuer on the same evening telegraphed to the defenders,—"Captain John Le Couteur comes down by to-night's mail train to go trip in boat you wrote about. Please wait arrival of train."

Le Couteur arrived too late for the trial trip, but he inspected the vessel at Glasgow, where it had gone. At a meeting with Mr Cunliffe, one of the defenders, he presented Bennett's card, and said that he had come from Beckmann. He stated to Cunliffe that the steamer was not exactly what was wanted. He and Cunliffe then went to the de-

fenders' building yard in Port-Glasgow, where Cunliffe prepared a sketch shewing the lines and dimensions of such a steamer as he thought would suit the requirements of Le Couteur's principals. The price was £13,850, including 2½ per cent commission to be paid to the pursuer. Le Couteur formed a favourable opinion of the defenders as shipbuilders, and in the course of conversation mentioned to Cunliffe that the Rio Grande Company had been negotiating with Hamilton and Company for the building of ships, and asked Cunliffe to call upon Beckmann in London, whom he mentioned as connected with the Rio Grande Company.

Upon the 24th February the defenders wrote to the pursuer:—"Captain Le Couteur arrived at mid-day on Saturday, too late for trial, but we saw him on Monday, and he went all over the vessel. He, however, wants something rather different, for which we quoted him a price, and we gave him a rough sketch of it with him. He left for London by the limited mail on Monday night, and before leaving said he would do what he could to give us the order. We may have to go south end of this week, when we will do what we can to bring about business. The commission we added was 2½% as requested by your good selves. Captain Le Couteur gave us the card of a Mr John Bennett junior, who, he informed us, was working with you in the matter and sharing commission. In case we go to London on Thursday night it would be well if you would post us up in these matters by return of post.—Yours truly, CUNLIFFE & DUNLOP."

Upon the 25th February the pursuer wrote to the defenders:—"I am in receipt of your favour of yesterday, and contents noted. I should advise you to call on Mr Bennett when in London to try and secure an order for one or more. The boats are required for the Rio Grande do Sul Steamship Company, and they are about giving orders out for the building of four larger ones. With respect to the commission it must be 3% on all orders, as I have to give two-thirds of same to Mr Bennett and friends in London. I remain, &c., BARROW MOSS.

"Mr Bennett's address is 43 Fish Street Hill, London, and wish you to call upon him, and I have advised him I have requested you to alter the commission to 3%; please advise us you agree to same."

Upon the 26th February the defenders wrote to the pursuer,—"Your favour of 25th inst. to hand. We expect to be in London on Monday first, and will call upon Captain Le Couteur and his principals, and also on Mr Bennett with reference to the small steamer, particulars and price of which we have already given them—and we will do our best to carry through the business, and in the event of succeeding will have pleasure in including 2½ commission for Mr Bennett and your good selves as you may arrange. We only included 2½% on the price we gave Captain Le Couteur, that being the percentage which you named to us, and unless the price be correspondingly increased we cannot afford 3%.

"The four larger steamers we have known of sometime since, and we understand that they have been fixed recently with one of our neighbours here.—Yours, &c."*

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* Mr Cunliffe stated in evidence,—"My object in saying (in my letter of 26th February to pursuer) that we had known about the four large steamers, was to keep myself clear should any business result at any time between us and the Rio Grande Company; I thought it possible that pursuer might at some future time make a claim upon us for commission—a claim which I felt he had no right to make, and I wrote that intimating previous knowledge of the Rio Grande Company, intending it to be a declinature of his claim. The letter was written purposely and carefully."

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Cunliffe went to London on 2d March. He did not, however, call upon Bennett, as he had promised to do in his last letter to the pursuer, but went at once to Beckmann. He sent in his card, and explained that he had called to see if there was anything doing about the small steamer, the sketch of which had been given to Le Couteur. Beckmann said that nothing could be done without communicating with his friends. He did not mention who his friends were, but he said the steamer was intended to be used at Rio Grande for inland navigation. The subject of the large ocean steamer was then introduced by Beckmann, who mentioned his connection with the Rio Grande Company, and asked Cunliffe if he could quote a price for a sister ship to those being built by Hamilton and Company. Cunliffe undertook to do so, and after some further negotiation the price was fixed at £31,300, including a commission of £800, which Beckmann stipulated should be paid to his firm of Julius Beckmann and Company. Beckmann, who acted as the adviser of the Rio Grande Company in the purchase of ships, laid Cunliffe's offer before the board of directors, and through his influence the offer was accepted, and the order for the fourth steamer to Hamilton and Company was cancelled.

Proof was led in regard to the custom of trade regulating the broker's right to commission, the result of which is sufficiently stated by the Lord Ordinary and the Judges of the Second Division.

The Lord Ordinary, on 17th December 1874, pronounced the following interlocutor:—"Finds that in February 1874 the pursuer introduced the defenders to Louis Karl Beckmann, who then represented the Rio Grande do Sul Steamship Company (Limited), and that in consequence of such introduction the defenders sold to the said company a steamship at the price of £31,300: Finds that the pursuer is entitled to commission on said price at the rate of £2, 10s. per centum, and that the same amounts to £782, 10s.: Ordains the defenders to pay the said sum of £782, 10s. sterling to the pursuer, with interest at the rate of £5 per centum per annum from the 16th day of June 1874 till payment, and decerns: Finds the pursuer entitled to expenses," &c.*

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* "NOTE.—(After a narrative of the facts)—The opinion which I have formed, as the result of a careful study of the evidence, oral and documentary, is, that whether commission be due or not upon the price of the large steamer which was ultimately ordered from the defenders, they never would have received the order, or even heard of the steamer, had it not been for the introduction to them, through the instrumentality of the pursuer, of Le Couteur as Beckmann's representative, sent down for the express purpose of opening negotiations with them for the purchase of a steamer in connection with the Brazilian trade. A small steamer and a large steamer were both wanted by Beckmann at the time,—it may be for owners wholly or in part different,—but still Beckmann was the person treating on behalf of both sets of owners; and it appears to me that when a person having such requirements, and being himself unacquainted with shipbuilders, asks an introduction to a builder from a person whose business it is to introduce sellers and purchasers of ships to each other, and is by that person introduced to a shipbuilder, it would be inequitable to allow him to deal with the introduction as having reference to only one of his requirements. If so, it follows that if Beckmann, on being introduced to the defenders, has, without expressing any dissatisfaction of the plan for the small steamer, suspended consideration of it for a time,—and has made a contract with them,—whether for himself or for a constituent,—for a much larger vessel, neither he nor the defenders can be allowed to maintain that the introduction by the broker was not the *causa causans* of that order being given. . . . .

(After examining Beckmann's evidence, his Lordship proceeded)—"All this very clearly shews (1) that Beckmann held himself out to the defenders as the person on whom the purchase of the steamer really depended; and (2) that

The defenders reclaimed.[1] At advising,— No. 112.

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LORD NEAVES.—This case is of a peculiar kind, and attended with nicety, but on the whole I have come to be of opinion that the interlocutor of the Lord Ordinary is not well founded.

The custom at the foundation of the pursuer's case is not unknown to the law. Any custom which is reasonable ought to be enforced, provided it is clearly proved, and provided the facts of the case support the application of the custom.

The custom is stated in very general terms, viz., that a broker who introduces a shipbuilder to a purchaser is entitled to commission on the first business done. This mode of stating the custom does not point to any distinction between a general and a special introduction.

The case is somewhat strangely libelled. Mr Moss sets forth on record,—"In or about February 1874 the Rio Grande do Sul Steamship Company were requiring at least one steam vessel of a light draught, and one or more larger steam vessels to be built." This is not a very accurate statement. Then he continues,—"The pursuer in the ordinary course of his business was duly made aware of the wants of this company, and from his own position and credit, and through his friends, correspondents, and connections, he had influence to give any shipbuilder an introduction, and a very probable prospect of getting an order for one or more of the vessels. The pursuer communicated with the defenders as to the said company's wants in February 1874, stipulating in the outset for 2½ per cent commission, which was agreed to by the defenders. They sent to the pursuer certain estimates, and explained that they had a steamer nearly completed, which they had built for an African company, and they requested the

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but for the pursuer's having introduced the defenders to Beckmann as being good shipbuilders they never would have heard of the order.

"This being so, the only remaining question is, Whether the pursuer is entitled to commission on the order? and if so, to how much? The law on this point is clearly stated by Erle, C. J. in the case of Green v. Bartlett, 30th May 1863, 32 L. J. C. P., 261—'The question whether the agent is entitled to be paid commission on the sale is one which has been often litigated, and the rule has been to hold that there has been a sale by the agent which would entitle him to commission if the relation of buyer and seller has been really brought about by what he has done; if, in other words, he was the *causa causans* by which the property was sold.' It appears to me that the pursuer was in the present case truly the *causa causans* of the sale of the steamer in question to the Rio Grande Company, by means of the introduction which he gave the defenders to Beckmann. And the evidence adduced by the pursuer—which is indeed corroborated by the evidence of the defenders, and by the whole history of the case—shews that it is a well established rule in the shipbuilding and shipbroking business that commission is due to the broker or agent upon the first order which results from his introduction of the builder to a customer, even although the parties, after the introduction has been effected, arrange the details of the transaction without calling for further assistance from the broker.

"The rate of commission is also proved to be 2½ per cent, in the absence of any special agreement to the contrary.

"The pursuer is therefore, in my opinion, entitled to decree for the sum claimed by him, with expenses."

[1] *Authorities cited.*—Wilkinson v. Martin, Feb. 16, 1837, 8 Carr and Payne, 1; Green v. Bartlett, May 30, 1863, 32 L. J. C. P. 261 (per Erle, C. J.); Burnet v. Bouch, July 4, 1840, 9 Carr and Payne, 620. See Russell on Mercantile Agency, pp. 130, &c.

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pursuer to send his principals, or some one representing them, to attend the trial trip of said steamer on the Saturday following, with a view to business. The pursuer thereupon went to London, and by his influence with the said Rio Grande Company and their friends and officers, Captain John Le Couteur was sent down to the defenders' yard at Port-Glasgow. The pursuer communicated with the defenders, and gave to Captain Le Couteur the defenders' letter and his card to introduce him to the defenders, and he presented these documents to the defenders. The representatives of the Rio Grande do Sul Steamship Company were thereby introduced for the first time to the defenders, and the defenders had the benefit of the pursuer's recommendations and influence in doing business. In consequence of the pursuer's introduction and through his influence the defenders, in or about March 1874, obtained an order for a steam vessel to be supplied to the said company at the price of £31,300."

I do not think that these averments are proved. It is not proved that the Rio Grande Company wanted the steamer first mentioned. Beckmann, who was looking after the interests of the Rio Grande Company certainly, but also after his own, wanted a steamer, not of the proper class for the company's ocean trade, but a smaller steamer. It had occurred to him and others that advantage might be taken of the existence of the company to start a river steamer for inland traffic on the Rio Grande. But it does not follow that the two undertakings were to be in connection.

The first thing that brings the defenders into contact with Beckmann was the smaller steamer. The pursuer gives the defenders an introduction to Beckmann, who, in order to satisfy himself of their efficiency, sends down Le Couteur to Port-Glasgow, and Le Couteur forms a favourable opinion of the defenders as shipbuilders. Nothing more is said about the smaller steamer. The defenders are employed to execute an order for a large steamer for the company which had been previously given to Hamilton and Company, but with power to cancel the order.

I do not think that the facts as proved come up to the case on record, which is that the party who gave the order was identical with the party to whom the builder was introduced. I have great doubts whether any custom is proved which will cover the real facts. The smaller steamer was not necessarily for the Rio Grande Company, but for a speculation that might be quite independent.

There seems a great difference between a general and a special introduction. A broker acts for both parties, and acts according as he has been appointed. If general business is wanted on both sides, the broker is entitled to commission on the first transaction. But a recommendation of a shipbuilder to build a small steamer is not necessarily a recommendation to build a large steamer. If the parties, even without circuity of persons, drop the business for which they have been introduced and take up a much larger transaction, I see no evidence of a custom that the broker shall still get a commission on the first piece of business that may be brought about, however large, and after an interval however long. The broker there is not the *causa causans* but only the *causa causæ causantis*.

The fact that the persons who gave the employment were not the same as the person to whom the introduction was given is a special difficulty in the way of the pursuer proving that he has done the work for which he claims payment.

LORD ORMIDALE.—This is one of a class of cases of which few, if any, have been under the consideration of this Court. I do not doubt, however, that the

custom on which it is laid is legitimate in itself, and a salutary one for interests of trade. No objection, indeed, was taken to the validity of an obligation or contract based on such a custom as that averred in the present case if it were established; but it was denied and disputed that any such obligation or contract has been proved.

Although the proof is somewhat voluminous, the real question at issue is to be found,—with very little assistance from the parole proof,—in the correspondence of the parties. The pursuer, so far as we see, was never indeed in personal communication at all with the defenders. That being so, I have directed my attention chiefly to the correspondence, which commences with a letter by Mr John Bennett, the broker of the Rio Grande Company, to the pursuer, Mr Moss, dated 16th February 1874. Moss transmits the letter, or a copy of it, to the defenders. The only steamer referred to in that letter is a small one for river trading in Brazil. The defenders answered that they had just built a steamer, a duplicate of which they thought might suit Mr Moss's constituents, and that it was to be forthwith subjected to a trial trip. Moss then gets a person,—Captain Le Couteur,—sent down from London to witness the trial trip, and Captain Le Couteur, accordingly, when he comes to Scotland, puts himself in communication with the defenders. He finds, however, that the vessel they had built would not suit, and so that particular matter terminated.

We then come to the letter of 25th February by Moss to the defenders—(Reads).[1] This is the first time that any allusion is made to the large or ocean steamers. The previous correspondence had related exclusively to a river or small steamer. Here, for the first time, Moss, I do not say thrusts himself into the matter of the large steamers, but, so far as appears, without being asked or employed by any one to do so, introduces the subject of the larger steamers. Now, although a broker chooses to write such a letter to a shipbuilder, that will not necessarily impose a liability for commission to him on the shipbuilder. What is the defenders' answer?—(Reads defenders' letter of 26th February 1874).[2] It is reasonable to presume that the defenders knew quite well what was doing in their neighbour's yard, and, therefore, that it was quite true they had been previously aware that the Rio Grande Company might require one or more large or ocean steamers. But even if they got the information for the first time from Le Couteur, which induced them to go to London, I do not, at present, see how that would found a good claim against them for commission by Moss. I rather think that, if a competition for commission had arisen between Moss and Le Couteur, the latter would have had the preferable claim. No doubt Le Couteur came down in consequence of the previous proceedings taken by Moss, but it is clear that he was sent down for a special purpose only, viz., to see whether the river or small steamer would suit.

It was in this state of matters that Cunliffe, one of the defenders, went to London, and got into communication with Beckmann. And it was he, and not Moss, who introduced Cunliffe to the Rio Grande Company, from whom an order was obtained for a large or ocean steamer.

Such are briefly the circumstances in which the question arises, whether Moss, the pursuer, has established his present claim for commission against the defenders on the cost of the large or ocean steamer just referred to. I concur with

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[1] *Supra*, p. 659. [2] *Ibid.*

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Lord Neaves in being unable to find any sufficient evidence to support such a claim on the part of the pursuer.

In the first place, there is not sufficient evidence that Moss gave the defenders any general, or, indeed, any introduction at all, to the Rio Grande Company. Looking at the correspondence I find nothing but a special introduction having reference to a special object, viz., a small, or river steamer; and that introduction was not to the Rio Grande Company, but to certain subordinate parties. I cannot hold that the fact of Moss saying in one of his letters to the defenders, "I know of a larger steamer," of which the defenders had themselves previously heard, is enough to support the present claim,—the more especially as it appears the defenders had, independently of Moss altogether, arranged to go to London to endeavour to get an order for the large steamer. Moss may have had a good claim against the defenders in reference to the small steamer, if an order had been obtained for it; and he may still have such a claim for anything that appears to the contrary. In the second place, it is not proved that the Rio Grande Company was identical with the persons who required the smaller steamer, and if so, this raises an additional bar to the pursuer prevailing in his present claim. If a broker gives a shipbuilder an introduction to A, for the purpose of obtaining an order for the construction of a small, or river steamer, and the shipbuilder, in the course of his negotiation with that purpose, comes into contact with a third party, who gives him an order for a large or ocean steamer, I cannot hold that this would give the broker a claim for commission against the shipbuilder on the latter transaction, merely because it may be said that in a certain loose sense it arose indirectly from, or in consequence of, the introduction which had been given to a different party, and in reference to a different kind of transaction.

In short, and without entering into farther details, it appears to me that there are wanting in the present case the elements of employment and service necessary to support the pursuer's claim, and, therefore, that the interlocutor of the Lord Ordinary will fall to be recalled, and the defenders assoilzied.

Lord Gifford.—I have arrived at the same conclusion. The action is brought by a commission-agent or broker, in order to recover his commission. Commission is the remuneration to which a broker is entitled under the contract of agency. There must always be a contract of agency to warrant the charge of commission. If there is no agency—no "commissioner" appointed—there is no room for "commission." In general, commission is due to the agent as recompense or payment for his skill, trouble, and responsibility. In the present case the claim for commission is somewhat peculiar. It is not laid upon skill, or work, or trouble, in the special transaction. The agent did not carry through the contract of sale. He did not even initiate it. The claim is for introduction and recommendation,—for the use, so to speak, of the agent's influence or intervention in bringing the parties together, and then leaving them to make their own contract, and this is not the ordinary way in which a commission is earned. Still, I do not doubt that such a claim may be well founded. When parties make a distinct contract for an introduction or recommendation, and where the introduction or recommendation is stipulated and agreed to be paid for—then, if the contract is fair and reasonable, it will receive effect. But there must be such a contract before the agent is entitled to remuneration, and the law will look somewhat narrowly to see that it is fair and reasonable, especially when the commis-

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sion is really added to the price, and charged against the purchaser, who did not employ the broker, and was not a party to the contract of agency.

In the present case I think that there was a contract between the parties, but of a very special and limited kind. The contract is contained in the letter of the pursuer to the defenders of 17th February 1874. Enclosed in that letter was an excerpt of a letter received by the pursuer from Mr John Bennett junior, in which Bennett asks the pursuer if he would quote a price for a light draught steamer. Mr Bennett's name, however, was withheld, and merely an excerpt from his letter was sent to shew what he was prepared to order. So that the enclosure, which gives a variety of details of requisites of the steamer, defines the business for which Moss became agent, if employed by Cunliffe and Dunlop. He was to be agent or broker between an undisclosed principal (Bennett) and Cunliffe and Dunlop, with a view of getting that principal to order from Cunliffe and Dunlop a vessel of the specified dimensions. I do not think that there was any other contract between the parties. Suppose that this steamer had been built, or may yet be built for Mr Bennett or for his constituents by Messrs Cunliffe and Dunlop, I do not doubt that the 2½ per cent commission will be due to the pursuer, because Cunliffe and Dunlop have expressly agreed to pay that commission, and the obligation is not illegal. I do not see that his claim could be resisted on the ground that another transaction had intervened. In short, I read the bargain as an agreement that if the defenders should be employed to build the river steamer which was wanted then they should pay the pursuer, in consideration of his introduction and influence, 2½ per cent on the price. But the pursuer maintains that his introduction was not special for any particular order, but general, and that a general introduction implies by custom of trade or by express stipulation a commission of 2½ per cent upon the first order which may be obtained, and the pursuer's claim is for a commission upon the first order, whatever that may be, and however different in its nature it may be from the river steamer which was originally contemplated.

I do not think that this contention is well founded, and I am not satisfied that any such custom of trade has been proved. There may no doubt sometimes be such a bargain, but I think it must always be specially alleged and proved, and there is no such bargain proved in the present case. I think the pursuer has failed to shew that the defenders agreed to pay him commission on the large ocean steamer which they built for the Rio Grande Company.

The first defence is that the larger steamer was not ordered by the same parties who were prepared to order the river steamer. I think this defence has been made good. There was some idea that the two steamers might come to belong to the same company, but at the date when the introduction was given for the river steamer there was no arrangement with the Rio Grande Company to take that river steamer. It may be that some of the parties interested in the Rio Grande Company were also interested in the river steamer, but there was no identity between the concerns.

In the next place, there was a material and essential difference between the things ordered. Suppose that instead of a large steamer, a very small vessel had been ordered, or it may be a mere boat, would Moss have been contented with commission on that, as being the first order? If the introduction was general, he would have been obliged to be contented with the first order, however small.

Still further, it was indirectly and not directly from Moss that Cunliffe and Dunlop got the order for the larger steamer. At the time when Moss men-

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tioned the river steamer he knew nothing of the larger steamers. Bennett had told him nothing about them. We see how the order for the larger steamers came about. Bennett or Moss sent down Captain Le Couteur. He was not then connected with the Rio Grande Company. He was sent down with reference to this river steamer, which was the private speculation of certain parties. It would be a strong thing to hold that because a broker introduces parties for one contract, that will entitle him to commission on another contract, not even between the same parties, but indirectly brought about, in consequence of the parties being brought together and introducing a third party, with whom new transactions arise. It is said that the large steamer was substituted for the smaller. If it could be made out that one order came in place of the other that would make a difference. But all the four larger steamers had been ordered from Messrs Hamilton before the smaller steamer was thought of, though there was a power to cancel the order for one. The smaller steamer was therefore in addition to and not in substitution of the larger steamers. The order which the defenders obtained for the larger steamer arose indirectly from Captain Le Couteur being sent down. It was Captain Le Couteur, and not the pursuer at all, who was the means of the defenders being employed by the Rio Grande Company to build the ocean steamer now in question, and I cannot hold that Moss was the *causa causans* of the order, or that he is entitled to any commission thereon.

Upon the whole, I am of opinion that the pursuer is not entitled to prevail, (1) because it was a special contract for which alone he was agent, and (2) because he was only the indirect and not the direct cause of the order in question.

I cannot help adding that I very strongly disapprove of the practice which seems to prevail of charging commission merely by adding it to the price without letting it separately appear as commission. The result is that the purchaser is made to pay commission without knowing or being aware of it, and he has no means of checking or objecting to the amount or rate. It may be charged at any rate; he cannot tell what, because it is charged as price. A fair commission will never be grudged, but it should always appear, and the agent or broker who charges the commission should be disclosed as such to the party by whom the commission is paid.

Lord Justice-Clerk.—This case would have been a very suitable one for a jury, and we are sitting very much in that capacity. The question to a large extent turns on the credibility of evidence, and had it not been for the importance of the case, although differing to some extent in my impression of the evidence, I should have simply acquiesced in the result at which your Lordships have arrived. I am anxious to make a few remarks on the general aspect of the case.

The custom of trade, by which a broker who introduces a shipbuilder to a customer is entitled to a commission of 2½ per cent on the first order which is the direct result of the introduction, is well averred and sufficiently proved. This right can only be claimed by a man in the profession, and therefore the notion of either Beckmann or Le Couteur, neither of whom are brokers, being entitled to commission, is out of the question.

The subject of contention is, whether the order for the large steamer was the direct result of the pursuer's introduction. If it were only the indirect result, our verdict must be against the pursuer. My opinion is that, if the witnesses are to be believed, it was the direct result. Lord Ormidale considers that the

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elements of our decision are very much limited to the written evidence. I do not take this view. The letters do not contain the constitution of the relation of principal and broker between the defenders and the pursuer. It is proved by the pursuer's evidence, and not denied by Cunliffe, that the defenders made the pursuer's acquaintance two years before this transaction, and introduced themselves as shipbuilders desirous of orders. Bennett, the London broker, who was acting for the Rio Grande Company, wanting a small steamer, writes to Moss whether he can quote a price. Moss writes to the defenders sending them the dimensions and particulars. It is right to say that this letter is not an introduction. It introduces the defenders to no one. It only asks a question. That letter does not, therefore, constitute the relation of principal and agent.

After getting the defenders' answer Moss goes to London, and mentions to Bennett the defenders as the parties whom he would recommend to receive the order. If Moss is to be credited, Bennett then told him of the large steamer. That information was given to Moss before Le Couteur went down to Glasgow. In consequence of the pursuer's recommendation Bennett pressed upon Beckmann to send some one to Port Glasgow. The first introduction is the telegram by the pursuer of 20th February that Captain Le Couteur was to come down by that night's mail. Le Couteur accordingly comes down as Beckmann's agent, and the result of his visit is that Cunliffe went to London and got the order for the large steamer.

A distinction has been drawn between a general and a special introduction. I can understand the difference between a general and a special recommendation, but I cannot see any reason for drawing a distinction between a general and a special introduction.

It is said that the small steamer was for a different party. I am by no means satisfied of this upon the evidence, but in the view which your Lordships take of the evidence I do not dissent from the result.

THIS interlocutor was pronounced:—"Recall said interlocutor: Find that the pursuer has failed to prove any contract between him and the defender for payment by the defenders of the commission sued for, or any facts sufficient to infer their liability for such commission: Therefore assoilzie the defenders from the conclusions of the summons: Find the pursuer liable in expenses," &c.

MORTON, NEILSON, & SMART, W.S.—HILL & FERGUSSON, W.S.—Agents.

No. 113.

Mar. 20, 1875.
Macknight.

JAMES MACKNIGHT AND ANOTHER (M'Cormick's Trustees), Petitioners.—*Hall.*

Trusts (Scotland) Act, 1867 (30 *and* 31 *Vict. c.* 97), *sec.* 14.—The Trusts Act, 1867, sec. 14, enacts that "when any person shall be entitled to the possession for his own absolute use of any heritable property, or moveable or personal property, the title to which has been taken in the name of any trustee .... or other person who has died or become incapable of acting without having executed a conveyance of such property, it shall be lawful for the person beneficially entitled to such property to apply by petition to the Court for authority to complete a title to such property in his own name," &c.

Held that the above enactment does not apply to the assignee of a beneficiary.

1ST DIVISION.
Ld. Curriehill.
M.

THIS petition was presented by James Macknight, W.S., and Robert Hill, W.S., testamentary trustees under a mutual settlement executed by the deceased Miss Rachel M'Cormick, who died in 1874, and her sister

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Helen, who died in 1865. The petition prayed for warrant to the petitioners as trustees foresaid to complete a title under sec. 14 of the Trusts (Scotland) Act, 1867,* to £695 of the stock of the Royal Bank of Scotland, to which Miss Rachel M'Cormick was alleged to have right under the settlement of her father, the deceased Edward M'Cormick, who died in 1814. The stock still stood in name of Mr M'Cormick's trustees, the last of whom died in 1837.

The Lord Ordinary, on 11th March 1875, reported the petition to the Inner-House.†

LORD PRESIDENT.—I am sorry I cannot concur in the opinion indicated by the Lord Ordinary. He says,—"If I had seen my way to dispose of the petition in the Outer-House, I should have been inclined to hold that the petitioners, as assignees (though in trust) of the party who herself was beneficially entitled to the stock or part of it for her own absolute use, are entitled to obtain from the Court authority to complete their title, in the mode proposed, to said stock, or to the share thereof to which their author was entitled." Now, the words of section 14 of the Trusts Act, 1867, are very precise. They are intended to apply to the case where there remains a proper beneficiary under a lapsed trust, and to enable him to have access to the property directly without reconstituting the trust, or obtaining new trustees appointed. The question is whether the clause is so expressed that it can be extended to cover the case of those who have acquired right from the proper beneficiary? I am of opinion that the expressions used cannot be so interpreted. The person who can take advantage of the provision is the person who is entitled, as beneficiary, to the absolute possession of property which was vested in trustees, and to which he has not got an operative conveyance. The petitioner would construe the words as including not only the person beneficially entitled, but also his assignee, whether for the assignee's

* Sec. 14 of the Trusts (Scotland) Act, 1867 (30 and 31 Vict. c. 97) enacts, —"When any person shall be entitled to the possession for his own absolute use of any heritable property, or moveable or personal property, the title to which has been taken in the name of any trustee, or *curator bonis*, or *factor loco absentis*, or *factor loco tutoris*, or judicial factor, or other person, who has died or become incapable of acting without having executed a conveyance of such property, it shall be lawful for the person beneficially entitled to such property to apply by petition to the Court for authority to complete a title to such property in his own name," &c.

† "NOTE.—. . . . . It seems to be clear that Miss Rachel M'Cormick, had she been now alive, might have competently obtained authority from the Court to complete a title under the statute to the shares of the stock to which she and her sister Helen were beneficially entitled, as she was entitled to the same for her own absolute use. The petitioners, however, are not entitled to said stock for their own absolute use, but solely as trustees for the purposes of the said mutual settlement; and it is therefore doubtful whether they come within the category of persons who are entitled to avail themselves of the summary method of completing a title introduced by the statute referred to.

"As the question is one of novelty and importance, and as there is in this case no contradictor, I have thought it expedient to report the point to the Court, in order that an authoritative judgment may be pronounced without unnecessary loss of time. I may be permitted to say that if I had seen my way to dispose of the petition in the Outer-House, I should have been inclined to hold that the petitioners, as assignees (though in trust) of the party who herself was beneficially entitled to the stock, or part of it, for her own absolute use, are entitled to obtain from the Court authority to complete their title, in the mode proposed, to said stock, or to the share thereof to which their author was entitled."

own uses or for those of other parties. I cannot so construe the clause, and, therefore, I am of opinion that we must remit to the Lord Ordinary to refuse the prayer of the petition. No. 113. Mar. 20, 1875. Macknight.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT accordingly remitted to the Lord Ordinary to refuse the prayer of the petition.

JAMES GOW, S.S.C.—Agent.

No. 114.

Mar. 20, 1875. Rae v. Linton, &c.

JOHN RUTHERFORD RAE, Pursuer.—*D.-F. Clark—M'Kechnie.*
THOMAS LINTON, Defender.—*M'Laren.*
THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND, Defenders.—*Macdonald.*

Issue—Reparation—Criminal Prosecution—Public Officer—Malice.—A person was charged before a police magistrate with the crime of falsehood, fraud, and wilful imposition, in so far as he did "wickedly and feloniously, falsely and fraudulently," present and cash at the head office of a bank a cheque on a branch thereof, "he well knowing that he had then no money" in the branch bank. Upon this charge he was convicted and sentenced to imprisonment. The conviction and sentence having been quashed by the Court of Justiciary in respect that the libel contained no relevant charge of falsehood, fraud, and wilful imposition, he brought an action for £2000 damages against the procurator-fiscal, who prosecuted, and the bank, who gave the information. The pursuer averred that he had an account current with the branch bank, and that he had previously drawn cheques upon it which had been duly honoured at the head office. *Held* that in regard to each defender the pursuer required to put in issue malice and want of probable cause.

2D DIVISION. Ld. Craighill. I.

IN August 1874 John Rutherford Rae was charged before the Police Court in Edinburgh at the instance of Thomas Linton, superintendent of police for the city of Edinburgh, and procurator-fiscal of the Court, with "the crime of falsehood, fraud, and wilful imposition, actor, or art and part, in so far as upon the 23d day of July 1874 years, or about that time, in the bank of Scotland, situated in Bank Street, in or near Edinburgh, the said accused did wickedly and feloniously, falsely and fraudulently, cause to be presented for payment to Robert Thomas Scott, a teller in said Bank of Scotland, a cheque or order for money, conceived in the following or similar terms:—'No. , Annan, 22d July 1874.—To the agents of the bank of Scotland, Annan.—Pay to the bearer the sum of ten pounds sterling £10 stg., J. RUTHERFORD RAE,'—he well knowing that he had then no money in said Bank of Scotland, Annan, and having in this manner imposed upon and deceived the said Robert Thomas Scott, he did then and there cause to be delivered to the said accused the sum of nine pounds, nineteen shillings and sixpence sterling, being the amount of said cheque or order, less sixpence for commission."

The presiding magistrate found the complaint proved, and sentenced Rae to twenty days imprisonment.

Rae presented a note of suspension to the High Court of Justiciary, who on 11th December 1874 pronounced the following judgment:—"In respect the libel contains no relevant charge of falsehood, fraud, and wilful imposition, pass the bill: Suspend the conviction and sentence complained of *simpliciter*: Find the suspender entitled to expenses," &c.*

Upon 22d January 1875 Rae raised an action of damages against Linton and the Bank of Scotland.

* For the proceedings in the High Court, see Justiciary Cases, p. 17.

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The pursuer averred that he had an account current with the branch bank of Scotland at Annan, where he resided at the time when he drew the cheque in question. He stated;—The said cheque was sent by the pursuer to the head office of the said bank in Edinburgh, where it was cashed. This was not the first time that the pursuer had negotiated cheques in a similar manner upon said bank, which were duly honoured by the bank, and paid by the branch office in Annan on transmission thither.

The bank admitted that the pursuer had previously opened an account with the Annan branch, and that he had previously presented cheques at the head office, which were cashed; but explained that upon these occasions there were funds at the pursuer's credit in the Annan branch to meet the cheques, that he had never been permitted to overdraw his account, and knew that he would not be allowed to do so.

Linton founded on the 30th section of the Summary Procedure Act, 1864:—"No procurator-fiscal, or other party prosecuting for the public interest by complaint under the provisions of this or any other Act, shall be liable to pay or be found liable by any Court in a greater sum than £5 as damages for or in respect of any proceedings taken or anything done on such complaint, or on any judgment following on such complaint, unless the person prosecuting for damages shall aver and prove that such proceedings were taken or done maliciously, and without probable cause." He tendered to the pursuer the statutory allowance of £5.

The following issues were adjusted by the Lord Ordinary:—"(1) Whether the defenders, the said governor and company of the Bank of Scotland, on or about the 7th day of August 1874, maliciously, and without probable cause, caused the pursuer to be apprehended, and thereafter to be tried in the Police Court of the city of Edinburgh, and convicted of the crime of falsehood, fraud, and wilful imposition, and subsequently to be imprisoned in the prison of Edinburgh for twenty days, to the loss, injury, and damage of the pursuer? Damages laid at £2000. (2) Whether, on or about the 7th day of August 1874, the defender, the said Thomas Linton, maliciously, and without probable cause, caused the pursuer to be apprehended, and thereafter to be tried and convicted in the Police Court of the city of Edinburgh, for the crime of falsehood, fraud, and wilful imposition, and subsequently to be imprisoned in the prison of Edinburgh for twenty days, to the loss, injury, and damage of the pursuer? Damages laid at £2000."

Rae moved the Court to vary the issues by deleting the words "maliciously and without probable cause" from each issue.

Argued for the pursuer;—Probable cause could only arise on the facts. The pursuer had been charged with acts which were not a crime by the law of Scotland. The proceedings were entirely outwith law, and the defenders were not entitled to have malice and want of probable cause inserted in the issues.[1]

Lord Justice-Clerk.—The line of demarcation between a proceeding entirely without warrant of law and one in which the law has not been accurately carried out is in some cases very subtle. But I have no doubt in this case. We have a private party laying an information before the competent authority, and that

[1] *Authorities cited.*—Arbuckle v. Taylor, May 1, 1815, 3 Dow, 160; Strachan v. Stoddart, Nov. 13, 1818, 7 S. 4; Hollands v. Richardson, July 12, 1843, 5 D. 1352, 15 Scot. Jur. 599; Barclay v. Barclay, March 2, 1854, 16 D. 714, 26 Scot. Jur. 309; Bell v. Black and Morrison, June 28, 1865, 3 Macph. 1056, 37 Scot. Jur. 543.

authority taking steps to have the complaint investigated. Ultimately it is found that the complaint is not relevant, not that it did not set forth what might be a crime, but that the acts averred did not amount to the crime libelled. The question now is, whether the defenders are liable without an averment of malice and want of probable cause. I think this is just such a case as requires proof of malice, even apart from the Act. A public officer in the discharge of his duty, although an error has been committed, cannot be made responsible without an allegation of malice. The case of Bell v. Black and Morrison, 3 Macph. 1056, was very different. The ratio of that judgment was that the proceedings complained of had not even a colour of law. It may turn out that the defenders knew things which ought to have prevented them acting as they did, but in that case it will be easy to prove malice. Malice and want of probable cause must enter the issues.

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LORD NEAVES, LORD ORMIDALE, and LORD GIFFORD concurred.

THE motion was refused.

W. S. STUART, S.S.C.—RICHARDSON & JOHNSTON, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

SUMMER SESSION.

THE CALEDONIAN RAILWAY COMPANY, Pursuers and Respondents.—*Johnstone.*
THE GREENOCK SACKING COMPANY, Defenders and Appellants.—*Sol.-Gen. Watson—Trayner.*
THE CLYDE SUGAR REFINING COMPANY, Defenders and Respondents.—*D.-F. Clark—M'Laren.*

No. 115.
May 13, 1875.
Caledonian Railway Co. v. Greenock Sacking Co. and Others.

Reparation—Culpa—Insufficiency of Building—Landlord and Tenant.—The tenant of a store employed a carrier with a horse and cart to remove goods. The horse was killed by the fall of the building.

In an action of damages at the instance of the carrier against the tenant and the owner of the building, after proof, *held* that the tenant was liable to the pursuer, in respect that the accident had been caused by his fault in overloading the store, and in not warning the pursuer of the insecurity of the building and danger which had been apparent for some days, but reserving to the tenant any claim of relief he might have against the landlord.

Expenses.—In the above action, *held* that the tenant was liable in expenses, not only to the pursuer, but to the other defender.

2D DIVISION. Sheriff of Renfrewshire. I.

BY missives, dated respectively 24th December 1872 and 23d February 1873, the Greenock Sacking Company leased from the Clyde Sugar Refining Company the first and second storeys and the attic storey of a large store, which the sugar company had bought from a cotton mill company, and which had been used by the former owners as a warehouse and reeling rooms.

The sacking company, after getting possession of the store, proceeded to use it for the purpose for which it was known that they had taken it,

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viz., as a jute store. They commenced storing the bales of jute in the attic storey, and after the men had been three days at work the store shewed symptoms of giving way, and, although some uprights and supports were put in by the sugar company's orders, on the fourth day the store fell, the outer wall falling outwards, and among other things seriously injuring a horse belonging to the Caledonian Railway Compay, who had been employed by the sacking company to carry the jute to the store. The horse died of its injuries, and the railway company raised an action for £95, 5s. 3d., as the value of the horse and harness, in the Sheriff-court, in which they convened both the sacking company and the sugar company as defenders.

In the course of the proof led by the railway company it was established that the sacking company had been informed by their men of the dangerous state of the store, and that they had given no warning of that to the railway company or their servants.

Both defenders led evidence at great length. The sacking company led evidence, with the view of proving that the accident happened owing to the original insufficiency of the store for the use for which it was let, and the sugar company, with the view of shewing that the fall of the store had been caused by the manner in which the sacking company had used the store.

The sacking company, before the proof was led, put in a minute agreeing to the case being tried as between them and the sugar company, the party found liable to pay the whole expenses. This minute was not, however, accepted by the sugar company.

In consequence of a great part of the proof having been taken by the Sheriff, and at his request, the Sheriff-substitute (Smith) made a vizandum to the Sheriff.

The Sheriff (Fraser), on 21st December 1874, pronounced an interlocutor, in which he found, *inter alia*, that the building fell, and the damage to the horse was caused, "through the *culpa* of the Greenock Sacking Company,—First, by overloading the building; and, secondly, by recklessness and want of care in the mode in which the jute was stored in the attic and second floors of the building." He accordingly decerned against the sacking company for £89, 18s. 3d. and assoilzied the sugar company from the action, and found the sacking company liable in expenses to both the railway company and the sugar company.

The sacking company appealed to the Court of Session.

THE Second Division pronounced the following interlocutor:—"Find that by the missives, Nos. 6 and 7 of process, the Clyde Sugar Refining Company let to the Greenock Sacking Company the premises in question for the purpose of using the same as a store: Find that the defenders (appellants) last-mentioned proceeded to store a quantity of jute in the attics of the building, and that during this operation various indications were observed tending to shew that the weight imposed was dangerous to the building, and that these indications were communicated to the said defenders: That, in the knowledge of this danger, the said defenders employed one of the servants of the pursuers (respondents) with a horse and cart to come within the building without intimating the state of the same, or the warnings received, and proceeded notwithstanding with the further loading of the premises: Find that the building suddenly fell, and so injured the horse belonging to the pursuers as to cause its death: Find that the fall of the building was caused by the imposition by the defenders on

the floor of the attic thereof of a greater weight than the building could sustain: Therefore dismiss the appeal, and affirm the judgment appealed from; reserving to the said defenders (appellants) any claim of relief they may have against the other defenders, the Clyde Sugar Refining Company: Find the defenders, the Greenock Sacking Company, liable in additional expenses to the pursuers and the other defenders; and remit to the Auditor of this Court to tax the additional expenses, and to report: *Quoad ultra* remit the cause to the Sheriff, and decern."

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HOPE, MACKAY, & MANN, W.S.—MASON & SMITH, S.S.C.—WILLIAM ARCHIBALD, S.S.C.—Agents.

AGNES STEWART OR SIMPSON, Pursuer.—*D.-F. Clark—Mitchell.*
ROBERT STEWART, Defender.—*Sol.-Gen. Watson—Lorimer.*
Et è contra.

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Simpson v. Stewart.

Process—Proof before Answer—Procedure-roll.—When a case is in the procedure-roll it is the duty of the Lord Ordinary, before allowing proof, to decide whether there should be any limitation of the mode of proof.

1ST DIVISION. Lord Shand. M.

THIS was one of four conjoined actions between Robert Stewart (the pursuer in the conjoined actions), and Mrs Agnes Stewart or Simpson, as executrix of her husband, the late George Simpson, being a counter action at the instance of Mrs Simpson against Robert Stewart, as executor of Andrew Stewart, for payment, *inter alia*, of certain bills. Mrs Simpson alleged,—(Cond. 3) "The said Andrew Stewart was, at the said date of his death, indebted to the pursuer's late husband in the following sums, with interest, viz.:—(1) £98, 10s. sterling, under bill dated 1st February 1870, drawn by the said George Simpson upon and accepted by the said Andrew Stewart, payable two months after date; (2) £200 sterling, under bill dated 28th September 1870, drawn by the said George Simpson upon and accepted by the said Andrew Stewart, payable one month after date; (3) £100 sterling, under bill dated 28th September 1870, drawn by the said George Simpson upon and accepted by the said Andrew Stewart, payable two months after date. No part of any of these sums has been paid or compensated for by either the said Andrew Stewart, or the defender as his executor, or in any other capacity, to either the pursuer's late husband or the pursuer; and the defender, as executor foresaid of Andrew Stewart, is indebted and resting owing to the pursuer in the said sums, with interest, as concluded for."

The defender stated,—(Ans. 3) "Denied. The defender does not admit the genuineness of the signatures of the said Andrew Stewart on the bills in question. If they are genuine, he believes and avers that the bills were accommodation bills granted for behoof of the said George Simpson, and that the said Andrew Stewart never got any money or value for them."

There was no plea to the effect that the defender's allegations could only be proved by writ or oath.

The Lord Ordinary pronounced an interlocutor conjoining the actions, and "in the conjoined actions allows to the parties a proof of their respective averments, and to both a conjunct probation."

A proof was led, part thereof consisting of evidence taken under a submission of the various subjects in dispute, which had proved abortive, which the parties agreed to hold as proof in the present case, and the

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Lord Ordinary thereafter pronounced an interlocutor containing, *inter alia*, the following findings:—"Having considered the cause and proof in the conjoined actions—(First) In the action at the instance of Mrs Agnes Stewart or Simpson, defender in the conjoined actions, widow of the late George Simpson, as sole executrix and universal disponee of her late husband, and as an individual, finds that in the accounting between the parties the said defender is entitled to credit for the following sums, viz., (1) £98, 10s., with interest from 4th April 1870; (2) £200, with interest from 31st October 1870; (3) £100, with interest from 1st December 1870, the said sums being the amounts of the bills mentioned in article 3 of the condescendence in the action at the said defender's instance."*

Robert Stewart reclaimed.

Lord President.—(After disposing of the other parts of the case)—Various bills are, *inter alia*, the subject of a counter action at the instance of Mrs Simpson against Robert Stewart, and she sets out in the 3d condescendence,—"The said Andrew Stewart was, at the date of his death, indebted to the pursuer's late husband in the following sums, with interest, viz.:—(1) £98, 10s. sterling under bill, dated 1st February 1870, drawn by the said George Simpson upon and accepted by the said Andrew Stewart, payable two months after date," and then she specifies two other bills. She then states,—"No part of any of these sums has been paid or compensated for by either the said Andrew Stewart or the defender as his executor, or in any other capacity, to either the pursuer's late husband or the pursuer, and the defender, as executor foresaid of Andrew Stewart, is indebted and resting owing to the pursuer in the said sums, with interest, as concluded for."

That is an action laid upon bills which have suffered no prescription.

What is the answer? That the bills were accommodation bills. The answer is distinct and specific, and the only competent way to prove it is by writ or oath. But unfortunately the Lord Ordinary did not notice this part of the case separately, and has allowed to both the parties a proof at large of their averments.

The pursuer ought to have stated a plea to the effect that these averments

* "Note. . . .—In regard to the bills, the three acceptances by the late Andrew Stewart, who is now represented by the pursuer, have been produced in process. The defence to the claim is that these were bills granted as accommodation bills for behoof of George Simpson, and for which Andrew Stewart never received any value. According to the ordinary rule this defence must be proved by the writ or oath of the drawer, and there is no such proof of the defence in this case. The pursuer, founding on the deposition of the late Mr Simpson, emitted before Mr Boyd as referee, and which has, in terms of the agreement of the parties, been admitted as proof in the present case, contends that the whole circumstances connected with the bills are so suspicious that he is entitled to the benefit of proof at large, and is not limited by the ordinary rule of law just referred to. It appears to me that the pursuer has not established circumstances which entitle him to the benefit of parole evidence; but further, that even if such evidence be admissible, he has failed to instruct that the bills were granted for Mr Simpson's accommodation. . . . . However this may be, it lies with the pursuer to cut down the acceptances, which bear to be for value, and I am of opinion that he has failed to do so, even if it were assumed that parole evidence could be received for that purpose."

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could only be proved by writ or oath. But there is no such plea on record, and it is reasonable to presume that the Lord Ordinary overlooked this part of the case. I cannot imagine that the present mode of allowing proof will justify the Lord Ordinary in sending a case to proof, leaving it to come out at the trial what part of the case must be proved by writ or oath. The matter falls to be disposed of when the case is in the procedure-roll. The Lord Ordinary should then direct his attention to the record, and see what part falls to be proved by writ or oath. I am not disposed to attach any blame to the Lord Ordinary, because he has been misled by the parties, and it is fortunate that the leading of the evidence does not bring out a different result.

But it would now be too late for the pursuer to limit the mode of proof, because she was the leader in the proof in which the whole matter of the onerosity of the bills was gone into. We are thus necessarily driven to consider the proof at large. I have no difficulty in holding that the presumption of onerosity is not removed by the proof which has been led.

The circumstance that a party has lost his right to limit the proof will not remove the presumption in favour of onerosity.

LORD DEAS.—I agree so entirely with your Lordship upon the merits of this case that I have nothing to add. There is one matter of procedure, however, as to which I think it right specially to express my concurrence with what has fallen from your Lordship, and that is as to the effect of the interlocutor pronounced by the Lord Ordinary on 15th October 1874, allowing to the parties a proof at large of their averments. The closed record in the fourth action, which is at the instance of Mrs Simpson, sets forth various bills in which her late husband is *ex facie* the creditor of Robert Stewart, the defender. The defence substantially is that these bills were accommodation bills. There is no plea to the effect that the proof of this defence should be limited to the writ or oath of the drawer of the bills, and consequently it seems to have escaped the Lord Ordinary to keep in view the rule of law to that effect in his interlocutor allowing a proof. There may be circumstances of real evidence affording so strong a *prima facie* suspicion of fraud as to justify allowing a proof before answer, so that it may be seen whether the case is so exceptional that the onerosity of the bills falls to be determined by the parole proof. But the interlocutor in question does not bear to be before answer. It is an interlocutor which settled the mode of proof, and unless proposed to be opened up (which it has not been) under the reclaiming note, so that the whole procedure might be gone back upon, we have no choice but to take the interlocutor, *quoad* the mode of proof, as the law of the case. Luckily, in the present instance, that does not lead to any miscarriage of justice, and it is therefore sufficient to notice the error. It is suggested that the Lord Ordinary may have considered that there was no difference in the effect of an interlocutor allowing a proof before answer and an interlocutor containing no such qualification. I cannot listen to that suggestion. I have been acquainted with the practice of this Court for nearly half a century and I never knew that doctrine acted on. The utility of the distinction has, on the contrary, been more and more recognised. The shape of the interlocutor must, no doubt, have been accidental, from the mode in which the pleas were stated, and the complicated nature of the accounting involved in the four conjoined actions.

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LORD MURE.—I concur with your Lordships that the interlocutor of the Lord Ordinary should be adhered to on the three leading questions which have been submitted to our consideration. And as regards the mode of proof, applicable to the bills founded upon in the counter action, I am also of opinion that under the interlocutor by which a proof at large was allowed, and which was acquiesced in, it is not now competent for the holder of the bills to maintain that the proof as to their non-onerosity must be restricted to writ or oath. There is no such plea upon the record, nor any such restriction in the interlocutor, and had it been the intention of the holder to stand upon the ordinary rule of law to that effect, care should have been taken to have the interlocutor by which the proof was allowed qualified in that respect. But that was not done. The interlocutor does not even bear to be "before answer," and I concur with Lord Deas as to its having been the practice, more especially in cases relative to the onerosity of bills, when proof otherwise than by writ or oath was to be allowed, for the interlocutor to bear expressly that the proof was to be before answer. For I have always understood that one reason for adopting that course has been that if the averments of fraudulent or suspicious conduct in relation to the bills, which were considered to be relevant to lead to a relaxation of the rule, should not be proved, it might still be open to the holder of the bills to ask the Court to give effect to the rule, that their onerosity could only be redargued by writ or oath. To such an extent has this been held to be the practice that in a case of Willans, Overbury, and Company (N. R.), relative to the onerosity of bills, decided by the Second Division of the Court in 1868, where the Lord Ordinary, in respect of the suspicious circumstances attending it, had relaxed the general rule, fully explaining in his note the grounds on which that course had been adopted, and that the proof was intended to be before answer, but had omitted so to qualify the interlocutor, the Court, while they approved of the course adopted, and allowed the proof, varied the interlocutor itself by adding the words "before answer."

MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—D. J. MACBRAIR, S.S.C.—Agents.

No. 117. MRS JANET NIELSON OR RAE AND ANOTHER, First Parties.—*D.-F. Clark—Adam.*
JOSEPH NIELSON, Second Party.—*Sol.-Gen. Watson—Blair.*

May 14, 1875. Rae v. Nielson.

Marriage-Contract—Mutual Settlement—Jus Quæsitum Tertio—Revocation—Donatio inter virum et uxorem.—Held that a mutual settlement executed by a husband and wife was ineffectual, in so far as it derogated from the wife's rights under an antenuptial contract of marriage, and *quoad ultra* was revocable by the wife after her husband's death as a donation *inter virum et uxorem*, the wife not having received any benefit therefrom.

2D DIVISION. I.

THE deceased James Nielson, master in the merchant service, about the end of the year 1838 married Elizabeth Haining of Lochbank, in the county of Dumfries. By antenuptial marriage-contract between the spouses, dated 5th December 1838, Mr Nielson, in consideration of the provisions in his favour therein contained, disponed and conveyed in favour of himself and Elizabeth Haining, and the longest liver of them,

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and the heirs and assignees of the longest liver, his whole means and estate, heritable and moveable, of whatever nature or denomination, wherever situated, then belonging or which should belong to him at the time of his death; and he appointed Elizabeth Haining to be his sole executrix and universal legatory. For these causes, and on the other part, Elizabeth Haining, *inter alia*, disponed and conveyed in favour of herself and Mr Nielson, and the longest liver of them in fee, and the heirs and assignees whomsoever of the longest liver, All and Whole her just and equal half *pro indiviso* of the lands of Lochbank; as also all other lands and heritable estate of every description that should belong to her at the time of her death, or that belonged to her at the date of the contract; as also the whole moveable estate then belonging or which should belong to her at the time of her death.

At the date of the marriage the whole of Mr Nielson's estate consisted of a sum of about £800 in money. Mrs Nielson was at that date infeft as joint proprietrix of one-half *pro indiviso* of the lands of Lochbank, which she had inherited from her father, and she had also a considerable sum of money.

In 1855 Mr Nielson purchased, at the price of £392, the property of Bank House, in the parish of Troqueer, in which he and his wife afterwards resided. The purchase-money was borrowed from his wife's sister. After the marriage Mr Nielson did not pursue his former employment, and the funds for the subsistence of himself and his wife were derived chiefly from the rents of the properties already mentioned, and the profits of land which was cultivated by Mr and Mrs Nielson and her sister as tenants.

In 1857 Mr and Mrs Nielson executed a mutual disposition and settlement, narrating that the testators "from our affection for each other, and for other good causes and considerations, have agreed and resolved to execute these presents," and disposing of their property as follows, viz.:—(1) The Bank House property was disponed by Mr Nielson to Mrs Nielson, in the event of her survivance, in liferent for her liferent use allenarly, whom failing, to Janet Nielson, his sister, and Janet Nielson (sometime Douglas, now Rae), his niece (daughter of his brother Charles Nielson), during their joint lives, and to Janet Nielson, his sister, in the event of her surviving his niece (Mrs Rae), also in liferent, and to his niece (Mrs Rae), in fee, whom failing, to others therein mentioned; but declaring that in the event of Jane Haining, the sister of Mrs Nielson, surviving both of the spouses, she should be entitled during her life to the possession of Bank House, and the use of the furniture therein, at a rent to be fixed by arbitration. (2) Mrs Nielson disponed her half of the lands of Lochbank in the following terms, viz.:—"To the said James Nielson, in the event of his surviving me, the said Elizabeth Haining or Nielson, in fee; whom failing, to the said Charles Nielson and Joseph Nielson, presently residing in London, brothers of the said James Nielson, in liferent, for their liferent use allenarly, equally between them, and to the said Charles, Mary Anne, Janet (Mrs Rae), Amelia, and Joseph Nielson equally, and the issue of such of them as may die, who shall be entitled to their parent's share, and the survivors and survivor of them, in fee." (3) They further gave, granted, assigned, and disponed "to each other, and to the survivor of us, and after the death of the survivor to the said Charles Nielson and Joseph Nielson, brothers of me, the said James Nielson, in liferent, for their liferent use allenarly, equally between them, and to the said Charles, Mary Anne, Janet (Mrs Rae), Amelia, and Joseph Nielson equally, and the issue of such of them as may die, who shall be entitled to their parent's

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share, and the survivors and survivor of them, in fee, the whole other heritable property, and all the other heritable and moveable estate, of whatsoever nature or denomination the same may be, which shall belong and be addebted to us or either of us at the time of our decease respectively." And (4) The survivor was appointed executor; and there was reserved power to revoke or alter "these presents during our joint lives in whole or in part," and "all former settlements, contracts of marriage, and codicils formerly executed by us" were cancelled and recalled, and declared to be of no force or effect.

Mr Nielson died without leaving issue on 7th October 1860.

The power of alteration and revocation contained in this mutual disposition and settlement was not exercised during the life of Mr Nielson. Mrs Nielson assumed the office of executrix under the mutual disposition and settlement executed in 1857, and was confirmed as such. She gave up an inventory of her husband's personal estate, which amounted to £500, and intromitted therewith.

Mrs Nielson died on 12th July 1873 leaving a settlement and codicil, dated in February and May 1873. By this settlement she conveyed to Janet Nielson or Rae, "and to the heirs of her body in fee," whom failing, to Charles Nielson and Joseph Nielson (brothers of her deceased husband), in liferent, equally between them, and to Charles, Mary Anne, Amelia, and Joseph Nielson, children of Charles Nielson, equally, and the issue of such of them as might die, and the survivors and survivor of them, in fee, her whole means and estate, heritable and moveable, which might belong to her at the time of her death, in so far as she had the power to dispose thereof; and she nominated executors, and revoked all former settlements made by her of the estate and effects thereby conveyed, in so far as inconsistent therewith.

During her lifetime Mrs Nielson disposed of the greater portion of the money to which she succeeded by the death of her sister, and which had accumulated after her husband's death; but she nevertheless possessed considerably more money at the time of her decease than the amount which came into her possession at her husband's death. Charles Nielson and Joseph Nielson, the brothers of James Nielson, both survived his widow.

Differences having arisen as to the effect of the various deeds above quoted, a special case was prepared, in which the foregoing facts were set forth. Mrs Janet Nielson or Rae and her husband were the first parties, and Joseph Nielson the second party to the case.

It was maintained for the first party (Mrs Rae) that the onerous conveyance in the antenuptial contract by which the fee of the property of both the spouses was conveyed to the longest liver, and his or her heirs or assignees, could not *stante matrimonio* be gratuitously altered even by joint consent; that by the terms of the postnuptial settlement Mrs Nielson's interest in her husband's property was gratuitously reduced from a right of fee to one of liferent only, the fee being given to the husband's relations, while the fee of her own heritable property was without any consideration destined to her husband if he should survive her, and failing him, to the children of his relations, and all the other property of both spouses was destined after the death of both to the husband's relatives; and that Mrs Nielson was entitled to revoke, and did effectually revoke, the postnuptial settlement by her own settlement of 14th February 1873, which now regulated the succession not only to her own property but to the property of her husband, to the fee of all which properties she was entitled under the marriage-contract.

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On the other hand, the second party (Joseph Nielson) maintained that the postnuptial settlement was a mutual and onerous contract between the spouses, which neither party after the death of the other could alter or revoke by deed, *mortis causa* or *inter vivos*, of a gratuitous nature; and further, that according to the sound construction of Mrs Nielson's deed of settlement of 1873, she intended to dispose and did dispose only of what means she might have acquired after her husband's death.

The following were the questions submitted to the Court:—"(1) Whether the antenuptial marriage-contract, of date 3d December 1838, was validly revoked to any and if so to what extent by the mutual disposition and settlement of date 2d March 1857? (2) Whether the mutual disposition and settlement was validly revoked to any and if so to what extent by the disposition and settlement and relative codicil, dated respectively 14th February and 29th May 1873? (3) Whether the estate which belonged to Mr and Mrs Nielson, or either of them, at the date of the dissolution of their marriage, falls to be disposed of under and in terms of the said last-mentioned disposition and settlement and codicil to any and if so to what extent? (4) Whether the second party is entitled to the liferent of the subjects provided to him by the said mutual disposition and settlement, or to any and what part thereof?"

Argued for Mrs Rae;—Any alteration made during the lives of spouses on an antenuptial settlement must be held as a donation by the wife if it in any degree diminished her rights. In this case, the wife, in the event of her surviving, would, under the provisions of the mutual settlement, have only got a liferent, whereas under the marriage-contract she was made liar of the whole estates. The right to revoke the mutual settlement existed as long as either of the spouses lived. The provisions in it were of a purely testamentary nature as regarded the estate of each,[1] and were not of the nature of contracts. The right to revoke, if competent against the husband, was competent against his gratuitous donees, or otherwise the husband could have been able to give his gratuitous donees a higher right than he had himself. The test of donation *inter virum et uxorem* was, did the wife gain or lose by the alteration? Here she certainly lost. But apart from such questions, under the case of Menzies,[2] recently decided, it was clear that the mutual settlement was ineffectual, being in contravention of the provisions of the antenuptial marriage-contract. The mutual settlement was beyond the legal capacity of the spouses, and so it could be disregarded. To the argument that the wife was barred from setting aside the mutual settlement by confirming as executrix under it, the answer was that she took no right by so confirming which she could not have got *aliunde:* she did not confirm with the intention of homologating the deed.

Argued for Joseph Nielson;—The rights under the marriage-contract which the wife renounced were not of the nature of rights under a trust for her protection. All she gave up was the right of settling the estate after all the objects of the marriage-contract were fulfilled. That distinguished this case from that of Menzies, where the means of maintenance during life were proposed to be diminished. This was not a case of donation—there was no inequality in the nature of the rights waived by the spouses respectively. All that was done was practically

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[1] Davidson v. Mossman, May 27, 1871, 8 Macph. 807, 42 Scot. Jur. 457; Traquair v. Martin, Nov. 1, 1872, 11 Macph. 22, 45 Scot. Jur. 28.

[2] Menzies v. Murray, March 5, 1875, *supra*, p. 507.

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at a time when it was uncertain which would survive to give the predecessor a voice in the settlement of the estate. The husband had not influenced the wife to favour his relations against her will, as her subsequent deed showed. A donation by a husband and wife to a third party *stante matrimonio*, where made by such a mutual deed as this, was irrevocable immediately on the death of one of them,[1]—the death operating as delivery. It was not a *donatio inter virum et uxorem* when the husband was excluded; it was a conveyance to a third party. It was competent to recall a gift of the substantial fee to the husband, with only a *spes successionis* to his heirs,[2] but here the husband could not defeat the rights given under the deed.

Separatim, The widow had homologated this mutual settlement by having herself confirmed as executrix under it, and it had thus become operative.

At advising,—

Lord Ormidale.—The disputed points in this special case have appeared to me to be attended with some difficulty in themselves, and to be also important in regard as well to the interests more immediately involved as to the class of cases generally of which the present is one.

Contrasting the provisions in the antenuptial contract of marriage with those in the mutual disposition and settlement, the latter deed must, I think, be held to be of such a nature as to be revocable by Mrs Nielson on the principle of *donatio inter virum et uxorem stante matrimonio*. It was clearly an infringement of the rights which had been secured to her by the antenuptial contract of marriage. And if so, it must, according to well established principles of law, have been revocable by her. Besides, the recent case of Menzies and Others (*supra*, p. 507), the principles recognised in which have certainly some bearing on the present question, I may refer to that of Jardine v. Currie, 17th June 1830 (8 Sh. 937),[3] where Lord Moncreiff, whose judgment as Ordinary was adhered to unanimously by the Court, expressly found that "the rule of the law of Scotland whereby donations *inter virum et uxorem stante matrimonio* are liable to revocation applies equally to all deeds, whether executed directly in the form of donations, or in the form of mutual contracts, or of grants taken by purchase from third parties, wherever such deeds do in truth and substance import gratuitous gifts by the one spouse in favour of the other." And his Lordship also "held this rule specially to apply to deeds infringing the rights settled by antenuptial contract."

It was strenuously argued, however, in the present case, that a mutual disposition and settlement such as there is here, assuming that it was revocable while both spouses were alive, could not be revoked by one of them after the death of the other; but no authority was cited in support of this proposition,

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[1] Anderson v. Garroway, Jan. 27, 1837, 15 S. 435, 9 Scot. Jur. 233; Fernie v. Colquhoun's Trustees, Dec. 20, 1854, 17 D. 232, 27 Scot. Jur. 86; Hogg v. Campbell, March 18, 1863, 1 Macph. 637, 35 Scot. Jur. 296; Kidd v. Kidds, Dec. 10, 1863, 2 Macph. 227, 36 Scot. Jur. 112.

[2] Erak. i. 6, 29; Heisleid v. Lindsay, 1591, M. 6087; Fernie v. Colquhoun's Trustees, *supra*.

[3] 2 Scot. Jur. 483.

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and it appears to me to be contrary to principle as well as precedent. To hold, indeed, that a wife cannot revoke after the death of her husband a deed which, *ex hypothesi*, had been executed by her under the undue influence of the marital power, would obviously be practically holding that it is not revocable at all. Not only, however, is there no authority, so far as I know, for such a contention, but there is authority the other way in the case of Jardine v. Currie already referred to, where it was held that donations by a husband in favour of a wife contained in a mutual deed of settlement were revocable by him after her death.

It was, in the next place, argued that the mutual settlement here in question could not be revoked in respect of the *jus quæsitum tertio* which it was said it involved by rights of liferent and fee being created in favour of the husband's relatives, and in respect also of the acts of adoption or homologation by the surviving wife of the mutual settlement which are referred to in the 7th article of the special case. But as the husband's relations, in favour of whom the rights of liferent and fee referred to are created, were not parties to the deed at all, and the interests which were created in their favour are entirely gratuitous, I cannot hold that such interests can interpose any bar to the revocation by the surviving wife, assuming revocation to have been otherwise open to her. Neither do I think that there is sufficient in this case to entitle the Court to hold that the right of the surviving wife to revoke has been barred on the principle of adoption or homologation. She does not appear to have taken anything by the mutual deed to which she had not right independently altogether of that deed. The only act of hers which can be referred to as an adoption of the mutual deed was her confirming as executrix under that deed. But I cannot hold that the expeding a bare title in that way—especially as it is not proved or even said that she was at the time aware of her legal rights—is sufficient to support a plea of adoption or homologation. A similar plea, in circumstances more favourable for it, was disregarded in the case of Borthwick v. Scott, July 21, 1724 (M. 6149). Nor do I suppose that any reliance was placed on such a plea in the present case, seeing that no special reference is made to it in any of the questions submitted for judgment. The point, indeed, was not even noticed in argument till after it had been suggested by the Court as possibly arising under the 7th article of the special case.

In regard to the only remaining point requiring notice, viz., the effect of Mrs Nielson's last deed of settlement, all that is necessary to say is that if my views on the other points are correct it necessarily follows that Mrs Nielson had the power, and did by her last deed of settlement exercise the power, of revoking the mutual disposition and settlement.

In these circumstances, I am of opinion, in answering the first question in the special case, that the antenuptial marriage-contract was not and could not be infringed upon or prejudicially affected by the mutual disposition and settlement; that in answer to the second question, the mutual disposition and settlement was wholly revoked by the disposition and settlement and relative codicil of dates 14th February and 29th May 1873; that in answer to the third question, that the whole estates of Mr and Mrs Nielson existing at the death of the latter fall to be disposed of in terms of the said disposition and settlement and relative codicil; and that the fourth question ought to be answered in the negative.

No. 117. LORD NEAVES concurred.

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LORD GIFFORD.—I am of the same opinion.

An antenuptial contract of marriage is the most onerous deed known in law, and fixes the rights of the married persons throughout the duration of the marriage.

Where there is no antenuptial contract questions may arise as to whether the provisions of any postnuptial settlement are reasonable, and where an antenuptial contract does exist, and a mutual settlement has been afterwards executed, the inquiry must be, not whether the provisions of this later deed are reasonable, but whether they differ from those of the antenuptial contract. The terms of the antenuptial contract, and the provisions therein, determine in all cases whether subsequent or substitutional provisions are or are not donations between the spouses.

The law in such a case has been clearly laid down by Erskine, b. i. tit. 6, sec. 29, where, after explaining what are donations, he proceeds :—"But where the interests of the husband and wife have been settled by antenuptial contract, postnuptial deeds are revocable, in so far as they either add to or diminish the provisions of the first contract without a valuable consideration on the other part; for every such provision, adding to the wife's prior settlement, is a donation by the husband to her, and every deed by which the wife renounces the least share of her former provision is a donation by her to the husband."

I have read this passage, because it has never been altered or called in question, and is an absolute rule of law which has never been derogated from.

In the present case we have an antenuptial contract, whereby the wife is made a creditor on the husband's estate, should she survive him, for the whole property left by him, heritable and moveable. In the event of her survivance the whole estate of the husband is to become the property of the wife in fee. The postnuptial mutual settlement, however, limits her interest from a fee to a liferent. Surely, according to the doctrine of Erskine, that is giving something up. In other words, she makes a donation to her husband, and such donation is revocable.

The fact that the husband is dead makes no difference as regards this donation by the wife; it remains a donation notwithstanding, and is revocable during the life of the donor.

So strongly, however, does an antenuptial contract settle the rights of the parties to it that the wife cannot deprive herself of her rights under it, or of any of the protections or safeguards, such as trusts, which the antenuptial marriage-contract provides. That was decided in the recent case of Menzies (*supra*, p. 507).

It is clear, then, that the wife here had an undoubted right to revoke the postnuptial mutual settlement, in so far as it derogated from the antenuptial contract. I think she effectually did so by her final settlement, and accordingly that deed must regulate the whole succession.

LORD JUSTICE-CLERK.—I entirely concur in the opinions expressed.

The first question, as has been pointed out, perhaps does not raise the real matter intended to be decided. I think that our finding, in answer to the first question, should be that the antenuptial contract was not effectually "altered" by the mutual settlement of March 1857.

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The only doubt I ever entertained was as to the effect of the widow's confirmation under the mutual settlement, whether it did not raise a *jus quæsitum tertio* to the beneficiaries; but as the widow took nothing under that deed to which she was not entitled otherwise I do not think the confirmation can be held to have the effect contended for.

THE COURT pronounced the following interlocutor:—"The Lords are of opinion, and find (1) that the antenuptial marriage-contract of date 3d December 1838 was not effectually altered by the mutual disposition and settlement of date 2d March 1857 so as to prevent the widow from subsequently revoking that deed; (2) that the said mutual disposition and settlement was validly and wholly revoked by the disposition and settlement and relative codicil dated respectively 14th February and 29th May 1873; (3) that the estate which belonged to Mr and Mrs Nielson or either of them at the date of the dissolution of their marriage falls to be disposed of under and in terms of the said last-mentioned disposition and settlement and codicil; (4) that the second party is not entitled to the liferent of the subjects provided to him by the said mutual disposition and settlement: Find the parties of the first part entitled to the expenses incurred by them in connection with the special case," &c.

J. C. & A. STEUART, W.S.—HUNTER, BLAIR, & COWAN, W.S.—Agents.

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JAMES HOULDSWORTH, Pursuer.—*Sol.-Gen. Watson—Mackintosh.* ALEXANDER BRAND'S TRUSTEES AND OTHERS, Defenders.—*D.-F. Clark—Alison.*

Landlord and Tenant—Lease, resumption of—Minerals—Clause.—A mineral tenant qualified his lease by a minute of agreement in which it was provided that in the event of his death the landlord might resume possession of the minerals if he should at any time thereafter be dissatisfied with the working thereof by the representatives of the tenant. The tenant died, and the minerals were worked by trustees for a year after his death, when the landlord intimated his dissatisfaction with their working, and his intention of resuming possession. The trustees refused to remove, in respect (1) that there was no ground for dissatisfaction, and (2) that the landlord was acting *in mala fide*. *Held*, on a consideration of a proof and correspondence (1) that it was not necessary for the landlord to state his grounds for dissatisfaction, and (2) that the trustees had failed to prove *mala fides* on the landlord's part.

2D DIVISION. Lord Shand. I.

IN November 1867 Mr Henry Houldsworth of Coltness let to Jonathan Hyslop and Robert Brand and their heirs the Greenhead ell coal and fireclay in a portion of his estate of Coltness, for a period of nineteen years, at a fixed minimum rent of £1000, or in his option for certain specified lordships.

Hyslop and Brand entered into possession of the mineral field, but after some time they disagreed and became involved in a litigation in the Court of Session. Ultimately it was arranged that their partnership should be dissolved, and that Hyslop should retire from the concern. Brand then applied to Mr James Houldsworth, who had succeeded to the estate of Coltness upon the death of his father, Mr Henry Houldsworth, to be continued as sole tenant of the minerals. Mr Houldsworth consented

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to this, upon Brand entering into a minute of agreement, which was dated 5th October 1869. This minute proceeded on the narrative of Hyslop and Brand's disagreement, and Brand's desire to be acknowledged as sole tenant, and provided—"*First*, that on the event of the death of the said Robert Brand during the currency of the lease the landlord is hereby empowered, if he so wishes, to enter on and resume possession of the colliery and other subjects of the lease, at a valuation as afterwards provided for, if he should at any time be dissatisfied with the working thereof by the representatives of the said Robert Brand." The other provisions referred to the possibility of Mr Brand's health failing, and to the mode in which the valuation was to be taken.

Brand continued to work the colliery and minerals under the lease and minute of agreement until September 1871, when owing, as Mr Houldsworth and his advisers said, to the improper working of the colliery by him the pit was flooded by a large quantity of liquid moss. Mr Houldsworth, after a meeting with Brand as to the removal of this moss, wrote on 11th October 1871 a letter to Brand, in which he agreed to allow a deduction on the lordships in consideration of Brand removing the moss. To this letter Brand appended a holograph acceptance. Brand worked the colliery under the lease, agreement, and last-mentioned letter until January 1873, when he died. He left a trust-deed, in which he directed his trustees, *inter alia*, to hold and work the Greenhead colliery for behoof of his son Robert, who was in minority.

Robert Brand junior died on 3d July 1873, being still a minor, and Alexander Brand, Robert Brand senior's immediate younger brother, came forward, as the nearest heir-at-law to the two Robert Brands, and claimed the heritable estate in that capacity. Alexander Brand died on 6th November 1873, leaving a trust-deed, under which he conveyed his whole estate to certain trustees. After Robert Brand senior's death the colliery was conducted by his trustees until 19th January 1874, when, by arrangement among the parties, it was handed over to the care of Alexander Brand's trustees, who continued to work it.

On 3d February 1874 Mr Houldsworth's agents, Messrs Murray, Beith, and Murray, W.S., Edinburgh, wrote by his instructions to the trustees of Robert Brand senior, Robert Brand junior, and Alexander Brand, intimating that Mr Houldsworth was dissatisfied with the working of the colliery, and intended to resume possession of it under the provisions of the agreement of 5th October 1869. The trustees, however, disputed Mr Houldsworth's right to resume possession, and accordingly Mr Houldsworth raised this action to have declarator of his right to enter on and resume possession of the minerals, and for decree of removal.

Alexander Brand's trustees defended the action.

Mr Houldsworth averred that the lease had been originally granted in reliance on the skill and experience of Hyslop, and that Robert Brand senior was not possessed of such skill. He also stated, that "since the death of the said Robert Brand senior the pursuer felt, and had just cause for feeling, serious dissatisfaction with the manner in which the colliery was carried on; and this dissatisfaction, and the causes of it, have been growing ever since, and exist down to the present time. Either from the inability of the said representatives to fulfil the tenant's part of the said lease and agreement, or in consequence of the deaths within so short a period of the said Robert Brand senior, the said Robert Brand junior, and the said Alexander Brand, and the subsequent disputes and litigations, the said colliery has not been and is not now carried on with any

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proper energy or attention, nor is the tenant's part of the stipulations of the lease duly fulfilled. While it was of great importance that the output should be kept up, so that the pursuer should be enabled to receive the lordships contemplated by the said lease, the representatives of the said Robert Brand have, since his death, permitted the output very seriously to decline, to the great loss and injury of the pursuer. Further, beneath the ell coal let to the said Robert Brand there are the main and splint coals, which are let on lease to the Coltness Iron Company, who are retarded in their working by the inefficient manner in which the ell coal workings are and have been carried on by the said representatives, and are consequently making serious complaints to the pursuer, and are claiming damages from the pursuer on account of their being retarded in their workings through the inefficient progress of the defenders. For the same reason the pursuer is also deprived of the lordships which he would earn if the Coltness Iron Company were permitted duly to prosecute their work. Moreover, in consequence of the existing disputes and litigations between and among the representatives of the said Robert Brand, the pursuer has no responsible person with whom he can deal in regard to the said colliery, or from whom he can secure implement of the stipulations of the said lease, none of the defenders having any experience or knowledge of colliery working. Further, the representatives of the said Robert Brand have not fulfilled the stipulations of the said letter of 11th October 1871 in regard to the removal of the moss from the colliery workings, whereby serious loss has been caused to the pursuer."

The trustees denied the accuracy of these averments, and stated that they had employed a thoroughly competent manager, and had conducted the colliery in the most approved manner, so that Mr Houldsworth could have no grounds whatever for dissatisfaction. They further stated,—"The defenders have ascertained, and aver, that negotiations for a transfer of the lease have been opened between the pursuer and a third party, whose name at present is unknown to the defenders; and he has raised the present action not in consequence of any *bona fide* dissatisfaction with the defenders' management of the works, but in the hope of being enabled to carry out these negotiations, and so secure the bonus, goodwill, or price of the lease, instead of allowing the defenders to transfer the lease to William Robertson, or some other suitable or competent person, and receive the price agreed on between them."

On 30th June 1874 the Lord Ordinary allowed parties a proof of their averments.

Evidence was led, the result of which is given in the Lord Ordinary's note and the opinions of the Judges.

Mr Houldsworth was himself examined as to the grounds of his dissatisfaction, which he summarised as follows:—"My reasons for being dissatisfied were, that I did not consider the colliery was worked with proper energy and attention; the output diminished; the moss was not removed,—is not, I believe, to this day; the Coltness Company could not get on with their workings below; and there was no proper head with whom I could deal and communicate beyond the underground manager." It appeared that Mr Houldsworth had been in treaty with a Mr Robertson as to taking a lease of the colliery at an increased lordship and fixed rent before he gave notice to the trustees of his dissatisfaction with their working.

On 15th January 1875 the Lord Ordinary pronounced this interlocutor:—"Finds that by minute of agreement, dated 5th October 1869,

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entered into between the pursuer, proprietor of the estate of Coltness, and the late Robert Brand, coalmaster, Wishaw, with reference to the lease of Greenhead colliery, then current, and which had been granted to the said Robert Brand, and Jonathan Hyslop, coalmaster, Wishaw, it was provided, *inter alia*, that in the event of the death of the said Robert Brand, the pursuer was thereby empowered, if he so wished, to enter on and resume possession of the colliery, and other subjects of the said lease of the Greenhead colliery at a valuation as therein provided for, if he should at any time thereafter be dissatisfied with the working of the colliery: Finds that the said Robert Brand died on 26th January 1873: Finds that in exercise of the powers conferred on him by said minute of agreement the pursuer, by letter dated 3d February 1874, sent by his directions and authority by his agents to the defenders, intimated that he was dissatisfied with the working of the said colliery by the representatives of the said Robert Brand, and had resolved to resume possession of the colliery in accordance with the power to that effect contained in said minute of agreement: Finds that the defenders have failed to instruct that the pursuer was not at the date of the said notice truly dissatisfied with the working of said colliery by the representatives of the said Robert Brand, and that the said notice was not given by the pursuer *in bona fide*: Therefore decerns in terms of the declaratory conclusions of the summons: Ordains the defenders to concur with the pursuer in taking steps for having a valuation of the plant and machinery connected with the colliery, including waggons, if any, ascertained in terms of the said minute of agreement, and decerns *ad interim*: Finds the pursuer entitled to expenses; allows an account," &c.*

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* "NOTE. . . . .—By the minute of 5th October 1869 the pursuer, in consideration of his agreeing to accept the late Robert Brand as sole tenant under the lease of the ell coal in the lands of Greenhead, then current between him and Mr Brand and Mr Hyslop, was empowered 'in the event of the death of the said Robert Brand during the currency of the lease, . . . if he so wishes, to enter on and resume possession of the colliery and other subjects of the lease at a valuation as afterwards provided for, if he should at any time thereafter be dissatisfied with the working thereof by the representatives of the said Robert Brand.'

"This clause undoubtedly gives very extensive power to the landlord. Before the agreement was entered into, serious differences had arisen between Mr Brand and his partner Mr Hyslop, which had resulted in litigation; and Mr Brand was evidently anxious to secure the lease entirely to himself, so far as the landlord was concerned, and prepared to make important concessions with this object. The pursuer, on the other hand, was apprehensive, in consequence of Mr Brand's state of health, that the colliery might not be conducted with sufficient energy, and it was a matter of great consequence to him to have the coal rapidly worked out, not only for the return of rent or lordship to be got from the colliery itself, but also because, until that coal was worked out the Coltness Iron Company, his tenants in the lower seams, which are of considerable value, were almost at a stand with their operations, and considerable loss was taking place from this cause. For this reason he stipulated that in a certain contingency he should be entitled to resume possession of the colliery even during Mr Brand's life, and that in the event of Mr Brand's death he should have the same power, if he should at any time be dissatisfied with the working of the colliery; and these terms were agreed to.

"The effect of this stipulation, on the terms of which the present case turns, was to empower the landlord to resume the colliery and take possession of the plant at a valuation as therein provided, if at any time he was himself dissatisfied with the working of the colliery by the tenant's representatives succeeding after

Alexander Brand's trustees reclaimed. At advising,—

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LORD JUSTICE-CLERK.—This case is one not only of some complexity as to the facts, but also of novelty in regard to the nature of the condition contained

his death. The tenant consented to the question of dissatisfaction on the landlord's part being left to the determination of the landlord himself, and did not require or stipulate for any judgment or determination by a third party as arbiter. No question was to be submitted to a disinterested person as referee. The landlord was accepted as the arbiter in the matter in which he was himself interested.

"It has been maintained for the tenants that as the exercise of the landlord's power under the agreement is challenged by them the landlord is bound to shew by sufficient evidence that reasonable grounds existed for his dissatisfaction, and that if the Court should be of opinion that he was acting unreasonably, or without sufficient grounds, he is not entitled to exercise the power. I cannot, however, adopt this view. By the agreement it has not been left either to the Court or to any other party than the pursuer to say whether sufficient grounds for dissatisfaction in point of fact exist. Persons may fairly differ in opinion on such a question. One person may be satisfied with grounds of dissatisfaction which, in the opinion of others, are quite insufficient. The landlord may deem certain grounds of dissatisfaction as sufficient which the Court or an arbiter might think insufficient; but as to this, provided he is acting honestly and in good faith, he is by the terms of the agreement the sole person to decide. The Court may be of opinion on the proof that when the notice was given good reasons for dissatisfaction did not exist; but the question to be solved is, not whether such reasons existed, or whether the Court shall be of opinion that such reasons existed, but whether the pursuer was truly dissatisfied with the working of the colliery on grounds satisfactory to his mind. If this was the case, the pursuer is entitled to resume the lease.

"There is no dispute as to the meaning of the words 'the working of the colliery.' Neither party contends that they are to be read in the limited sense of referring to the underground operations in the colliery. They plainly refer generally to the carrying on of the business, including not only the underground working, but the output and sale or disposal of the coal.

"The pursuer, on 3d February 1874, intimated that he was dissatisfied with the working of the colliery, and required the defenders to give up possession. This notice must be accepted, in the first instance, as sufficient to enable the pursuer to exercise the power which the agreement gives him. For the reasons I have stated the defenders, on disputing the effect of the notice, are not, I think, entitled to have the case decided on the issue whether the landlord had reasonable grounds for dissatisfaction. The issue on which the case turns must, I think, be, 'was the landlord, when he gave the notice, in point of fact dissatisfied with the working of the colliery.' On this point the defenders allege (answer to cond. 18) that the pursuer has raised the present action not in consequence of any *bona fide* dissatisfaction with the defenders' management of the works, but in the hope of being able to carry out certain negotiations with another party, and so as to secure a *bonus*, or goodwill, or price for the lease. This averment amounts to a denial of the truth of the pursuer's notice, that he was dissatisfied with the working of the colliery, and an averment that he had given the notice, not *in bona fide*, or because of dissatisfaction with the working of the colliery, but entirely for the purpose of gain to himself.

"In consequence of this averment proof became necessary; and in disposing of the proof it appears to me that the pursuer having formally intimated his dissatisfaction by the notice of 3d February, the onus lies on the defenders to instruct their defence, as I have now stated it. In order to succeed, the defenders must, I think, shew that the notice was untrue, in so far as it bore that the

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in the minute of agreement of 5th October 1869 between Mr Houldsworth and the late Robert Brand. That condition is as follows:—"That in the event of pursuer was dissatisfied with the working of the colliery. If, in fact, he was so dissatisfied, it appears to me that his right to resume possession of the colliery cannot be affected by the circumstance that he had at the time, as appears to be the case, arranged to let the coal on terms more advantageous to himself than were contained in Mr Brand's lease. Assuming that he was really dissatisfied with the working of the colliery, and was to resume the lease, he was entitled to let the coals to a new tenant on the most advantageous terms he could obtain.

"I do not think it necessary to enter very fully on a consideration of the evidence which has been adduced. The pursuer has distinctly deponed that, when the notice of 4th February was given, he was in fact dissatisfied with the working of the colliery. At that time fully a year had elapsed from the date of Mr Brand's death. In the meantime the colliery had been in the hands of the trustees, who had carried on the operations and business until 3d July 1873, in the hope that Mr Robert Brand jun., the original tenant's only son, would be able to take up the lease. On that date, however, Mr Robert Brand jun. died, before attaining majority. The right to the lease then devolved on Alexander Brand, a brother of the original tenant, but while the colliery was still under the management of Robert Brand's trustees he also died, on the 5th of November 1873. Questions had arisen between Alexander Brand and his brothers and sisters in regard to the rights of succession to the late Robert Brand, the original tenant, and his son. These questions were arranged under an agreement by which Alexander Brand had undertaken to collate the heritage with them, including the right to the lease in question. At Alexander Brand's death it was found that he had left a trust-disposition and settlement in favour of trustees, to whom the trustees of the original tenant, Robert Brand, transferred the colliery on 19th January 1874; and Alexander Brand's trustees were in possession of the colliery and carrying on the business when the pursuer's notice was given.

"The pursuer in his evidence states the reasons of his dissatisfaction with the working of the colliery to have been that the output had diminished considerably, and that there had also been a failure to remove a quantity of moss which had burst into the workings, and which the tenant had bound himself to remove under an agreement contained in letters between the parties dated 11th October 1871; that he was of opinion that there was a want of energy in the carrying on of the colliery, and that it was also a cause of dissatisfaction to him that the work was in the hands of a body of trustees and that there was no practical man at the head of the concern with whom he could deal. The parole proof adduced by the pursuer clearly corroborates his evidence; and if the case had stood there it would, I think, have presented no question raising any difficulty. The defenders' evidence was directed to shew that every effort had been made to carry on the operations at the colliery with proper skill and attention, and that they had raised and disposed of as much coal as was in their power; and I may say that I think the evidence shews that the mineral workings were properly carried out, and that the defenders—at least the defenders, the trustees of Robert Brand—made considerable exertions in order to make the most of the business. The question, however, being whether the defenders have thereby succeeded in shewing that the pursuer was not, in point of fact, dissatisfied with the working of the colliery, the evidence now referred to plainly does not establish this.

"Referring, in the meantime, specially to the period between the beginning of November 1873 and the landlord's notice of February 1874, the proof contains not only the evidence of the pursuer to the effect that he was dissatisfied during that period, and that his adviser Mr Landale, and his factor Mr Bain, entertained the same feeling, but also the evidence of Mr Landale and Mr Bain to this effect. In addition to these it is proved by John Brand, one of the de-

the death of the said Robert Brand during the currency of the lease the landlord is hereby empowered, if he so wishes, to enter on and resume possession of

fenders, and by Mr Bain, that at Martinmas 1873 Mr Bain complained of the want of output at the colliery. Mr Andrew, the defenders' cashier, refers to a similar complaint. And Mr William Robertson, another of the trustees, who was himself for sometime in negotiations with the landlord for taking over the colliery, states that in the end of 1873 Mr Bain expressed a wish to him that the colliery should be placed in his hands in order that it might be carried on with energy, which he understood Mr Bain to consider was wanting in the management of the trustees, and with his acquiescence the letter dated 16th December 1873 was written by Mr Bain to the trustees' agent, intimating that 'the present miserable output from the pits renders it necessary for the landlord to interfere very shortly' unless the trustees should have the matter wound up. There are two letters by Mr Bain to the pursuer, dated 2d and 4th January 1874 respectively, which contain expressions calculated to convey to the pursuer the impression that there was much want of energy in carrying on the colliery, and that this was Mr Bain's opinion. The evidence which I have thus generally noticed is, in my opinion, sufficient to shew that dissatisfaction in the working of the colliery did exist in the pursuer's mind at the date of the notice, even if it were incumbent on the pursuer to instruct this as matter of fact by evidence beyond the notice.

"Against this evidence the defenders rely on the terms of a number of letters which were produced on their call at the close of their proof by Mr Beith, the landlord's agent, consisting of communications passing between Mr Landale, Mr Bain, and the pursuer. It was not without difficulty that I admitted these documents at the stage of the case at which they were called for. But in a case in which the question really is, what was the state of the pursuer's mind when the notice was given, and in which the pursuer must obviously have been influenced to a great extent by the communications made to him by his factor and mining engineer on matters which were necessarily beyond his own observation, it appeared clear that such letters might have an important bearing, and that injustice might be done if they were not admitted. It is very unfortunate, however, that the call for these letters was not made before the proof began, for it was certainly the duty of the defenders, if they meant to found on such documents as part of their case, to have had them in process before the proof, or at least to call on the parties to bring them to the trial, and in any view to have made the correspondence the subject of cross-examination of the parties to it. In consequence of the lateness of the call the parties were allowed to give their evidence very much on mere recollection without reference to documents which would have refreshed their memory, and it may be to some extent have modified the terms of their depositions. In so far as disadvantage arises in disposing of the case on the proof, from the stage at which the documents were put in, I think that disadvantage must rest entirely with the defenders. It was suggested that it was not clear to the defenders that they had right to recover the documents until the pursuer had been examined, but I see no ground for this. In a case in which the *bona fides* of the pursuer was challenged, I should have had no doubt the defenders were entitled to recover the communications with the landlord and his factor and mining engineer, from whom he derived most of his information as to the working of the colliery. . . . .

"The defenders maintain they have established a want of *bona fides* on the pursuer's part, by the evidence shewing that the pursuer, before giving the notice, had evidently made the best bargain he could for reletting the colliery; that he let it for a higher lordship, and on an obligation by the new tenant to undertake the litigation which he had reason to expect would ensue with them. It appears to me, however, that the evidence as to this new arrangement is not entitled to the effect which the defenders seek to attach to it. Believing, as I do, that the pursuer, when he gave the notice of 3d February, was dissatisfied with the working of the colliery, and was therefore resolved to resume the lease,

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entered into between the pursuer, proprietor of the estate of Coltness, and the late Robert Brand, coalmaster, Wishaw, with reference to the lease of Greenhead colliery, then current, and which had been granted to the said Robert Brand, and Jonathan Hyslop, coalmaster, Wishaw, it was provided, *inter alia*, that in the event of the death of the said Robert Brand, the pursuer was thereby empowered, if he so wished, to enter on and resume possession of the colliery, and other subjects of the said lease of the Greenhead colliery at a valuation as therein provided for, if he should at any time thereafter be dissatisfied with the working of the colliery: Finds that the said Robert Brand died on 26th January 1873: Finds that in exercise of the powers conferred on him by said minute of agreement the pursuer, by letter dated 3d February 1874, sent by his directions and authority by his agents to the defenders, intimated that he was dissatisfied with the working of the said colliery by the representatives of the said Robert Brand, and had resolved to resume possession of the colliery in accordance with the power to that effect contained in said minute of agreement: Finds that the defenders have failed to instruct that the pursuer was not at the date of the said notice truly dissatisfied with the working of said colliery by the representatives of the said Robert Brand, and that the said notice was not given by the pursuer *in bona fide*: Therefore decerns in terms of the declaratory conclusions of the summons: Ordains the defenders to concur with the pursuer in taking steps for having a valuation of the plant and machinery connected with the colliery, including waggons, if any, ascertained in terms of the said minute of agreement, and decerns *ad interim*: Finds the pursuer entitled to expenses; allows an account," &c.*

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* "NOTE. . . . .—By the minute of 5th October 1869 the pursuer, in consideration of his agreeing to accept the late Robert Brand as sole tenant under the lease of the ell coal in the lands of Greenhead, then current between him and Mr Brand and Mr Hyslop, was empowered 'in the event of the death of the said Robert Brand during the currency of the lease, . . . if he so wishes, to enter on and resume possession of the colliery and other subjects of the lease at a valuation as afterwards provided for, if he should at any time thereafter be dissatisfied with the working thereof by the representatives of the said Robert Brand.'

"This clause undoubtedly gives very extensive power to the landlord. Before the agreement was entered into, serious differences had arisen between Mr Brand and his partner Mr Hyslop, which had resulted in litigation; and Mr Brand was evidently anxious to secure the lease entirely to himself, so far as the landlord was concerned, and prepared to make important concessions with this object. The pursuer, on the other hand, was apprehensive, in consequence of Mr Brand's state of health, that the colliery might not be conducted with sufficient energy, and it was a matter of great consequence to him to have the coal rapidly worked out, not only for the return of rent or lordship to be got from the colliery itself, but also because, until that coal was worked out the Coltness Iron Company, his tenants in the lower seams, which are of considerable value, were almost at a stand with their operations, and considerable loss was taking place from this cause. For this reason he stipulated that in a certain contingency he should be entitled to resume possession of the colliery even during Mr Brand's life, and that in the event of Mr Brand's death he should have the same power, if he should at any time be dissatisfied with the working of the colliery; and these terms were agreed to.

"The effect of this stipulation, on the terms of which the present case turns, was to empower the landlord to resume the colliery and take possession of the plant at a valuation as therein provided, if at any time he was himself dissatisfied with the working of the colliery by the tenant's representatives succeeding after

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LORD JUSTICE-CLERK.—This case is one not only of some complexity as to the facts, but also of novelty in regard to the nature of the condition contained

his death. The tenant consented to the question of dissatisfaction on the landlord's part being left to the determination of the landlord himself, and did not require or stipulate for any judgment or determination by a third party as arbiter. No question was to be submitted to a disinterested person as referee. The landlord was accepted as the arbiter in the matter in which he was himself interested.

"It has been maintained for the tenants that as the exercise of the landlord's power under the agreement is challenged by them the landlord is bound to shew by sufficient evidence that reasonable grounds existed for his dissatisfaction, and that if the Court should be of opinion that he was acting unreasonably, or without sufficient grounds, he is not entitled to exercise the power. I cannot, however, adopt this view. By the agreement it has not been left either to the Court or to any other party than the pursuer to say whether sufficient grounds for dissatisfaction in point of fact exist. Persons may fairly differ in opinion on such a question. One person may be satisfied with grounds of dissatisfaction which, in the opinion of others, are quite insufficient. The landlord may deem certain grounds of dissatisfaction as sufficient which the Court or an arbiter might think insufficient; but as to this, provided he is acting honestly and in good faith, he is by the terms of the agreement the sole person to decide. The Court may be of opinion on the proof that when the notice was given good reasons for dissatisfaction did not exist; but the question to be solved is, not whether such reasons existed, or whether the Court shall be of opinion that such reasons existed, but whether the pursuer was truly dissatisfied with the working of the colliery on grounds satisfactory to his mind. If this was the case, the pursuer is entitled to resume the lease.

"There is no dispute as to the meaning of the words 'the working of the colliery.' Neither party contends that they are to be read in the limited sense of referring to the underground operations in the colliery. They plainly refer generally to the carrying on of the business, including not only the underground working, but the output and sale or disposal of the coal.

"The pursuer, on 3d February 1874, intimated that he was dissatisfied with the working of the colliery, and required the defenders to give up possession. This notice must be accepted, in the first instance, as sufficient to enable the pursuer to exercise the power which the agreement gives him. For the reasons I have stated the defenders, on disputing the effect of the notice, are not, I think, entitled to have the case decided on the issue whether the landlord had reasonable grounds for dissatisfaction. The issue on which the case turns must, I think, be, 'was the landlord, when he gave the notice, in point of fact dissatisfied with the working of the colliery.' On this point the defenders allege (answer to cond. 18) that the pursuer 'has raised the present action not in consequence of any *bona fide* dissatisfaction with the defenders' management of the works, but in the hope of being able to carry out' certain negotiations with another party, and so as to secure a *bonus*, or goodwill, or price for the lease. This averment amounts to a denial of the truth of the pursuer's notice, that he was dissatisfied with the working of the colliery, and an averment that he had given the notice, not *in bona fide*, or because of dissatisfaction with the working of the colliery, but entirely for the purpose of gain to himself.

"In consequence of this averment proof became necessary; and in disposing of the proof it appears to me that the pursuer having formally intimated his dissatisfaction by the notice of 3d February, the onus lies on the defenders to instruct their defence, as I have now stated it. In order to succeed, the defenders must, I think, shew that the notice was untrue, in so far as it bore that the

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in the minute of agreement of 5th October 1869 between Mr Houldsworth and the late Robert Brand. That condition is as follows:—"That in the event of pursuer was dissatisfied with the working of the colliery. If, in fact, he was so dissatisfied, it appears to me that his right to resume possession of the colliery cannot be affected by the circumstance that he had at the time, as appears to be the case, arranged to let the coal on terms more advantageous to himself than were contained in Mr Brand's lease. Assuming that he was really dissatisfied with the working of the colliery, and was to resume the lease, he was entitled to let the coals to a new tenant on the most advantageous terms he could obtain.

"I do not think it necessary to enter very fully on a consideration of the evidence which has been adduced. The pursuer has distinctly deponed that, when the notice of 4th February was given, he was in fact dissatisfied with the working of the colliery. At that time fully a year had elapsed from the date of Mr Brand's death. In the meantime the colliery had been in the hands of the trustees, who had carried on the operations and business until 3d July 1873, in the hope that Mr Robert Brand jun., the original tenant's only son, would be able to take up the lease. On that date, however, Mr Robert Brand jun. died, before attaining majority. The right to the lease then devolved on Alexander Brand, a brother of the original tenant, but while the colliery was still under the management of Robert Brand's trustees he also died, on the 5th of November 1873. Questions had arisen between Alexander Brand and his brothers and sisters in regard to the rights of succession to the late Robert Brand, the original tenant, and his son. These questions were arranged under an agreement by which Alexander Brand had undertaken to collate the heritage with them, including the right to the lease in question. At Alexander Brand's death it was found that he had left a trust-disposition and settlement in favour of trustees, to whom the trustees of the original tenant, Robert Brand, transferred the colliery on 19th January 1874; and Alexander Brand's trustees were in possession of the colliery and carrying on the business when the pursuer's notice was given.

"The pursuer in his evidence states the reasons of his dissatisfaction with the working of the colliery to have been that the output had diminished considerably, and that there had also been a failure to remove a quantity of moss which had burst into the workings, and which the tenant had bound himself to remove under an agreement contained in letters between the parties dated 11th October 1871; that he was of opinion that there was a want of energy in the carrying on of the colliery, and that it was also a cause of dissatisfaction to him that the work was in the hands of a body of trustees and that there was no practical man at the head of the concern with whom he could deal. The parole proof adduced by the pursuer clearly corroborates his evidence; and if the case had stood there it would, I think, have presented no question raising any difficulty. The defenders' evidence was directed to shew that every effort had been made to carry on the operations at the colliery with proper skill and attention, and that they had raised and disposed of as much coal as was in their power; and I may say that I think the evidence shews that the mineral workings were properly carried out, and that the defenders—at least the defenders, the trustees of Robert Brand—made considerable exertions in order to make the most of the business. The question, however, being whether the defenders have thereby succeeded in shewing that the pursuer was not, in point of fact, dissatisfied with the working of the colliery, the evidence now referred to plainly does not establish this.

"Referring, in the meantime, specially to the period between the beginning of November 1873 and the landlord's notice of February 1874, the proof contains not only the evidence of the pursuer to the effect that he was dissatisfied during that period, and that his adviser Mr Landale, and his factor Mr Bain, entertained the same feeling, but also the evidence of Mr Landale and Mr Bain to this effect. In addition to these it is proved by John Brand, one of the de-

the death of the said Robert Brand during the currency of the lease the landlord is hereby empowered, if he so wishes, to enter on and resume possession of

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fenders, and by Mr Bain, that at Martinmas 1873 Mr Bain complained of the want of output at the colliery. Mr Andrew, the defenders' cashier, refers to a similar complaint. And Mr William Robertson, another of the trustees, who was himself for sometime in negotiations with the landlord for taking over the colliery, states that in the end of 1873 Mr Bain expressed a wish to him that the colliery should be placed in his hands in order that it might be carried on with energy, which he understood Mr Bain to consider was wanting in the management of the trustees, and with his acquiescence the letter dated 16th December 1873 was written by Mr Bain to the trustees' agent, intimating that 'the present miserable output from the pits renders it necessary for the landlord to interfere very shortly' unless the trustees should have the matter wound up. There are two letters by Mr Bain to the pursuer, dated 2d and 4th January 1874 respectively, which contain expressions calculated to convey to the pursuer the impression that there was much want of energy in carrying on the colliery, and that this was Mr Bain's opinion. The evidence which I have thus generally noticed is, in my opinion, sufficient to shew that dissatisfaction in the working of the colliery did exist in the pursuer's mind at the date of the notice, even if it were incumbent on the pursuer to instruct this as matter of fact by evidence beyond the notice.

"Against this evidence the defenders rely on the terms of a number of letters which were produced on their call at the close of their proof by Mr Beith, the landlord's agent, consisting of communications passing between Mr Landale, Mr Bain, and the pursuer. It was not without difficulty that I admitted these documents at the stage of the case at which they were called for. But in a case in which the question really is, what was the state of the pursuer's mind when the notice was given, and in which the pursuer must obviously have been influenced to a great extent by the communications made to him by his factor and mining engineer on matters which were necessarily beyond his own observation, it appeared clear that such letters might have an important bearing, and that injustice might be done if they were not admitted. It is very unfortunate, however, that the call for these letters was not made before the proof began, for it was certainly the duty of the defenders, if they meant to found on such documents as part of their case, to have had them in process before the proof, or at least to call on the parties to bring them to the trial, and in any view to have made the correspondence the subject of cross-examination of the parties to it. In consequence of the lateness of the call the parties were allowed to give their evidence very much on mere recollection without reference to documents which would have refreshed their memory, and it may be to some extent have modified the terms of their depositions. In so far as disadvantage arises in disposing of the case on the proof, from the stage at which the documents were put in, I think that disadvantage must rest entirely with the defenders. It was suggested that it was not clear to the defenders that they had right to recover the documents until the pursuer had been examined, but I see no ground for this. In a case in which the *bona fides* of the pursuer was challenged, I should have had no doubt the defenders were entitled to recover the communications with the landlord and his factor and mining engineer, from whom he derived most of his information as to the working of the colliery. . . . .

"The defenders maintain they have established a want of *bona fides* on the pursuer's part, by the evidence shewing that the pursuer, before giving the notice, had evidently made the best bargain he could for reletting the colliery; that he let it for a higher lordship, and on an obligation by the new tenant to undertake the litigation which he had reason to expect would ensue with them. It appears to me, however, that the evidence as to this new arrangement is not entitled to the effect which the defenders seek to attach to it. Believing, as I do, that the pursuer, when he gave the notice of 3d February, was dissatisfied with the working of the colliery, and was therefore resolved to resume the lease,

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the colliery and other subjects of the lease, at a valuation as afterwards provided for, if he should at any time thereafter be dissatisfied with the working thereof by the representatives of the said Robert Brand." Then there is another condition with which we have no concern at present, as it was only to come into operation in the event of Mr Brand falling into a state of health incapacitating him from attending to business. And then there is the farther provision that "in the event of the first party or his successors in the Coltness estate entering on possession of the said colliery in either of the foregoing referred to contingencies he will have right to acquire from the second party or his representatives full possession of the said colliery and lease referred to, without any process of law being used or necessary, together with the whole pits, plant, and others connected with the same, including waggons belonging to and leased by the second party, as soon as the value of the latter can be fixed and ascertained, and the amount paid to the second party, or his representatives." Now, the landlord says that the first of these contingencies has occurred—that he is dissatisfied with the mode of working the colliery by Mr Brand's representatives—and that consequently he is entitled, on a valuation, to enter into possession of the colliery, and of the plant, waggons, &c.

The answer to that demand of the landlord is twofold. First, that the construction of the clause of the agreement above quoted requires not merely that the landlord shall be dissatisfied with the working, but that he shall be able to allege and prove a sufficient ground for his dissatisfaction. I am of opinion that this contention is not sound. The condition is not that the tenant is bound to remove on a third party, whether an arbiter or otherwise, being satisfied that the landlord has good grounds for being dissatisfied. The condition is simply that he shall remove on the landlord being dissatisfied. It is impossible for us to add to that condition anything which we do not find in the contract. Second, the actual fact that the landlord is dissatisfied is denied, and the defenders aver that he only pretends to be dissatisfied, and is using his right under the agreement as a pretext for getting rid of them without true and just cause. The Lord Ordinary has so far sustained the relevancy of this defence as to allow a proof, and on the proof being led he has found that the defenders have failed to instruct this averment.

My opinion is that where a condition is made to depend upon the opinion or conviction of one party to a mutual contract, his announcement of that opinion or conviction is meant to be conclusive. You cannot go behind it. It is controlled only by the conscience of the individual. The fact to be determined here is whether the landlord is dissatisfied, and, as nobody can tell but himself

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so as to take it from the defenders, he was entitled, in arranging for another tenant, to make the best bargain he could; and he seems to have stipulated that the working should be energetically carried on.

"The pursuer, at the close of the proof, objected to the title of the trustees of Alexander Brand to take up and hold the colliery, and thereupon Alexander Brand's eldest son and heir, a pupil, was sisted as a party by minute and interlocutor of 9th December last. This meets the pursuer's objection. The fact remains, however, that the tenant is a pupil, and that his tutors are persons unacquainted with mining business, and further, that they are carrying on the colliery really for the benefit of the trust; and all this affords an additional element which the pursuer was entitled to have before him, and seems indeed to have had in view, in coming to the conclusion to give notice."

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whether he is dissatisfied or not, his own deliberate expression of his dissatisfaction must be accepted as absolute. It is quite a different matter where the question whether the landlord has just ground for dissatisfaction is referred to the determination of an arbiter. But where the condition depends on consent, approval, satisfaction, or the reverse,—things in fact which depend on the mind of an individual,—I doubt whether it is a relevant allegation to send to a proof at large that the individual did not really consent, approve, was not really satisfied, or the reverse. The parties were satisfied to leave this matter to the conscience of the landlord; that was their contract.

But the defenders support their case by attempting to prove that Mr Houldsworth is using his right here *in mala fide*, to further private ends; and therefore, although that is the impression I have on the construction of this clause, I am not sorry that the Lord Ordinary has followed the course which he did, because I have come to the clear opinion that not only have the defenders failed to shew that this is a dishonest attempt to take advantage of the clause, but I am satisfied that Mr Houldsworth has entirely vindicated his action in this matter. It seemed to be thought that because Mr Houldsworth thought he could make a better bargain if the lease came to an end, therefore he was actuated by a dishonest motive in the course which he took. That, I think, is entirely fallacious. Of course Mr Houldsworth would not give effect to his dissatisfaction unless he thought he was to be benefited by it. He might be dissatisfied, but he might be entirely powerless to make a better bargain than the one he had with his existing tenant, and therefore the fact so much founded on, that he had a better offer, so far from tending to weaken Mr Houldsworth's position, is the very groundwork of it. He takes advantage of this condition because he thinks it is for his benefit to do so. But in regard to the working of the colliery it is quite clear that he was subject to very serious and considerable disadvantages. There were three matters in which unquestionably the existing lease was to his prejudice, so far as the tenant who had the working of the colliery was concerned. In the first place, he had to deal with representatives, and not with a principal. It seemed to be argued that this was not a reason for dissatisfaction within the words of the clause, but I do not agree with that. I think the working of the colliery meant the whole method in which the colliery was carried on; and the fact that there was no principal with whom the landlord could communicate was a material inconvenience, which was not removed and was not affected by there being a skilled manager appointed by the trustees. As he had not an individual interest in the colliery he was not in the same position as a responsible tenant. In the next place, there was the unquestionable fact that the output was diminishing. It is said that this was not the fault of the tenant. It is of no moment whether it was the fault of the tenant or not; it was a ground of dissatisfaction with the existing working of the colliery which Mr Houldsworth was quite reasonably entitled to consider as raising the question whether the lease should continue or not. And, lastly, there was that most important element, that there were two separate leases of the two seams of coal, which more and more as the working went on came into collision with each other, and that the Coltness company could not carry on their operations with the rapidity which was necessary for the landlord's advantage as long as the other lease was in the hands of Mr Brand's representatives. The tenants, it is true, said that they could not get waggons, and it was the want of waggons that prevented them from working as fast as they might otherwise have done. That might be;

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but does it follow that the landlord may not be dissatisfied with that state of matters, and hope to remedy it by putting the lease into other hands? I think not, and therefore, on the whole matter, without going into the details of the evidence, I am of opinion that even if the landlord had required to prove reasonable cause for dissatisfaction he has done so.

I cannot conclude my observations without saying that I think there has been, to say the least of it, very great laxity in the way part of the evidence has been put in. The letters between Mr Houldsworth and Mr Bain, in the first place, should not have been produced or admitted at the stage at which they were without Mr Houldsworth and Mr Bain being both put into the box by the party adducing the correspondence. Certainly as regards Mr Bain's letters, being the letters of a third party,—not a party to the suit,—they are not evidence of anything.

I think we should adhere.

LORD NEAVES.—I have arrived without difficulty at the same conclusion. The case is of importance both to the parties and to the law in reference to a lease of this peculiar kind. The general principles applicable to the case are not, I think, attended with much difficulty. But I am not quite satisfied with the way in which the case has been matured. I think it was scarcely advisable to pronounce the interlocutor of 30th June 1874 in the terms in which it is expressed, particularly as it is not qualified by the usual expression "before answer." I am not disposed to decide on any abstract question, or to do more than is necessary for putting the case on a right foundation. In particular, I do not think it necessary to determine whether such a clause as this may or may not be got behind by proving, *habili modo*, that there is a mere fraudulent pretence of dissatisfaction, where no dissatisfaction truly exists. I do not say that if that could be proved I should be prepared to give the landlord power, in such circumstances, of putting an end to the lease as if he were dissatisfied. If, for instance, there existed documents under his own hand, declaring he was not dissatisfied, but quite well satisfied, and merely said he was dissatisfied for the purpose of giving the lease to some favourite tenant,—if there was any such case, we might or might not remedy it. But there is nothing of that kind here. On the contrary, we have the landlord appearing and affirming on oath that he was dissatisfied. The word "dissatisfied" admits of considerable latitude. It may mean that he was not satisfied, because a man is dissatisfied when he is not satisfied. That is one form and a very serious form of dissatisfaction. A man may see that a thing is not working well, but he may not be able to point to the particular matter which is the cause of the mismanagement. Here there is a falling off in the output, which is a most material circumstance; and there are many things which obviously were natural sources of non-satisfaction or dissatisfaction; and I must say that Mr Houldsworth is entirely free from any suspicion that he was not acting in an honourable and fair manner to these parties. There has not been an approach to proving that it was a mere pretence; and when once you find the sincere feeling of a man's mind, and that he had probable cause for acting in a particular way, I do not see that, in the circumstances of the case, the matter can come under our jurisdiction. Upon these grounds, which are virtually adopted by the Lord Ordinary—though he goes a little further—I concur in the view which your Lordship has taken. I see nothing in the case to make me doubt that the termination of the lease has been made in

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good faith. I concur in the remarks your Lordship has made as to the admission and use made of the letters, and altogether in the result at which you have arrived.

LORD ORMIDALE.—I have arrived at the same opinion, and without any difficulty. I think it of importance to keep in view that, in regard to this mineral lease, the tack was originally conceived in favour of two parties, Brand and Hyslop, and that there is evidence to the effect that Hyslop was the individual chiefly relied upon. Then I find that while it is granted to these two individuals and their heirs, it is not given to the survivor of them and his heirs. I think that of some importance, because it leads at once to the explanation of how it was that the minute of agreement of 1869 was entered into. Hyslop, and Brand, his co-tenant, got into disputes, and while they were in dispute the minute of agreement, which is dated in October 1869, was come to between the landlord and Mr Brand; and it expressly bears to proceed upon the consideration that the landlord was to accept of Mr Brand as sole tenant, the latter having got rid of Mr Hyslop. Now, the landlord was not bound to do that, and, for anything we see to the contrary, things may have got into such a position that, if it had been in the least desirable for the landlord, he had it in his power then, if he had pleased, to have got rid of these parties altogether. But he does agree, on the application of Brand, to accept of him as sole tenant, although Hyslop, the co-tenant, was the individual who clearly, according to some of the evidence in the case, was originally chiefly relied upon. It is upon a consideration of that circumstance that the particular stipulation or clause in the agreement on which the present discussion has turned was made a part of it.

Now, it is pretty obvious that the clause is differently expressed from any of those clauses that are said to be analogous or similar in any of the cases that were cited; and I have not been able to discover any decided case in which there was a similar clause. It is very peculiarly expressed, and it is not very easy to ascertain exactly what the parties intended by it. The peculiarity of the terms in which it is expressed probably arose from its not having been framed by a professional man, for it would rather appear to have been made out by Mr Bain, who, although evidently a man of very considerable intelligence, was probably little skilled in the framing of formal writs. Be that, however, as it may, it is undeniable that the clause in question is very peculiar, and that it is not very easy to understand what its true interpretation is. It bears that, in the event of the death of Robert Brand during the currency of the lease, the landlord was empowered, if he wished, to enter on or resume possession of the colliery, &c. The contingency of Robert Brand dying during the currency of the lease is referred to as entitling the landlord, if he pleased, in place of allowing his heirs or representatives to take up the lease during the remainder of its natural endurance, to resume for himself possession of the colliery. It is obvious therefore that, looking at the clause so far as I have now referred to it, all the landlord had to do was to express his resolution to put an end to the lease. But there are other parts of the clause which require attention, for it goes on to provide for the representatives of Robert Brand taking up the lease and carrying on operations under it. This portion of the clause is somewhat differently expressed from the first part, for it bears that if he, the landlord, should at any time thereafter be dissatisfied with the working thereof by

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the representatives of the said Robert Brand, he should be entitled, on giving notice in a particular way, and on certain valuations being made, to resume possession. Now, what is the meaning of his being dissatisfied? If it was that he required to instruct good and sufficient reasons for his dissatisfaction, or, in other words, if he required to shew that the colliery was not properly worked, that would raise an issue of fact which could only be determined judicially, if not otherwise adjusted. But the terms of the clause are, "if *he* shall be dissatisfied." Now, I cannot doubt that the views expressed by both your Lordships on this subject are correct, and that we must hold it was put into the power of the landlord himself to say he was dissatisfied, and so put an end to the lease. All he had to do was to satisfy himself that things were not going on well, and to intimate that he was dissatisfied.

But the defenders state, in answer to the 18th article of the condescendence, "that the landlord has raised the present action, not in consequence of any *bona fide* dissatisfaction with the defenders' management of the works," &c. In consequence of that allegation I am disposed to think the Lord Ordinary followed the right course in allowing a proof, for the statement is to the effect that the defenders undertook to prove that although intimation had been given by the landlord that he was dissatisfied with the working of the colliery, he, in point of fact, was not dissatisfied, and that his statement of dissatisfaction was a mere pretence put forward *in mala fide*. I can conceive circumstances in which this might be established. Suppose that in this very case, where there has been an exhaustive diligence, under which there has been recovered and put into process every scrap of correspondence or writing that bears on the matter, and suppose, farther, that there were letters or correspondence between Mr Houldsworth, on the one hand, and Mr Bain and Mr Landale and Mr Beith, on the other, in which Mr Houldsworth distinctly stated to these parties, or some of them, that he had a sinister object to accomplish by getting quit of the tenants and putting an end to the lease,—desiring, it might be, to give the benefit of the lease to another party, one of his own family, while at the same time he was quite sensible that everything was conducted in an unobjectionable manner by Brand's representatives, and that things could not be better managed,—if such a case as that were proved by writing under the pursuer's own hand, it might very well be maintained that he was not acting *in bona fide* when he gave the intimation which he did give in February 1874. It is certainly not very likely that such a case would occur, and most undoubtedly it has not occurred here. For, looking at the proof, I am unable to find any ground whatever on which the defenders' allegations of *mala fides* can be supported. On the contrary, there is a great deal of evidence not only to shew that Mr Houldsworth was dissatisfied, but that he had sufficient grounds for his dissatisfaction. We have this most material circumstance, that there was a diminution of the output. No doubt it is said in excuse by the tenant that he could not get waggons, and there is some evidence that he was hampered by the railway company in regard to getting waggons, but that of itself might be a reason for dissatisfaction to the landlord. It was most material for him to get the coal put out in as large a quantity as possible, so as to be in possession of his lordship, but he could not get that accomplished. And the proof shews that Mr Houldsworth had reasons for thinking that if the lease was in other hands waggons would have been got in sufficient number so as to allow of a larger output. It is also very obvious that there was ground for dissatisfaction on the part of Mr Houldsworth in the

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fact that the colliery was now in the hands of trustees and of a pupil, and that there was no proper head; and though Mr Anderson appears to have been unobjectionable in his management underground, a great deal more had to be done than that. For example, Mr Anderson, while engaged under ground, could not attend to that most material matter, the obtaining of a sufficient number of waggons. There were also other grounds of dissatisfaction, and instead of its being proved that Mr Houldsworth acted *in mala fide*, I think it clear that he was indulgent and forbearing. It is true that Mr Bain in some of his letters appears to have been satisfied with the working of the colliery, and especially with the operations of Mr Anderson, the underground manager, but still it is very important to keep in view that during the few months immediately before the notice was given—after the death of Mr Alexander Brand—satisfaction was not expressed even by Mr Bain with the operations, but, on the contrary, there are letters in which, about that time, he expressed to Mr Houldsworth his dissatisfaction.

In regard to Mr Houldsworth's having acted throughout in perfect good faith, it ought to be also noticed that there are two letters which, to my mind, are quite conclusive on the point. On the 1st of August 1873, when the negotiations between Mr Houldsworth and Mr Bain and Mr Beith had commenced with a view to terminating the lease, Mr Houldsworth writes to Mr Bain,—"In what position is Brand's colliery? Has Beith written? and, if so, what? Nothing must be done unfair to Brand's heirs, and anything Beith does in my name must be done at the request of the Coltness Iron Co." That is stated by Mr Houldsworth in a letter to his own manager, and nothing, I think, could indicate more completely the good faith of Mr Houldsworth in this matter. And in his anxiety to avoid the risk of anything being done unfairly or harshly to Brand or his representatives he again, in his letter of 22d August to Mr Bain, repeats,—"It would be much the best for the Iron Co. to make a previous arrangement with the heirs and trustees if possible; if not, and they wish me to take any action, 1st, Mr Beith must assure me that I can properly do so under the agreement, and, 2d, the Iron Co. must relieve me of all expense." Accordingly, Mr Houldsworth would not proceed to give intimation without the advice of his law-agent, Mr Beith, who was made acquainted with everything, and Mr Beith acted cautiously and prudently, as might have been expected, in the advice he gave. And, acting on that advice, intimation was postponed for a considerable time, till at last matters came to such a crisis in February 1874 as to satisfy Mr Beith and Mr Houldsworth that intimation could be no longer delayed. For the reasons I have now stated I concur in the proposed judgment, which I understand is to the effect of an adherence in substance to the Lord Ordinary's interlocutor, but perhaps there should be an additional finding to the effect that Mr Houldsworth, when the intimation was given, had sufficient grounds to be dissatisfied with the working of the colliery.

LORD GIFFORD.—I have come to be of the same opinion, and, latterly, without any doubt whatever. The question turns upon the true import and meaning and upon the legal effect of the clause in the minute of agreement of 5th October 1869. The agreement was to the effect that the landlord, instead of his two tenants, Brand and Hyslop, accepted Mr Brand senior alone as the sole tenant, but stipulated that he, the landlord, should, in certain events, have a

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power to resume and terminate the lease. There are two of these provisions relative to the resumption of possession by the landlord which are very material, and I think the latter one, which has not been fully founded upon, throws light upon the first, which has been the main subject of contention between the parties. The second provision is to take effect during old Brand's life, and it declares that if he shall become unwell and be absent from the colliery, and if, during any period of six months, the output shall fall below £2000, then the landlord, if he so wishes, may put an end to the lease even during old Brand's life. There are here two conditions, first, the condition of the illness of Brand, combined with the falling of the output below £2000 in the half year; and, second, the landlord has the power to declare the lease at an end if he so wishes, —an option is given to the landlord—an absolute power if he chose—to terminate the lease, and this will be enough if it concurs with the other two matters.

But then Brand might die and another set of circumstances arise, for which provision is also made in the lease, though this is placed before the condition I have just alluded to. The provision is that if Brand should die and be succeeded by executors or representatives then the landlord, if he so wishes, and if he is dissatisfied, for I read the two ifs together—I think the two things must concur—if Brand shall die, and if the landlord shall be dissatisfied with the working of the colliery, and wish to put an end to the lease, then he may do so. Now, it is under this clause, and in the circumstances for which it provides, that the question has arisen here. Brand died, and was succeeded by successive representatives, and the landlord ultimately came to be first dissatisfied with the working of the colliery, and second, desirous to put an end to the lease. There is no dispute about his being desirous to put an end to the lease. It was a mere option on his part. He is not bound to put an end to it, even though dissatisfied. He has exercised the option given to him, and the dispute really is, was he dissatisfied in the sense of the provision in the lease. What is the true legal meaning and effect of the clause which provides for putting an end to the lease "in the event of the landlord being dissatisfied with the working?" Now, I am of opinion that this provision has reference solely to the mind of the landlord. The condition is not as to the actual working or state of the working of the colliery, but as to the mind of the landlord. Is he or is he not dissatisfied with the working? I do not doubt that the parties might get beyond the mere statement of dissatisfaction, and shew that the dissatisfaction with the working was merely simulated and was not real, but to do that I think the averments of the defenders must come up to an averment of *mala fides* or of fraud on the part of the landlord. I prefer the word "fraud" rather than "*mala fides*," because I think it must come up to that. The landlord must be proved to be merely pretending dissatisfaction without really feeling it; and unless the defenders can make out that the landlord is (as one of your Lordships has said) telling a lie, saying he was dissatisfied when he really was not, the defence must fail. Now, if that is the sole question of fact, I can only come to one conclusion on the evidence. I think the landlord has acted in perfect *bona fide* throughout all this negotiation. It is a very serious allegation which the defenders must undertake to establish against the landlord. I think it is an allegation of fraud, and the defenders cannot succeed in their defence without proving that the landlord is acting fraudulently,—that he is using this clause not for the true purpose and not in the true sense which the parties intended it, but for another purpose alto-

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gether, and without the real state of facts having arisen on which alone the lease was to be put an end to.

I do not need to go into the evidence, because it really cannot be contended that a case of fraud has been made out. I put it to the Dean, in the course of the argument, whether he held upon the evidence that fraud was proved, and he rather avoided putting the issue as if it were so. He did not wish to accuse Mr Houldsworth of fraud, but I do not see how he could avoid that if he has a case at all. If Mr Houldsworth was perfectly sincere in expressing his dissatisfaction, and if that was his true state of mind at the date when he gave the notice, it seems to me to be quite enough; for it is his dissatisfaction, and not the dissatisfaction of the Court or of Mr Landale, or any third party, to which reference is made; it is the dissatisfaction of the landlord himself. Now, turning to the landlord's evidence, it is impossible to doubt that, if he is to be believed, he was much dissatisfied with the state of the working at the date of the notice, and is so still. He expressly swears that. The issue really is, whether he was or was not dissatisfied; and in order to prove the negative of the issue the defenders would require to prove that the landlord was merely pretending or simulating dissatisfaction while he had no such feeling, and so was actually forsworn. I cannot face that issue, and look at the evidence, without coming to the conclusion on all grounds that the defenders have not made their case out. Not only does the landlord swear to his dissatisfaction, but he gives very good reasons for that dissatisfaction; and although it is not the question for the Court to determine whether these reasons are well founded or not, still, when the sincerity and *bona fides* of the landlord are impugned, it is important to see that his alleged dissatisfaction was not unreasonable and groundless. Whether he had sufficient grounds for his dissatisfaction is not the question at all. That would have been the issue (as Lord Ormidale pointed out) if the clause had been expressed that the landlord might put an end to the lease if the colliery were not well conducted. But that is a totally different issue from the issue really raised, whether the landlord is or is not dissatisfied with his tenant. Now, the reasons which the landlord gives he puts in five particulars. He says, at page 5 of his evidence,—"My reasons for being dissatisfied were that I did not consider the colliery was worked with proper energy and attention; the output diminished; the moss was not removed,—is not, I believe, to this day; the Coltness company could not get on with their workings below; and there was no proper head with whom I could deal and communicate beyond the underground manager." Now, suppose all these reasons were bad reasons, they still may have had such force in Mr Houldsworth's mind as to create dissatisfaction, and that is enough in this case; for if the parties refer to the conscience of the landlord being really and truly dissatisfied, effect must be given to the bargain which they themselves have made. It is true Mr Houldsworth was not intimately conversant with many grounds on which he founded his dissatisfaction, but that only removes the case one step, for he was entitled to take and be guided by the opinion of the advisers in whom he had confidence. It is plain that Mr Landale had told him that he was not satisfied, and Mr Bain was not satisfied. Now, Mr Houldsworth was entitled to go upon the advice of those in whom he had confidence as to this matter, and if he believed Mr Landale, his own adviser, and was dissatisfied in consequence of the opinion which he received from that gentleman, and if he really came to this conclusion fairly and honestly, I think this is enough to determine the case. If

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that is to be overcome by putting it to the Court whether they would be dissatisfied in consequence of Mr Landale's statement, or, in the whole circumstances now disclosed, it would be changing the issue altogether, and making the termination of the lease to depend not on Mr Houldsworth's dissatisfaction but on the dissatisfaction of the Lord Ordinary or the Court. I think that, after every possible light has been thrown on the subject by the proof, after perusal of all the documents that have been recovered, after the disclosure of the landlord's most intimate negotiations with his own engineer and his own agent, *mala fides* has not been established against Mr Houldsworth, but on the contrary, I think the proof and the whole private documents demonstrate his *bona fides*. Lord Ormidale has read part of the letters, which shew that he was very careful to do nothing hastily, but to be fully satisfied in his own mind that he had good grounds for putting an end to the lease. Therefore it cannot be said that it was a mere pretence to put an end to the lease. These documents disclose a very careful and conscientious proceeding on the part of Mr Houldsworth in order to be quite sure that he had grounds for dissatisfaction, and they shew that time was given which might possibly remove these grounds before he availed himself of the clause in the minute of agreement enabling him to put an end to the lease. Therefore, viewing the issue as being whether the notice was given fraudulently and *in mala fide*, I can come to no other conclusion, and I do so with perfect confidence, than that the defenders have failed to instruct the affirmative of that issue.

THE COURT adhered.

MURRAY, BEITH, & MURRAY, W.S.—ALEX. MORISON, S.S.C.—Agents.

No. 119.

May 21, 1875. Robb v. Logiealmond School Board.

ALEXANDER ROBB, Pursuer.—*Scott—Young.*
THE SCHOOL BOARD OF LOGIEALMOND, Defenders.—*D.-F. Clark—Keir.*

School—Schoolmaster—Retiring Allowance—Education (Scotland) Act, 1872 (35 *and* 36 *Vict. c.* 62), *sec.* 60—*Process—Relevancy.*—A parish schoolmaster, appointed before the Education Act, 1872, was removed by the school board, under sec. 60 of the Act, proceeding on a report by an inspector that there were no pupils in attendance at the school, and that the schoolmaster was unfit for the office of schoolmaster in that parish, and his application for a retiring allowance was refused without a reason being assigned. In an action against the board by the schoolmaster claiming a retiring allowance he averred that the scarcity of scholars was caused by decrease of population, by political feeling, and by sectarian rivalry, which led the inhabitants to support other schools. The Court remitted to the school board to specify the ground of their resolution to refuse the pursuer a retiring allowance, if they still adhered to it. The board adhered to their refusal, and specified as the ground of it the pursuer's inefficiency, caused by his extreme indolence, culpable neglect of duty, and general misconduct, "as proved by the complete absence of scholars, and substantiated by the evidence of the inhabitants of the district." *Held* that, in the face of this resolution, the pursuer's averments were not relevant, and defenders assoilzied, but without expenses, as they had not at first assigned any reason for refusing an allowance.

1ST DIVISION. Lord Young. B.

SEQUEL of case reported *ante*, p. 417.

The pursuer lodged a minute of amendment, in which he alleged as causes of the small attendance at the school the smallness of the

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population in proportion to the number of schools, and that the other schools were more conveniently placed in the centres of population, and that the population was decreasing, and had decreased by one-third since 1858, and that the school had been farther injured by sectarian rivalry and political feeling, leading the inhabitants to support other schools.

THE COURT, without deciding on the relevancy of the amended record, pronounced this interlocutor:—"Before further answer, remit to the school board of Logiealmond to reconsider their resolution of 29th October 1873 refusing the pursuer a retiring allowance, and, if they adhere thereto, to specify in their resolution the ground of such refusal."

The school board met on 27th April 1875 and unanimously "resolved to adhere to the resolution contained in their former minute of 29th October 1873, to refuse Robb a retiring allowance; and, in obedience to the deliverance by the Court, the meeting specified, and hereby specify, the pursuer Robb's inefficiency as the ground of their refusal, that inefficiency being occasioned by his extreme indolence, culpable neglect of his duties as a teacher, and general misconduct, as proved by the complete absence of scholars, and substantiated by the evidence of the inhabitants of the district."

A copy of the minute of this meeting was produced to the Court.

LORD PRESIDENT.—In this case of Robb v. the School Board of Logiealmond we gave opinions on 5th February last differing from those of the Lord Ordinary, and holding that a schoolmaster dismissed under the 60th section of the statute might have right to a retiring allowance although his case did not fall within the category of old age or infirmity, and we continued the case that the pursuer might give us some more definite statement as to the cause why he was dismissed. He did amend his record, but there was no statement in the minutes of the school board as to the grounds of dismissal. We then determined to remit to the school board to specify the grounds of their refusal to grant a retiring allowance. We have now before us a minute of the school board, in which they state,—"In obedience to the deliverance by the Court, the meeting specified, and hereby specify, the pursuer Robb's inefficiency as the ground of their refusal, that inefficiency being occasioned by his extreme indolence, culpable neglect of his duties as a teacher, and general misconduct, as proved by the complete absence of scholars, and substantiated by the evidence of the inhabitants of the district."

Now, if the schoolmaster had received this deliverance before his original dismissal, I should have thought that we had a strong case against the schoolmaster, and we would have required a very strong case on his side to have got the better of it. The board are entitled to take into account the grounds on which the dismissal had taken place in deciding whether they would grant a retiring allowance. The ground stated, if well founded, will prevent him from having a right to a retiring allowance. The school board, if they think fit, may still grant him an allowance. But the only question is, whether Robb has made statements which can form the subject of inquiry. I think that is out of the question. One prominent fact is that the school of which the pursuer was the schoolmaster has for some time been a school without a scholar. Any attempt

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LORD DEAS.—I am of the same opinion. I adhere to what I said on a former occasion, that the onus ought not, in the first instance, to be laid on the schoolmaster to prove that he is not in fault. But the circumstances here are peculiar. The school is absolutely without a scholar. That fact, I think, calls for explanation from the schoolmaster, and I agree with your Lordship that the schoolmaster here has failed to give any satisfactory or even intelligible explanation of it. On the other hand, we have now a distinct deliverance from the school board stating the grounds upon which they have proceeded. I by no means say that there might not have been a case stated for the schoolmaster, which, even in the face of such a deliverance, ought to be admitted to proof. But the presumption against him here is very strong, and I am satisfied that he has not made any relevant statements to meet it.

LORD ARDMILLAN.—When the case was before us last session we had nothing to guide us as to the claim for a retiring allowance beyond a statement by the school board that the pursuer was removed, on the report of an inspector, for inefficiency, it being the fact that there were no pupils in attendance at the school. Confessedly the master had been competently and rightly removed. But as the school board had simply declared the teacher to be inefficient, without saying any more, we were all of opinion that we had not the explanation necessary. It is possible that there may be a case in which a master is entitled to a retiring allowance, although removed for inefficiency, if the inefficiency was not occasioned by any fault of his own. Now, however, that the school board have explained the matter, and stated by a regular minute that the pursuer's inefficiency has been occasioned "by his extreme indolence, culpable neglect of his duties as a teacher, and general misconduct," I think it would require a very special and peculiar case to be stated on his part to overcome the effect of that minute, and open the door to any farther inquiries. Nothing approaching to such a case has been stated by the pursuer, and I have no doubt that the judgment proposed is the right one.

LORD MURE.—I am of the same opinion, for there are not, I think, set forth on the record, even as amended, any facts and circumstances relevant and sufficient to get the better of the inferences to be deduced from the broad and admitted fact that, for a considerable period prior to the dismissal of the pursuer, there had been no pupils attending his school. This absence of scholars being admitted, it would, in my opinion, require some much more distinct and specific averments in explanation of the reason why no pupils have attended the school than those here made to warrant us in allowing the pursuer a proof to traverse the grounds of dismissal as now laid before us by the board.

The defenders moved for expenses.

LORD PRESIDENT.—No. I think when a school board refuse a retiring allowance they should state their reasons.

LORD ARDMILLAN.—I concur in that observation, which, I think, is very important.

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THIS interlocutor was pronounced:—"Having resumed consideration of the reclaiming note for Alexander Robb, pursuer, against Lord Young's interlocutor of 18th November 1874, with the record as amended, and minute of the school board, dated 27th April 1875, No. 68 of process, reported to the Court in terms of the interlocutor of 20th March last, and heard counsel farther, refuse the said reclaiming note, and adhere to the interlocutor reclaimed against."

GEORGE BEGG, S.S.C.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 120.

May 21, 1875.
Staig v. Johnston.

1ST DIVISION.
Lord Gifford.
M.

DAVID STAIG, Petitioner.—*J. C. Smith.*
PETER JOHNSTON, Respondent.—*J. M. Gibson.*

*Process—Reclaiming Note—*20 *and* 21 *Vict., c.* 56*—Court of Session Act,* 1857, *sec.* 10.—The Lord Ordinary on the Bills, in disposing of petitions for factors, &c., during vacation, under sec. 10* of the Court of Session Act, 1857, does not exercise his Bill-Chamber jurisdiction, but merely acts in place of the Junior Lord Ordinary, and his interlocutors must be reclaimed against within eight days.

ANDREW CLARK, S.S.C.—MACNAUGHTON & FINLAY, W.S.—Agents.

No. 121.

May 25, 1875.
Jamieson v. Forrest.

GEORGE AULDJO JAMIESON AND ANOTHER, Appellants.—*D.-F. Clark—Asher.*
JOHN CLARK FORREST (Trustee on S. S. Robertson's Estate), Respondent.—*Sol.-Gen. Watson—R. V. Campbell.*

Bankrupt—Cautioner—Ranking.—Although a cautioner for the debt of a person who has become bankrupt will not be allowed to rank on the bankrupt's general funds for his loss as cautioner when the creditor has already been ranked for the full debt, if the cautioner holds a lien over any special fund belonging to the bankrupt his right to full indemnity therefrom will not be affected by the ranking of the creditor.

Bankrupt—Cautioner—Ranking—Security.—Held that a person holding a lien over a portion of a bankrupt's estate in security of advances made to him, and against risks and loss through a cautionary obligation undertaken for the bankrupt, was entitled to apply the security in the first instance to extinguish his loss through the cautionary obligation.

1ST DIVISION.
Ld. Curriehill.
M.

THIS was an appeal by George Auldjo Jamieson, C.A., and James Auldjo Jamieson, W.S., against a deliverance by John Clark Forrest, trustee on Stewart Souter Robertson's sequestrated estate, on claims lodged by the appellants.

The following narrative is taken from the Lord Ordinary's note:—"The appellants are admittedly creditors of the bankrupt in respect of two bills dated 14th May 1874, the one for £2000 and the other for £700, and amounting, with interest, as at the date of the sequestration, to £2731, 14s. 6d.

"The claimants are also admittedly cautioners for the bankrupt in a bond for £2000, granted by him to Mr William Burnett.

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* "The Lord Ordinary on the Bills during vacation shall have the same powers in regard to petitions for the appointment of factors *loco tutoris, curators bonis*, and judicial factors as are by this Act conferred in relation thereto on the Junior Lord Ordinary as aforesaid."

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"It is also admitted that the claimants, at and prior to the sequestration, held, and that they still hold, on *ex facie* absolute and unchallengeable titles, certain moveable property belonging to the bankrupt, as specified in the foregoing interlocutor, for security, satisfaction, and relief of the debts owing to them by the bankrupt, and of the liabilities which they have incurred for his behoof.

"The main question raised in the present appeal is, whether they are entitled to apply these securities in relieving themselves of their liability to Mr Burnett under their cautionary obligation?

"It appears that Mr Burnett, in addition to the cautionary obligations of the claimants, held, in security of the debt due under the bond, certain policies of assurance on the life of the bankrupt. At the date of the sequestration, the sum, with interest due on the said bond, amounted to £2033, 8s. 3d. Mr Burnett realised by the surrender of the policies £172, 2s. 9d., leaving a balance due under the bond of £1861, 5s. 6d., for which he has claimed and been ranked in the sequestration as an ordinary creditor, and on which he will receive a dividend of 3s. 6d. per £, amounting to the sum of £325, 14s. 6d. The debt due under the bond will thus be reduced to £1535, 11s., and for that sum he has a claim against the claimants as cautioners.

"The claimants, as creditors of the bankrupt in virtue of his two acceptances above mentioned, have claimed to be ranked as ordinary creditors for the amount thereof, £2731, 14s. 6d., under deduction of the value of the securities held by them. But they propose, in the first instance, to apply these securities, to the extent of £1535, 11s., in relief of their cautionary obligation to Mr Burnett, and to deduct from their debt only the balance of the value of the securities. And as the total value of the securities is £1660, 19s. 8d., it follows that only £125, 8s. 8d. will be available as a deduction from the claim on the bills, if the claimants are entitled to apply the securities in the manner proposed.

"The trustee maintains that they are not entitled so to apply the securities, because he thinks that by doing so the cautioners would virtually be ranking upon the general funds for £1535, 11s., which sum was included in the ranking of Mr Burnett, the principal creditor, for £1861, 5s. 6d."

The trustee issued the following deliverance:—"The trustee rejects the claim as lodged, for the following reasons, viz.:—(1) The claimants are not entitled to deduct from the amount of their securities the sum in which they may ultimately be found liable as co-obligants with the bankrupt to Mr William Burnett under the bond to him for £2000. Mr Burnett has ranked upon the bankrupt estate for the amount of his bond, and if the present claim were allowed it would in effect be paying the full amount of Mr Burnett's debt out of the bankrupt's estate. The trustee holds that all claim upon the bankrupt's estate in respect of Mr Burnett's debt is exhausted by Mr Burnett ranking. It would have been open to the claimants to have required and obtained from Mr Burnett an assignation to the debt on payment of the amount thereof, and in virtue thereof to have entered a claim on the estate; but the trustee holds that they are not entitled to take credit for it, or profit by it in any other way." . . .

The claimants appealed.

The Lord Ordinary pronounced the following interlocutor:—"Sustains the appeal, and recalls the deliverance of the trustee appealed against: Finds that the claimants are co-obligants with and cautioners for the bankrupt in a bond for £2000 to William Burnett, which, at the date of the sequestration, amounted, with interest, to the sum of £2033, 8s. 3d., but in security of which Mr Burnett held an assignation to certain policies of insurance on the life of the bankrupt: Finds that Mr Burnett

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realised the surrender value of said policies, amounting to £172, 2s. 9d., which reduced the amount due under the bond to £1861, 5s., for which sum he has been ranked in the sequestration, and will receive a dividend at 3s. 6d. per £, amounting to £325, 14s. 6d., whereby the liability of the claimants as cautioners foresaid will be reduced to £1535, 11s.: Finds that the claimants held at the date of the sequestration, and still hold, on titles *ex facie* absolute and unchallengeable, securities over certain shares and other assets of the bankrupt: Finds that the securities so held by the claimants consist of—(1) 600 £10 shares of the State Line Company, the value of which is £1485, 19s. 8d., being the value of said shares at £3, 10s. each, or £2100, less £614, 0s. 4d., being the amount of calls paid by the claimants; (2) claim on Lewis T. Merrow under his letter to the bankrupt guaranteeing said shares, the value of which is £50; (3) claim on the estate of L. T. Merrow and Company, in respect of a bill for £2500 granted by them to the bankrupt, and indorsed by him to the claimant George Auldjo Jamieson, in security of the claim of the claimants against the bankrupt, the value of which is £125, being an expected dividend from the estate of L. T. Merrow and Company of 1s. per £: Finds that in the value of said bill there ought not to be included the sum of £430, 18s. 1d., being the amount of an expected dividend on a separate claim in this sequestration made by the said George Auldjo Jamieson in respect of said indorsed bill of £2500, which claim has been rejected by the trustee: Finds that the true value of the whole securities so held by the claimants is £1660, 19s. 8d.: Finds that said securities are available to the claimants for extinction and relief *pro tanto* of all their lawful claims against and liabilities for the bankrupt, and that they are entitled to hold and apply the same, in the first instance, for their relief of the said balance of £1535, 11s., or for such other balance as shall be ultimately claimed from them by Mr Burnett under their foresaid cautionary obligation: Finds that on the assumption that the liability of the claimants under said cautionary obligation will amount to £1535, 11s., the value of the said securities available for payment or satisfaction of the other debts due to them by the bankrupt, and falling to be deducted from the claim of the claimants in respect of the bankrupt's acceptances to them for £2000 and £700, and interest, is £125, 8s. 8d.: Remits to the trustee to rank the claimants accordingly, and decerns: Finds the appellants entitled to expenses," &c. *

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* "NOTE.—(After the narrative above quoted)—It appears to me that the trustee is mistaken in this view. If indeed the securities held by the claimants had been appropriated to the bill debts alone, to the exclusion of their cautionary liabilities,—in other words, if, as cautioners, they were mere unsecured creditors,—the trustee would have been right in refusing to allow them so to apply the securities, and they would not be entitled to rank upon the general estate for the amount of their liability. In the words of Mr Bell (Com. i. 348), 'If the creditor have already been admitted to rank on the funds of the bankrupt the cautioner is not also to be admitted.' But that doctrine is not applicable to the present case, where the cautioners hold securities over the bankrupt estate for their indemnification.

"For in a note to the foregoing passage Mr Bell says, 'It will be recollected, however, that the subject under discussion is only the claim of indemnification against the general fund. The cautioner may have security for his indemnification—(1) by heritable security; (2) by pledge or other security on moveables; (3) by retention or compensation. In all of these cases he will be entitled to a total relief so far as the security reaches.' This doctrine, which is obviously founded on clear principles of equity, appears to me to be conclusive against the contention of the trustee; and I therefore think that his deliverance must be

No. 121. The trustee reclaimed.

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THE COURT adhered to the Lord Ordinary's interlocutor, with the variation of inserting the words "in accordance with the foregoing findings," in place of the word "accordingly" in the remit to the trustee.

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recalled, in so far as it refuses to allow the claimants to operate their relief from the cautionary obligation out of the securities held by them.

"This being so, it follows that the claimants are entitled to hold or apply their securities to the extent of £1535, 11s. in relief of their cautionary obligation, and that the sum which they are bound to deduct from their claim under the bills is only the sum of £125, 8s. 8d., being the balance of the total value of their securities after deducting the amount of the cautionary obligation.

"In their oath the claimants had valued their securities at the sum of £2091, 17s. 6d., in place of £1660, 19s. 8d., the true value. The error was pointed out by the trustee, and rectified in his deliverance. It arose in this way. One of the securities held by the claimants is a bill for £2500 granted by L. T. Merrow and Company to the bankrupt, and indorsed by him to Mr George Auldjo Jamieson, who, however, admittedly holds the bill not for any separate value but as an additional security to himself and his brother for the general liabilities of the bankrupt to them.

"Unquestionably that bill is a security which must be deducted from the present claim, in so far as any dividend shall be received upon the same out of the estate of Merrow and Company, and that expected dividend, amounting to £125, is accordingly included in the foresaid sum of £1660, 19s. 8d. as part of the securities held by the claimants. In the oath, however, the claimants value that bill at the further sum of £430, 18s. 1d., thus stating it as of the total value of £555, 18s. 1d. This was done because Mr Auldjo Jamieson, regarding the bankrupt's indorsation as a separate and independent obligation for £2500, had lodged a separate claim to be ranked for that amount, and had anticipated that he would receive a dividend of £430, 18s. 1d., which would certainly have increased the value of the bill as a security. But as the trustee has rightly rejected that separate claim, the bill for £2500 ought only to be valued as a security for Merrow's dividend of £125.

"The result of the whole matter thus comes to be, that as the total value of the securities held by the claimants amounts to only £1660, 19s. 8d., and as the claimants are entitled to deduct from that value £1535, 11s. sterling, the amount of their cautionary liability, the value which they must now deduct from the £2731, 14s. 6d. due under the bill forming the subject of the present claim is £125, 8s. 8d., leaving £2606, 5s. 10d. as the sum for which they are entitled to be ranked as ordinary creditors.

"I should add that at the debate the trustee stated (and he has now lodged a minute to the same effect) that if the claimants would cause Mr Burnett's claim to be withdrawn, and should themselves claim as in his right on the unpaid balance of £1861, 5s. 6d. due under the bond, he would allow the claimants to lodge such a claim, and he would rank them upon the estate to the full amount of £1861, 5s. 6d., and of the £2731, 14s. 6d. due under the bankrupt's two acceptances, in all for £4593, under deduction of the total value of the securities, £1660, 19s. 8d.; in other words, he would give a ranking as ordinary creditors for £2932, 0s. 4d. But the claimants declined to accede to that proposal, because they would thereby not obtain out of their securities that to which they are entitled, viz., relief of their cautionary obligation to the extent of these securities. They could not place themselves in the position proposed by the trustee without paying to Mr Burnett £1861, 5s. 6d., so that they would have to pay out a much larger sum than at present they can ever be called upon by Mr Burnett to pay, and they would do so with the certainty that they could not recover it out of their securities. Mr Burnett was not bound to demand, in the

MARY HUME OR M'DONALD, Pursuer and Respondent.—*Rhind.*
DAVID M'DONALD, Defender and Appellant.—*Balfour.*

No. 122.

May 25, 1875.
M'Donald v. M'Donald.

Husband and Wife—Separation and Aliment—Sheriff.—A married woman raised an action in the Sheriff-court against her husband for interim aliment until a permanent arrangement of the rights and interests of the parties should be made in a competent Court, on the ground that the pursuer was obliged to live separately on account of her husband's cruel conduct. It appeared from a proof that at the date of the action, and until a few days before the proof, the pursuer was living in her husband's house. *Held* that in the circumstances the action was incompetent in the Sheriff-court.

Observed (*per* Lord Deas), that in granting an interim allowance of aliment to a wife the Sheriff ought to fix a time at which the aliment should cease.

1ST DIVISION. Sheriff of Lanarkshire. M.

THIS action was raised in the Sheriff-court of Lanarkshire on 16th December 1873 by Mary M'Donald, residing at 373 Bath Street, Glasgow, wife of David M'Donald, clothier, against her husband, concluding for interim aliment "aye and until a permanent arrangement of the rights and interests of the parties shall be made by a competent Court, with expenses, the pursuer being compelled to live separately from the defender by reason of the defender conducting himself towards her in such a harsh, cruel, and tyrannical manner as to endanger her health and life, and more particularly upon the 11th day of December current, within the house occupied by them at 373 Bath Street aforesaid, having struck her with his fists upon the face and other parts of her person to her serious injury and effusion of blood, and also having on various previous occasions ill-used her."

The record was closed on 30th December. On 23d January 1874 a proof was allowed. Evidence was led on 2d April, 30th May, 25th September, and 26th October. It appeared that the parties were married in October 1872, and had been on bad terms ever since, but they continued to live in separate rooms in a house of which the defender was the tenant, until about 17th March 1874, when the pursuer left the house.

On 5th December 1874 the Sheriff-substitute (Clark) pronounced this interlocutor:—"Finds that on the 11th day of December 1873, within the house occupied by them, the defender struck the pursuer with his hand on the head to the effusion of blood, and that she has since and is now living separate from him: Therefore decerns against him for the

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first instance, full payment of his debt from the cautioners; on the contrary, he was entitled, and morally bound, to go, in the first instance, against the bankrupt and his general estate. And it is only the deficiency, after deduction of the amount of his dividend, which he is entitled to demand from the cautioners. This he has done, and the general creditors have no title to complain that the bankrupt had, before his insolvency, lawfully given to these cautioners security available for their relief. If Mr Burnett, after claiming to be ranked on the estate for £1861, had called upon the claimants as cautioners to pay to him to account of their obligation the sum of £1535, 11s., and they had done so, the position of the parties would have been this, viz., that the cautioners would have recouped themselves out of these securities, while Mr Burnett would still have been entitled to rank upon the estate for the full amount of his debt, but only to the effect of enabling him to recover the difference between the full amount of his debt and the sum paid by the cautioners—(see Black v. Melrose, 2 D. p. 706). He would in that case have obtained precisely the same dividend as that for which he has now been ranked on. I do not see that the rights of the cautioners as holders of these securities can be altered by Mr Burnett having received that amount from the general estate before making the demand upon the cautioners."

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sum of 12s. a-week in name of interim aliment for the maintenance and support of the pursuer, commencing payment of the said aliment as on the 11th day of December 1873, and so on weekly thereafter in advance, aye and until a permanent arrangement of the rights and interests of the parties shall be made by a competent Court: Finds the defender liable to the pursuer in expenses."

The defender appealed, and the Sheriff (Dickson) adhered.

The defender appealed to the Court of Session.

He argued;—The Sheriff had no power to award aliment to a wife who was at the date of raising the action living in her husband's house. The proof did not disclose such a case of cruelty as would justify the pursuer in separating herself from her husband.[1]

LORD PRESIDENT.—I have had occasion more than once to express opinions on the powers of Sheriffs exercised in cases of separation and aliment in granting interim aliment. It is a useful jurisdiction, and one which I should be unwilling to interfere with if exercised in circumstances suitable for its operation. But there is great risk of the Sheriff interfering in cases where there is no necessity, and where he cannot approach the subject without trenching on ground which is only suitable for the supreme Court.

When this action was raised the pursuer was living in family with her husband in his house, which was the domicile of the marriage. It was an essential preliminary to granting aliment that she should prove her right to separation, and this she could only do by a consistorial process, an action of separation and aliment in this Court. It would have been quite different if the spouses had been long separate, or had been living separate under a joint arrangement. Then it might be supposed that the parties consented to an allowance being made to the wife. But so far from this being the nature of the case, the pursuer continued to live with her husband after defences were lodged, and after proof was allowed. Then, for the first time, when she considers herself safe of obtaining interim aliment, she thinks fit to leave the house. Nothing could more clearly illustrate the abuse of the power of granting interim aliment than the conduct of the pursuer here. It was just because she saw she was going to obtain her aliment that she left the house. I think that the action is incompetent under the circumstances, and should be dismissed.

LORD DEAS.—At the date when this action was raised, 16th December 1873, the pursuer was living in the house of her husband. The house was taken in his name as tenant, and he was liable for the rent. The only sense in which she says that she lived separate from him is that she did not sleep in the same bed, or live in the same room. That was plainly no proper separation. On 31st December, when the record was closed, and on 2d January when a proof was allowed, she was still living in the same house with her husband. She left on 17th March, and she has lived separate since that time. After she had so left, a diet of proof was fixed, and evidence led on 2d April, again on 30th May, again on 24th June, again on 25th September, and again on 26th October. On 5th December the Sheriff-substitute awarded a sum of interim aliment payable for all that time. I agree with your Lordship that this course of procedure was

[1] *Authorities.*—Benson v. Benson, Feb. 14, 1854, 16 D. 555; Smith v. Smith, June 11, 1874, *ante*, vol. i. p. 1010; M'Gregor and Barclay v. Martin, March 12, 1867, 5 Macph. 583, 39 Scot. Jur. 294.

virtually converting this process into a process of separation and aliment, which is competent only in this Court. No. 122.

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I should wish to make one other remark. The conclusion of the action is for aliment "aye and until a permanent arrangement of the rights of the parties shall be made by a competent Court," and the Sheriff-substitute has given effect to this conclusion in his interlocutor. This is a common form, and I do not therefore say that the Sheriff-substitute erred in adopting it. But I think that it would be much better if a time were limited within which, if an action of separation and aliment was not instituted, the interim aliment awarded should cease. This would tend very much to do away with the objections so frequently made to the course of these actions in the Sheriff-court.

LORD ARDMILLAN concurred.

LORD MURE.—I am of the same opinion. There can be no doubt that actions of aliment by a wife against her husband, as contended for by the respondent, are competent in the Sheriff-court, but they are so, I conceive, only when brought for aliment *ad interim*, and when the parties are living separate. They are, moreover, summary processes, as pointed out by the authorities, and require to be carried on with more than ordinary despatch. In the present case, *ex facie* of the summons, the action appears to me to be relevant and competent, as it bears to be for interim aliment, and proceeds upon the allegation that the parties were separated, in consequence of the conduct of the defender. But that statement is not correct in point of fact, as it appears from the evidence that the parties were not separated at the date of the action in December 1873, but were living in the same house, and continued to do so down to the middle of March 1874. If, then, proof had been led in the case, as it ought, I think, to have been done in a summary proceeding, in January, or at latest in February 1874, it would have appeared that the parties were living in the same house at the defender's expense, and that the statement in the summons on which the relevancy and competency of the action depended was unfounded, and the result must, I think, have been either that the defender would have been assoilzied, or the action dismissed. But the proof was not begun till the 2d of April, three months after the record was closed, and was not concluded till the 26th of October, after several adjournments, and one of them for nearly four months, while the judgment appealed against was not pronounced till the 10th of February 1875, fourteen months after the date of the summons, which was raised in December 1873.

In the circumstances, therefore, as disclosed in the evidence thus led, negativing as the proof does the allegation as to the separate residence of the parties, on which the action proceeded, I concur with your Lordships that this action was incompetent. The remedy in such a case was plainly that of an action of separation and aliment in this Court, and had one been raised in December 1873 it would, I have no doubt, have been disposed of one way or other, at least by the Lord Ordinary, of an earlier date than that fixed for the first diet of proof in the Sheriff-court.

THE COURT pronounced this interlocutor:—"Recall the interlocutors of the Sheriff-substitute and Sheriff complained of: Find that when the action was raised in the Sheriff-court the pursuer and defender were living together in the defender's house: Find that

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they continued so to live together during the dependence of the action down to the 17th of March 1874, when the pursuer left the defender's house, and has since lived separate from him: Find that, in these circumstances, the action for aliment was and is incompetent; dismiss the said action, and decern."

WILLIAM KELSO THWAITES, S.S.C.—J. & R. D. Ross, W.S.—Agents.

No. 123.

May 26, 1875. Glasgow Water Commissioners v. Inland Revenue.

GLASGOW CORPORATION WATER COMMISSIONERS, Appellants.—*D.-F. Clark—M'Laren.*

THE SOLICITOR OF INLAND REVENUE, Respondent.—*Sol.-Gen. Watson—Rutherfurd.*

Assessment—Income-Tax.—The Glasgow Water Commissioners were appointed under a local Act of Parliament, by which they were authorised to borrow money on annuities and mortgages, and to acquire the works of certain private water companies which had formerly supplied the city with water, and to bring in an additional supply of water. They were empowered to levy a compulsory rate within the municipal boundary, and also a rate on persons who chose to take the water outside the boundary, and to sell the water to manufacturers and others. The Act required the commissioners to levy a rate sufficient along with the other income to cover all annual expenses, including a sum of not less than one per cent on the money borrowed, to be accumulated as a sinking fund for redemption of the annuities and mortgages, and to be applied to no other purpose, any balance to be applied to reduce the rate of the following year. *Held* that the surplus after paying expenses was not assessable as profits under the Income-tax Acts.

1st DIVISION. B.

THIS case was presented by the commissioners acting under the Glasgow Corporation Water-Works Acts against a determination of the commissioners for general purposes under the Property and Income-tax Acts for the City of Glasgow, in an appeal from an assessment of income-tax. The following facts were set out in the case:—"The Glasgow Corporation Water Commissioners appealed against a supplementary assessment made upon them under schedule D of the Income-tax Acts for the year 1872-73,[1] in respect of the sum of £17,032, 15s., on the ground that the sum charged, which is the surplus of the water-rates, after payment of all other current expenses necessary for carrying on the undertaking, has been applied, as directed by Act of Parliament, viz., towards the formation of a sinking fund in redemption of the annuities and mortgages, and the remainder of the sum carried forward to the following year's account, to be applied, as the Act directs, in reducing the domestic water-rate, and not therefore assessable.

"The facts are these:—By the Act 18 and 19 Vict., cap. cxviii., the Lord Provost and Magistrates of the city of Glasgow were appointed commissioners to obtain a supply of water for the city of Glasgow and its suburbs, and as such commissioners were empowered to acquire, and have acquired, by purchase, the 'Glasgow Water-Works' and the 'Gorbals Gravitation Water-Works,' the two joint stock companies by which the city of Glasgow and its neighbourhood were previously supplied with water, together with power to introduce an additional supply of water from Loch Katrine.

"For these purposes they are authorised to borrow money by annuities, mortgage, and otherwise, and it is provided that the several sums so borrowed should be applied in defraying the expense of purchasing and acquiring lands and other property, and of executing the authorised works.

"They are required, by compulsory clauses in the Act, to furnish the city

[1] 5 and 6 Vict. cap. 35, sec. 60, No. III., rule 3d; 29 Vict. cap. 36.

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of Glasgow, *i.e.*, within the municipal boundaries, with a supply of water for domestic purposes, and to erect thirty-two public fountains, and the area within these boundaries is termed 'the limits of compulsory supply.'

"They are also required to introduce a supply to the suburbs within a prescribed area, embracing a very large population.

"They are also empowered to sell water for the purposes of trade, manufacture, &c., either by measure, or upon such special terms as may be agreed on between them and the consumer.

"They are also authorised to let meters on hire to those parties who consume by measure, and make a charge therefor of ten per cent per annum.

"Householders residing beyond the limits of compulsory supply are not required to take water, but having once done so, must continue to take it for three years, when they may cease doing so.

"To provide for the annual expense connected with carrying on these undertakings the water commissioners are required to meet once a year to make an estimate of the probable expense, and, having done so, are empowered to levy (1) A rate, to be called 'the domestic water-rate,' from the occupiers of all dwelling-houses within the municipal boundaries, being the 'limits of compulsory supply,' according to their rents; (2) The 'public water-rate,' not exceeding 1d. per pound on the full annual value of all dwelling-houses, shops, warehouses, buildings, &c., within the municipal boundary, and this rate is payable within these limits, whether the water supplied by the corporation be used or not; (3) Such rates as may be fixed by the commissioners from all parties residing beyond the limits of compulsory supply who use the water; but these rates are not to exceed the rates previously charged by the old companies.

"The sum to be thus raised, together with the sums received from traders and others supplied under special agreement, and for the use of meters, must be sufficient to cover all the annual expenses, including a sum of not less than one per cent on the money borrowed, to be set apart as a sinking fund for the redemption of the annuities and mortgages, and such sinking fund, it is declared, shall be from time to time applicable to the redemption of mortgages and annuities, and to no other purpose whatsoever; and the rates to be levied must be so regulated that such rates shall be sufficient to pay the interest on money borrowed, and the annuities payable under the Act, together with all other charges and expenses and such other sums as shall be set apart for the purpose of the sinking fund. And if in any year the amount received shall be more than sufficient for all these purposes the commissioners are required to make a reduction in the domestic water-rate of the next year.

"The appellants specially referred to sections 89, 90, 92, 109, 110, and 119 of the Act 18 and 19 Vict., cap. cxviii., 'Glasgow Corporation Water-Works Act, 1855,' and they desire that these be held as part of their case.

"It was argued on behalf of the appellants that the case of the Attorney-General v. Black,[1] founded on by the Inland Revenue, was not analogous, because—(1) The question in that case was whether the corporation of Brighton were liable to pay income-tax in respect of a coal-duty levied by them, and it was held that the corporation were liable to pay income-tax in respect of the coal-duty. (2) The grounds upon which that decision proceed do not exist here. In that case the duty was of the nature of a toll, and was levied from whatever persons landed coals, whether inhabitants of Brighton or strangers. It was thus not a 'district-rate'—a rate levied from the inhabitants or owners or occupiers of property within a defined area. While the Court held the coal-duty to be taxable, they

[1] 17th June 1871, Law Reports, 6 Exchequer, 308.

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intimated clear opinions that any revenue which was truly of the nature of a 'district-rate' would not be taxable. (3) The question thus comes to be, whether the monies dedicated to the creation of the sinking fund and the surpluses are profits from carrying on the business of introducing water, or whether they are a 'district-rate.' The appellants submit that whether regard be had to their origin or application they are a 'district-rate.' The sinking fund is created to provide for reduction or repayment *pro tanto* of the sums borrowed for the purposes of the Act. (4) The rate is in the strictest sense for the public benefit within the particular district. The money is not of the nature of 'property or profits,' for another reason, viz., that it does not belong to any one for his patrimonial benefit, and that no one is enriched by it. The case is not varied by the fact that the appellants took over the undertakings of private water companies. These companies were undoubtedly commercial undertakings, established and carried on for the purposes of profit and for no other purposes; and accordingly their rates were fixed at such an amount as to yield a profit to the shareholders.

"The appellants maintain that no valid argument against them arises from the fact that their statutes contain provisions for supplying water beyond the limits for compulsory supply. In a certain sense the supply of water even beyond these limits, but within the limits of the Act, is compulsory, inasmuch as section 86 of the Act of 1855 declares that the appellants shall cause pipes to be laid down and water to be brought to every part of the places and districts within the limits of the Act beyond the limits for compulsory supply whenever a sufficient requisition upon them to do so shall be made, and they are not entitled to make profit by such supply beyond, any more than within, the proper compulsory limit.

"The income, on which the city of London were held liable to be assessed in the case of the Attorney-General v. Scott,[1] was different from the rates levied by the appellants, and in that case the city were making large accumulations of money not appropriated by statute or otherwise.

"On behalf of the Inland Revenue it was replied;—(1) Whatever name may be applied to the water-rate it is certain that in its origin the water company was a commercial undertaking. It is so still, except that payment of rates under the old companies was not compulsory. The commissioners enter into contracts with traders and others to supply them with water on terms which may be mutually agreed on, and also let meters on hire, which are transactions of a purely commercial nature. The appellants are empowered to fix from time to time the rates to be levied without the limits of compulsory rating, but the rights of limitation of rates obtained by certain districts under the Acts of the companies existing in 1855 are still in force. So far, therefore, as the extra-municipal districts are concerned the Glasgow Water Commissioners are carrying on a commercial undertaking. A rate of this kind cannot legally be deemed a 'district-rate.' (6) The fact of the appellants being merely trustees, and personally deriving no gain or profit from their office, does not affect the question, Is there any surplus after deducting from the receipts all the ordinary expenses which are necessary for carrying on the undertaking?

"In the Attorney-General v. Scott, January 1874, the city of London were held liable for the tax on their income, just like an individual. In the case also of the Tyne Improvement Commissioners v. Overseers of Chirton,[2] and the Birkenhead Dock Trustees v. Overseers,[3] provision was

[1] January 1874, 28 Law Times, 302.
[2] 1 Ellis and Ellis, 516.
[3] 2 Ellis and Blackburn, 148.

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made by Act of Parliament for the application of the profits, in the formation of a sinking fund or otherwise, for the repayment of principal monies borrowed, and the Court did not regard that circumstance as affecting the question before it, but held that the profits constituted the income, which was the measure of the extent of the liability in respect of occupation for rating purposes.

"The commissioners, having considered the whole case, refused the appeal, and affirmed the assessment; but the appellants, being dissatisfied with that decision, craved a case for the opinion of the Judges."

At advising,—

LORD PRESIDENT.—This is a case stated for the opinion of the Court by the Commissioners of Property and Income-tax of the city of Glasgow. The Glasgow Corporation Water Commissioners were charged, under schedule D of the Income-Tax Act, with duty upon profits to the amount of £17,032, 15s., arising for the year 1872-3 upon their undertaking; and they maintain that that sum of £17,032, 15s. does not consist of profits arising upon their undertaking, and is not assessable to income-tax under schedule D. For the purpose of answering this case it is necessary to attend very particularly to the constitution of this water corporation commission, and to the clauses of the statute by which it was brought into existence. It is a local Act—18 and 19 Victoria, cap. cxviii.—an Act which was obtained by the citizens of Glasgow for the purpose of obtaining a liberal supply of good water for the city, as we all know, by the importation into the city of the water of Loch Katrine. The commissioners for executing the Act are the municipal corporation; but in so far as this question is concerned, and in so far as regards their powers as water commissioners, they are a separate corporation. The first step that was necessary in prosecution of the design of that statute was to buy up two old companies who had been in the habit of supplying the town with water, one on the north side and the other on the south side of the Clyde; and accordingly the new corporation not only bought up the whole works of these two companies, but they also bought up the stock of the companies, and paid for this acquisition in the form of annuities to the shareholders of the two companies. It became necessary also to provide money for the purpose of executing the necessary works for bringing in the water of Loch Katrine, and it seems to have been estimated that that would cost somewhere about £700,000; and accordingly a power is given to the commissioners to borrow money to that extent. The old companies were bought up, the annuities were granted, the money was borrowed, and the works have now been executed for several years, and are in active operation. The next question to attend to is what is the revenue of the commissioners under this statute. They are required by the Act of Parliament to meet once a-year, and make up an estimate of the probable expense for the year of the whole undertaking; and for the purpose of meeting that, they are empowered to levy a rate, which is called the domestic water-rate, from the occupiers of all dwelling-houses within the municipal boundary, which is otherwise called in the statute the limits of compulsory supply. That rate is laid on according to the rental of the dwelling-houses. Besides that, they are empowered also to impose a public water-rate not exceeding a penny in the pound on the full annual value of all premises whatever—not dwelling-houses only, but every kind of premises within the same limits; and as regards what are called the limits of compulsory supply, these rates are payable whether the inhabitants of the district within these limits

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choose to use the water or no. In addition to that, the water commissioners are entitled also to deal with the inhabitants of a certain district beyond the limits of compulsory supply, and to give them water if they choose to have it; and if they choose to have it, they are also empowered to lay on a rate upon these parties; and the rates thus raised, whether within the limits of compulsory supply or beyond them, are to be applied, in the first place, for the payment of the current annual expenses of keeping up the undertaking and conducting the supply of water to the city—in short, all ordinary current expenses. They are also applicable, of course, to the payment of interest upon the money borrowed on mortgage, and to the payment of the annuities which have been granted to the shareholders of the old water companies. There is a further provision, that after the lapse of ten years there shall be a sum, at the rate of £1 per cent upon the total amount of the money borrowed upon mortgage, paid over into a sinking fund for the redemption of that debt, and after the lapse of twenty years a sum of 30s. per cent is to be paid over into the sinking fund for the same purpose. If, after providing for all these purposes, there is any surplus of the income for any year, the water commissioners are required to apply it in making a reduction on the amount of the water rate for the next year, and therefore any surplus which they may have after providing for these purposes must be carried into the next year's account, so to be applied.

Now, the sum of £17,032, 15s., upon which the charge is made under schedule D of the Income-tax Act, comprehends the whole portion of the revenue of the water commissioners which is applied towards the formation of the sinking fund in redemption of the annuities and mortgages in the manner that I have already mentioned, and also the balance, if any, which is carried forward to the following year's account, to be applied as the Act directs in reducing the domestic water-rate; and the question is, whether income arising from this assessment, which is appropriated to such purposes, is assessable for income-tax under schedule D as profits of this undertaking. I am humbly of opinion that it is not. It seems to me that this is an Act of Parliament by which the citizens of Glasgow have undertaken, through this water corporation as their representatives, to assess themselves for a very important public purpose—a purpose very conducive to their own comfort and wellbeing—to obtain a good supply of water for the city. In so assessing themselves they had not in view certainly to make profit by the undertaking. On the contrary, what they have distinctly in view is to pay money in order to obtain this particular benefit. They are not therefore trading in any commodity, nor are they entering into any undertaking for the use of property that is to be attended by a resulting profit, or a beneficial interest accruing to any individuals, or to any corporation. The object of the assessment is to pay for bringing in the water, and when that is done the assessment and the authority to levy it come to an end. If in the progress of the operation of this Act the city of Glasgow is in so happy a condition that they can afford to reduce their assessments to a mere fraction of a penny, that must be done under the operation of the statute. If that fraction of a penny is sufficient to pay the current expenses of maintaining this water commission, and the works under their charge, and I suppose if by some wonderful scheme of good management they should so contrive that they would be able to get water for nothing by-and-by, then the right to levy assessment would come to an end altogether. But one thing at least is perfectly certain, that it is made matter of absolute statutory regulation that the expense of

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supplying this water, including all the various items that I have already mentioned, and the revenue, are to be kept actually commensurate and equivalent, as near as possibly can be; and that being practically impossible in every year, the way in which the same object is achieved is by carrying over any surplus of one year into the next year, and employing it in reducing the assessments, and so in reducing the revenue for the next year. Now, it seems to me that it is not within the contemplation of schedule D of the Income-tax Act to charge any portion of a local rate raised for such a purpose as profit, or as anything else falling within that schedule D. The case is entirely different from those that have been cited which have been decided in the Court of Exchequer in England, because in those cases the statute which gave the right to levy the assessment did not impose it upon the citizens of the particular burgh or locality which obtained the Act. It was not an authority to the citizens of a particular locality to assess themselves. On the contrary, it was a right and privilege given to a particular corporation to assess everybody—the whole public who happened to import, in the one case, coals into the burgh, and, in the other case, to import something else—I forget what it was. But there, it must be observed, the corporation of the particular burgh, or the commissioners—for it does not matter in the least degree which they were—were making a profit out of a tax levied upon the lieges generally, and were applying the proceeds of that tax for the benefit of the community which they represented; and therefore they were held, most justly I think, to be making profit, no doubt not for individual benefit, but for corporate benefit, and for the benefit of the community, represented by the administrative body that levied the tax.

I have only further to say, that if any attempt had been made here to discriminate between that portion of the revenue which arises from the rates levied within the limits of compulsory supply and that portion of the revenue which is raised in the districts beyond the limits of compulsory supply I should have been very glad to attend to any grounds which might have been urged for such a distinction. It was said no doubt in argument, but rather by way of illustration of the general claim than anything else, that this corporation does in a certain sense trade in water, and sell it to those people who are outside the limits of compulsory supply—that it is matter of traffic with them; and what they may derive from them in the shape of rates may perhaps be fairly represented as coming within the denomination of profit—of revenue derived from the use of a certain subject of which they are the administrators. But it appears to me that that question does not arise here. We have not before us the means of seeing what the result of the transactions between the water commissioners and the persons beyond the limits of compulsory supply are or have been. We do not know that any surplus has arisen from these transactions. Most certainly we know that the only sum which is here charged with income-tax does not represent anything in the nature of profits derived from that special source, but, on the contrary, represents the whole part of the revenue of the water commission which is devoted by Parliament towards the formation of a sinking fund, and which has been directed, *quoad ultra*, to be carried forward to the next year's account. I therefore give no opinion upon any question which may arise perhaps hereafter as to the portion of the revenue of this water commission which may be derived from those parties who lie outside the limits of compulsory supply. But as the case stands, I am against the deliverance of the commissioners, and I think it must be quashed, and the assessment disallowed.

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LORD DEAS.—If there are any profits made here, I think it quite clear they must be profits made by the ratepayers, because there are not two parties—the corporation on the one hand and the ratepayers on the other. The corporation is the mere trustee, hand, and instrument of the ratepayers. There is no room, therefore, for saying that the corporation can make profit. That is impossible. The whole question is, are the ratepayers making profit? Now, as your Lordship has pointed out, if we confine our attention, as it is right to do, in the first instance at least, to the bounds of compulsory supply, I do not see how it is possible to say that the ratepayers are making any profit. They are paying for the water, and the water being paid for, even if it becomes free, there is no profit made. If that be so, the only question that could well have been raised would have been that which your Lordship has latterly alluded to, viz., whether the ratepayers were making profit by selling water to parties beyond the compulsory bounds. Now, there is no evidence that they are making profit of that kind. If they be, it is certain that this £17,000 odds does not represent that profit. That profit may be comprehended in the £17,000 for anything I can tell, but that sum certainly does not represent the profit. I entirely concur with your Lordship that questions which may be raised about assessing the profit made from parties beyond the bounds of the compulsory supply are not before us, and I am not prepared to give any opinion as to how far such profit, if there be any, may be liable for assessment. The assessment, at all events, could not be upon the £17,000, but upon something very much smaller than that. I need hardly say that in coming to this result I do not indicate any opinion against what was done in the poor-law cases quoted, and more particularly in the case of Adamson v. The Clyde Navigation Trustees (22 D. 606).[1] I prepared the joint opinion in that case, which was substantially adopted by all the Judges with one exception, and affirmed in the House of Lords (4 Macq. 931), and it would be very strange if I were to say anything contrary to what is laid down in that opinion, and I certainly am not doing so. But the difference between that case and this is sufficiently clear from the explanation which your Lordship has given of the facts of this case. I entirely concur in the views stated by your Lordship, and have nothing further to add.

LORD ARDMILLAN.—I have very little to add to what your Lordships have said, for I entirely concur. I have only two observations to make. Where the area of taxation and the area of distribution exactly correspond—where a rate is raised for a public purpose, and the whole of what is collected is applied to that public purpose—I take it that that is what is meant by the English Judges when they speak of a district rating or assessment; and in that case there could be no income which could be chargeable with income-tax. Further, where there is an excess of revenue over the necessary expenditure for distribution, if a company voluntarily use that excess of revenue to pay off their debt by the formation of a sinking fund, a question might very well be raised whether, that being their voluntary use of funds which would have been profit if not so applied, they might not still be liable for income-tax. But that is not the case here. The statute, and not the will of the company, applies the whole excess to the creation of the sinking fund, and the statutory result of the application of that money is the ultimate diminution, and, it may be, the ultimate extinction

[1] 32 Scot. Jur. 203.

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of the assessment; for if ever it came to this, that the water could be got for nothing, there would be no assessment. The statute, therefore, not only authorises but directs the appropriation of the money, and that being the case I do not think that this sum applied under the powers of the statute and by direction of the statute to the purposes of the statute, can be considered as income. A separate question might arise, but it is not now before us, in regard to the sum raised from the non-compulsory district, as it is called—*i.e.*, the district beyond the compulsory area, it being said to be used to some extent for the benefit of those in the compulsory district. A curious question may perhaps be raised as to whether the fund raised beyond the line and used for the benefit of those within the line does not to some extent partake of the nature of income as profit. All I say now is, that that question is not raised here, and we are not at present called on to deal with it. I have formed no opinion, and I reserve my opinion, upon it. I think it is a nice point, but it is not now before us.

LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Reverse the determination of the commissioners, and disallow the assessment: Find the appellants entitled to expenses, and remit to the Auditor to tax the account thereof, and report."

CAMPBELL & SMITH, S.S.C.—DAVID CROLE, Solicitor of Inland Revenue.—Agents.

THE DUKE OF ROXBURGHE AND OTHERS, Appellants.—*D.-F. Clark.*

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May 26, 1875.
Duke of Roxburghe.

1ST DIVISION.
Sheriff of Roxburghshire.

M.

Process — Appeal, competency of — Competition.—In a petition for division of the area of the parish church of Jedburgh among the heritors the Sheriff pronounced an interlocutor finding that the heritors in that part of the parish which had been disjoined and erected into the *quoad sacra* parish of Edgerston were not heritors of the original parish so far as regarded the division. The interlocutor did not finally dispose of the petition as regarded the remaining heritors, and there was no finding as to expenses. The heritors of Edgerston appealed. When the case was called in the Single Bills no objection was taken to the competency of the appeal, but the Court considered the question, and held that the appeal was competent, in respect that the process was a process of competition, and that the interlocutor disposed of the whole subject-matter of the competition so far as the appellants were concerned.

MACKENZIE, INNES, & LOGAN, W.S.—Agents.

JAMES MORISON, Pursuer.—*Mackintosh—Robertson.*
GLENSHIEL SCHOOL BOARD, Defenders.—*D.-F. Clark—Keir.*

No. 125.

May 28, 1875.
Morison v. Glenshiel School Board.

School—Schoolmaster—Retiring Allowance—Education (Scotland) Act, 1872 (35 *and* 36 *Vict. cap.* 62), *secs.* 60 *and* 55—*Parochial and Burgh Schoolmasters (Scotland) Act*, 1861 (24 *and* 25 *Vict. cap.* 107), *sec.* 19.—In an action brought by a parish schoolmaster, appointed prior to the Education Act, 1872, against the school board of the parish, by whom he had been dismissed, for declarator that he was entitled to a retiring allowance, *held* that his claim was excluded by the resolution of the board dismissing him on the ground of fault, and that the judgment of the board finding fault proved was not subject to review in a Court of law.

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2D DIVISION. Lord Young. I.

THE school board of Glenshiel being dissatisfied with James Morison, who had been schoolmaster of the parish since 1860, applied for a report from the inspector of schools for the district as to the state of the school. On 10th April 1874 the inspector sent his report.* A copy of the report was sent to Morison. The board on 15th June passed this resolution,—"The school board having considered the said report, and finding that Mr Morison has failed to make any communication to this meeting, of which he had notice, and a copy of the special report having been sent to him, they have no hesitation in coming to the conclusion, on the strength of this report, and from the knowledge of the majority of the members of the school board of the circumstances of the case, that the teacher is unfit by his conduct, and inefficient from his own fault, and that, in justice to the inhabitants of the parish, he should be removed from the office of teacher. They therefore resolved, subject to the confirmation of the Education Board, to dismiss, as they hereby do dismiss, the said Mr James Morison from the office of teacher of the Glenshiel public school aforesaid, together with all the privileges and emoluments attaching thereto; and they respectfully trust that the Education Board will grant the necessary confirmation of this judgment and resolution."

The Board of Education confirmed this judgment on 24th July. Morison thereupon raised this action against the school board, concluding for declarator that he was entitled to a retiring allowance equal in amount to his whole salary at the date of his removal, or at least for two-thirds of it.

He averred;—"The defenders being, as the pursuer believes and avers, unduly influenced by the said Rev. Alexander Matheson and others, lately took proceedings under the 60th section of the 'Education (Scotland) Act, 1872,' for the removal of the pursuer from office, as incompetent, unfit, or inefficient. . . . The inspector did not visit the school before framing the report which is founded on by the defenders. He visited the school in March 1874 in order to report on the state of the school to the Lords of the Treasury, but he did not again visit and inspect the school before furnishing his report to the defenders. The defenders, nevertheless, at a meeting held on 15th June 1874 passed the following resolution. . . . . The pursuer does not admit that he is incompetent, unfit, or inefficient; on the contrary, he avers that he is at least as competent, fit, or efficient, as he was when appointed in 1860. In any view, however, he denies, and it is not the fact, that there has been any incompetency, unfitness, or inefficiency on his part, which is, or has been, due to his fault. The defenders are called on to specify in what particulars the pursuer has been guilty of fault in the discharge of his duties."

He also cited the 60th section of the Education Act, 1872, and the 19th section of the Parochial and Burgh Schoolmasters Act, 1861.†

* The report bore,—"I found 18 pupils present under one master. The state of instruction was extremely unsatisfactory. Sixteen pupils were presented in the standards, of whom ten only passed in reading, three in writing, and but one in arithmetic. Those that passed in reading had but a very imperfect knowledge of the meaning of what they read. Geography was the only extra subject professed, and in geography I could scarcely get a simple correct answer to any out of several very elementary questions. It is rare to meet a school whose general condition is so low, with nothing of a redeeming feature, as in the case of Glenshiel public school. I therefore express my opinion, with no hesitation, that the present teacher is inefficient."

† 35 and 36 Vict. cap. 69, sec. 60.—"Any teacher of a public school appointed prior to this Act may be removed from his office in manner following,—

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The school board in their defences, stated that the bad condition of the school had "been caused by the fault of the pursuer, and, in particular, by his neglect and want of attention in the discharge of his duties, and by his intemperate habits." They also added,—"The pursuer's misconduct has continued throughout, and since the defenders were intrusted with the administration of the school they, from their own knowledge and observation, became well aware of his inefficiency, and of acts of misconduct on his part."

Pleaded for the pursuer;—The pursuer's removal not having been occasioned by any fault on his part, he is entitled to a retiring allowance in terms of the statute.

Pleaded for the defenders;—(1) The action is not supported by relevant averments, and ought to be dismissed, with expenses. (2) The defenders ought to be assoilzied from the whole conclusions of the summons, in respect that the pursuer having been removed for inefficiency caused by his fault, he is not entitled to any retiring allowance.

On 6th February 1875 the Lord Ordinary assoilzied the defenders.*

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that is to say . . . (2) If the school board of any parish or burgh shall consider that any such teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school and the teacher from Her Majesty's inspector charged with the duty of inspecting such school; and on receiving such report the school board may, if they see cause, remove such teacher from office, provided that before proceeding to give judgment on the matter they shall furnish to the teacher a copy of such report, and that a judgment removing the teacher shall not have effect until confirmed by the Board of Education: Provided also, that in the case of teachers of parish schools appointed previously to the passing of this Act who may be so removed, school boards shall have the same powers of granting retiring allowances, and the teachers shall have the same rights to retiring allowances, as were vested in heritors and ministers and in parish schoolmasters respectively, by secs. 19 and 20 of the Parochial and Burgh Schoolmasters (Scotland) Act, 1861, in the case of parish schoolmasters permitted or required to resign, or dismissed or removed from office, as therein provided."

24 and 25 Vict. cap. 107, sec. 19.—"In case it shall be found, on a report by one of Her Majesty's inspectors of schools, made on the application of the heritors of the parish, and concurred in by the presbytery of the bounds, that the schoolmaster of any parish is disqualified, because of infirmity or old age, for the due performance of the duties of his office, or that from negligence or inattention he has failed efficiently to discharge such duties, it shall be lawful to the heritors and minister, at any meeting called and held as aforesaid, to permit or require such schoolmaster to resign his said office, and in case of his refusal to do so, to dismiss or suspend such schoolmaster, and, when necessary, to declare the school vacant; and in every case of such resignation the heritors and minister may grant to such schoolmaster a retiring allowance, payable during the remainder of his life; provided that, where such resignation shall not be occasioned by any fault on the part of the schoolmaster, the heritors shall grant a retiring allowance, the amount whereof shall not be less than two-third parts of the amount of the salary pertaining to said office at the date of said resignation thereof, and shall not exceed the gross amount of such salary, which retiring allowance shall be payable in all respects in like manner with the salary of the schoolmaster."

* "OPINION.—This is an action by a schoolmaster, removed under clause 60 (sub-section 2) of the Education Act, 1872, for unfitness and inefficiency, to recover the retiring allowance to which he alleges right under the provisions of that clause. The action proceeds on the same construction of the clause which I rejected in a similar action at the instance of the schoolmaster against the school board of Logiealmond. The parties here were not content to abide by the final decision in that case, and I was not unwilling to hear a full argument

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The pursuer reclaimed, and argued;—The Education Act, 1872, did not contemplate that school boards should be the judges between their own

from the able counsel who represented them, and to reconsider the opinion which I had previously formed on a question of novelty and interest. In deciding the Logiealmond case I assumed that the management of the school (in the ordinary sense of the term 'management') was by Act committed to the school board, with the power and duty of seeing to its continuing efficiency as an educational establishment, and of removing the teacher if, in their judgment, the school should at any time fall into a state of inefficiency by reason of his unfitness. It was not suggested in argument, nor did it occur to myself as a reasonable or even possible view of the Act, that the school board were only managers to the effect of seeing that the material and mechanical appliances of education were provided with due economy to the ratepayers, and had so little concern with education itself that they were not at liberty, without the teacher's leave, to visit the school for the purpose of satisfying themselves that it was efficiently conducted, but only to see that the building in which the children were taught was sufficiently commodious, and kept in decent repair. In the view that the members of the school board were chosen by the constituency, not from any confidence in their ability to manage the schools as educational establishments, and to take care that they should be efficiently taught and conducted, but only as likely persons to see to the condition and repair of the school buildings and furniture, I should have had some difficulty in dealing with the case of the removal of a teacher by such a board, because they considered him 'incompetent, unfit, or inefficient.' The language of section 60 might have been found too strong to admit of the removal with all its consequences being resisted, but it would have been impossible not to feel that the Legislature had unfortunately and quite inexplicably committed an important and delicate duty to a body which, as being chosen for a very different kind of duty, were presumably unfit to discharge it, and were even denied the most obvious and apparently essential means of enabling themselves to perform it with such intelligence as they might accidentally possess. In such a case a Court of law would at least regard the proceedings with considerable distrust, and, attaching no importance or weight to the opinion of so incompetent a body, would be disposed to strain the construction of the statute in order to compensate the dismissed teacher with a pension.

"As a right view of the powers, duties, and responsibilities of school boards is material to every question that can arise out of the relation between them and their teachers, I deem it my duty to take this opportunity of stating my opinion on the subject, as one of general interest and concern, and bearing, not remotely, on the case before me.

"The leading principle and feature of the Act of 1872 is, that the direction and management of the public schools supported by local rates and Government grant is thereby committed to the people themselves, to be exercised by means of school boards elected, as the Act directs, in the several districts into which, for the purposes of education, the country is divided. I venture to lay it down as a true proposition that the whole management of every public school existing, or which may exist, under the Act, is committed to the school board of the district in which it is situated. The management is certainly not divided, and, therefore, if it were true, which I think it is not, that anything which school management involves is withheld from the school boards, it is certain that to this extent the schools are left without management altogether, for no power of management is given to any other bodies or persons. With respect to the parish and burgh schools, which constitute a considerable though ever-decreasing proportion of the public schools under the Act, the whole powers and duties of their former managers, viz., the heritors, ministers, and town-councils, are transferred to the boards, while all power of interference by church courts is taken away. The power and duty not only of providing suitable buildings and furniture, but of appointing and removing teachers, is expressly conferred and imposed on the boards. It has been suggested that there is significance in the

pockets and their obligations to their servant—the teacher. If that had been intended, there would have been some express judicial machinery circumstance that the visiting powers of presbyteries are not transferred to the boards. But as these (whatever they were) are not transferred at all, but simply abolished, the only significance is that any connection between the Established Church and the schools is severed, which cannot, I should think, signify that the schools are not to be visited by their managers.

"The whole powers and duties respecting the material appliances, and the personal staff of every school established under the Act in any district, being thus conferred and imposed on the school board of that district, it was perhaps superfluous to provide, as section 36 does in express terms, that 'the school board of every parish and burgh shall maintain and keep efficient every school under their management,' for this would probably have been implied. One purpose of the provision was to guard against the possibility of a school board, which had, under section 28, been compelled to establish a school which they thought unnecessary, thereafter, when an opportunity occurred, practically discontinuing it, by simply omitting to do what was necessary to maintain it in a state of efficiency, as by omitting to appoint a teacher when a vacancy occurred, or continuing an inefficient teacher who drew no scholars, which would, of course, be as efficacious for the discontinuance of the school, contrary to the opinion of the Board of Education, as allowing the school buildings to go into disrepair. If it was necessary to make express provision against the practical discontinuance by the school boards of any schools instituted or taken over under the Act, this is the only clause which does so, and it will probably be generally thought that the provision was a prudent one. I am aware that it has been suggested that the clause relates only to the school buildings and furniture, and that a school board will well perform its duty to 'maintain and keep efficient any school,' by keeping the school-house with its furniture in good repair, although it is not resorted to by a single child, whether because there is no teacher at all, or because the teacher is so 'incompetent, unfit, or inefficient' that no prudent parent will, and no parent ought to be required to, intrust a child to his tuition. With reference to this suggestion, I will only observe that it is not in accordance with my notion of maintaining and keeping a school in a state of efficiency by a board which is intrusted with the power, and charged with the duty of appointing efficient teachers, and removing such as they shall 'consider' to be inefficient. I should certainly be greatly surprised if, on a complaint by the Lord Advocate, under section 36 of the Act, this Court should acquit a school board which had really discontinued a school by neglecting to provide and maintain a proper educational establishment therein, because the school-house, although disused and empty, was commodious and in decent repair. It is, indeed, abundantly clear that the words 'maintain and keep efficient' in the first branch of the clause are opposed to the word 'discontinue' in the second; and that as allowing the school buildings to go to ruin is not the only way of discontinuing a school, so keeping these in repair is not the only thing requisite in order to maintain the school in a state of efficiency.

"But if school boards be responsible, as I think they clearly are, for maintaining and keeping the schools 'under their management' in a state of efficiency, it is obviously necessary that they shall have the power not only of appointing, but also of removing, the teachers, and so the provisions of the Act which confer this power appear to be in harmony with the principle of the measure. It is clear that they have the choice of the teachers, for whose fitness and competency they are responsible, and, being equally responsible for the conduct and continuing efficiency of every teacher whom they employ, they have also the power of removal. Nor need the power surprise any one, for not only had Parliament conferred the same power on the school boards of England only two years before, but it is a power which, so far as I know, is possessed and exercised by every body of school managers in the civilised world. It is true that, by a rule of which I believe there is no example elsewhere in any case at all similar, the parish schoolmasters of Scotland held their places for life. That this was an

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provided to investigate questions, such as this, of fault. There was no such machinery, so there was no jurisdiction. The powers of school inconvenient and inexpedient rule appeared (so, at least, Parliament thought) not only from the experience we had of its operation, but from the conduct of mankind, proceeding on experience, in every department of life and business. Parliament accordingly determined that there was no reason why the school boards of Scotland should employ their teachers upon any other footing than those of England, or why such contracts as all school managers, including those of the great foundation schools of the country, and, indeed, the managers of all undertakings whatever, found the most expedient with their employés, should not also be esteemed the most expedient for the Scotch school boards and their teachers. They are, accordingly, required by the Act to contract with teachers exactly as all others who require the services of teachers contract with them. In the public interest there is a certain qualification prescribed, to be testified by certificate. This is analogous to the qualification prescribed by law for ship masters, medical practitioners, and many others who seek employment in their several callings.

"But it is according to the practice of Parliament to make reasonable provision for the protection of existing interests, and accordingly clause 60 was introduced into the Act. The object of it, as is plain, I think, from the language, was to modify with respect to teachers appointed before the Act, to such extent as was deemed necessary for their reasonable protection, the power of removal which in all other cases was conferred absolutely on the school boards. It would have been against the public interest and contrary to the policy of the Act to exempt them from the control of the boards who were made responsible for their efficiency. But, on the other hand, it was considered proper, in deference to the principle of reasonable protection to existing interests, that the action of the boards, with a view to their removal for inefficiency, should be subjected to certain specified checks. Accordingly, while the school board of every parish or burgh is empowered officially to 'consider' whether 'any such teacher is incompetent, unfit, or inefficient,' a board which considers that he is so must, before proceeding to remove him, require a special report 'regarding the school and the teacher' from H. M. inspector, and furnish the teacher with a copy of it. This is the first check. The second and only other is, 'that a judgment removing the teacher shall not have effect until confirmed by the Board of Education.' It is, I think, not amiss that I should mention, with reference to some views which have been expressed regarding the functions of inspectors, that it was not without hesitation and difficulty that the department of the Government charged with the administration of the Parliamentary grant, whose servants Her Majesty's inspectors are, consented to allow this duty to be put on these officers, it being contrary to the rule and practice of the department to interfere, or permit their inspectors to interfere with the management of any school, or to interpose in any way between the managers of a school and their teachers. But the case was considered to be exceptional and temporary, and so the clause was allowed to pass as matter of public convenience.

"But, attaching all due importance to the checks, it must nevertheless be acknowledged that the duty imposed on the school board is of a very onerous kind, and that respect is justly due to their judgment. They are responsible for the efficiency of the school, although taught by a teacher appointed before the Act, and may be made answerable (upon a complaint to this Court) if they allow it to fall into a state of inefficiency, although its inefficient condition is attributable to the unfitness or incompetency of the teacher. Their opinion, or, as the Act expresses it, what they, as managers of the school, 'consider' regarding the efficiency of the teacher, is the primary condition of any action under the Act. If their judgment be favourable to the teacher, there is no power elsewhere to remove him, although they may no doubt be compelled to take action by proceedings against themselves, under section 36 of the Act. They are thus put to form their judgment under the responsibility of a grave duty, for the due discharge of which they are answerable, not only to their constituents, but to

boards as to removal for old age or infirmity were administrative, and in these cases a retiring allowance was compulsory. In a question of refus-

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the law. With the opinion which I have expressed, I cannot hold that they are unfit for the duty which Parliament has put on them, or that they are without the means of acquiring the knowledge necessary to enable them to perform it intelligently. I cannot hold that the teacher is entitled to set them at defiance, and to exclude them from the school, unless they come to see to the repair of the building or the condition of the desks and forms. I must hold, on the contrary, that the managers of a school, responsible for its efficiency (as all managers presumably are, and as these managers expressly are), are entitled to visit it, and that, acting on the ordinary prompting of the human understanding, they will do so before condemning the teacher as 'incompetent, unfit, or inefficient.' I have already pointed out that the school board must themselves judge in the first instance, although their first judgment (if condemnatory of the teacher) is provisional, and need take no more formal shape than a requisition for a special report by one of H.M. inspectors. It is not, however, too much to say that reasonable men will not form such a judgment and act upon it, even to the extent of calling for a special report from the inspector (in itself a serious and significant step), without grave deliberation on the subject, after taking all due means of informing themselves regarding the school and the teacher.

"When, therefore, the school board in this case required a special report from the inspector, I must assume that they had previously, after due deliberation, and in the intelligent and honest discharge of their statutory duty, come to the conclusion that the pursuer was 'incompetent, unfit, or inefficient.' These expressions are almost undistinguishable in meaning, and really only aid each other exegetically. On resuming consideration of the case with the inspector's report, they had 'no hesitation in coming to the conclusion, on the strength of this report, and from the knowledge of the majority of the members of the school board of the circumstances of the case, that the teacher is unfit by his conduct, and inefficient from his own fault, and that in justice to the inhabitants of the parish he should be removed from the office of teacher,' and they pronounced judgment removing him accordingly. Nothing remained but the application of the second statutory check, and it was applied, with the result that the judgment was confirmed by the Board of Education.

"In condescendence 3 the pursuer declines to admit the regularity of the proceedings; but the only criticism which he makes seems to me to be unfounded, and no conclusion or plea is put upon alleged irregularity. The action assumes regular and effectual dismissal under the Act, and concludes for a retiring allowance on the ground alleged in condescendence 4, that the pursuer 'denies, and it is not the fact, that there has been any incompetency, unfitness, or inefficiency on his part which is or has been due to his fault.' The pursuer makes no other averment, but calls on the defenders 'to specify in what particulars the pursuer has been guilty of fault in the discharge of his duties'—a call which the defenders, disputing the pursuer's right to make it, answer by alleging intemperate habits, neglect, and frequent absences from his duties.

"The question thus raised for decision seems to be whether a teacher who has been removed under clause 60 (sub-section 2) of the Act has a good action for a retiring allowance, on a general denial that the unfitness, &c., for which he was removed was due to his fault; and I am of opinion that he has not.

"It is obvious that the trial of such an issue would be most perplexing, although, were such trial necessary to vindicate a right clearly conferred by statute, the difficulty would no doubt have to be encountered. The general rule is that the proof of fault is on the party alleging it, and perhaps the pursuer's case may be put most strongly on the call which he makes on the defenders for a specification of the fault they allege and undertake to prove, for the purpose of resisting his claim. But it would, in my opinion, be contrary to the meaning and intention of the Act to require the defenders to establish by evidence in this Court the grounds on which they proceeded in the discharge of their statutory duty. The managers of a school, if they are to do their duty fearlessly, must

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ing a retiring allowance, however, questions arose affecting civil rights, and the civil courts must decide in such matters. It was possible to conoften proceed on their observation of results during a considerable period, and their judgment of the teacher's responsibility for them. Their conclusion of fault on his part may be just, and such as they are bound in duty to act upon, without the possibility on their part of establishing it by evidence in a court of law. They are themselves the best judges, and have the best opportunities of judging. It is to them, accordingly, that the statute commits the duty of judging, so far at least as regards removal; and they are assuredly not tied to proceed only on such evidence as a court of law requires. Then, does the Act provide that they must pay a retiring allowance unless they prove fault in a court of law? I think it does not.

"The Act of 1872 (clause 60, sub-section 2) gives no larger power to school boards to grant, and no larger rights to teachers to demand, pensions than were conferred on heritors and schoolmasters respectively by the Act of 1861 (section 19). This is clear, for the later Act refers to the prior for the measure of the powers and rights which it gives. The prior Act authorised the heritors to remove and give pensions to teachers who were 'disqualified because of infirmity or old age for the due performance of the duties' of their office, but it authorised removal with a pension in no other case whatever. Removal without pension was authorised in the case of a teacher who 'from negligence or inattention has failed efficiently to discharge such duties.' The defenders say that the pursuer 'is unfit by his conduct and inefficient from his own fault,' and this is on the face of their judgment which the Board of Education confirmed. The pursuer denies 'fault;' but as he does not allege 'infirmity or old age,' I fail to see how he can have right to a pension. Had he been removed under the Act of 1861, it must have been for 'negligence or inattention,' for he is not old or infirm, and it seems clear that the heritors could not have granted him a pension. But if this be so, the school board which removed him under the Act of 1872 have no power to grant him a pension, for the power of the heritors under the one Act is the measure of the board's power under the other.

"In refusing to allow the pursuer a proof of his negative averment of no fault, or to require the defenders to prove the faults which, in answer to his call, they have averred in general terms, I proceed on what I conceive to be the law applicable to all cases of removal under this clause of the Act, and it concerns the community that the law should be settled. I think it would be contrary to the intention of the Act, and detrimental to the public interest, to put a school board which has dismissed a teacher in the same position as a defender in an action for slander, by requiring them to condescend upon and prove the *veritas* of the grounds on which they proceeded. The members of the board may be morally certain that the teacher is inefficient, intemperate, negligent, and frequently absent from duty, leading to the utter destruction of the school, without being able to establish much of it (except, perhaps, the condition of the school) on a trial in a court of law. It is not for the interest of the community that they should be deterred from dismissing the teacher, if they, the inspector and Board of Education, all concur in thinking that the interests of education require it, by the apprehension of a litigation with a dismissed teacher, in which they may be required to satisfy this Court also of the propriety of that step. The question may only regard a pension, but a pension means a higher school rate in the parish, and I am not disposed to countenance the notion that there must either be proof of delinquency in a court of law, or a pension and increased rate. This was not, I think, the intention of the Act, and so to construe it would be calculated to deter school boards from the due discharge of their duty. No public department, no business or domestic establishment, could be efficiently conducted on the condition that those in charge and having the responsibility should not dismiss an employé unless prepared to set forth and establish his misconduct at law. Even in private establishments good men require no such protection against the caprice of employers, and school boards are public bodies which ought to be regarded, and I trust ever will be regarded by this Court,

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ceive the case of a man naturally inattentive from incapacity without fault, and surely a board could not remove him without compensation.[1]

with a confidence in their integrity and discretion corresponding to that which Parliament has manifested by the large and important duties committed to them. Teachers who are disabled by infirmity or old age are proper objects of compassion, and the Legislature has made fair provision for them accordingly. But to allow a young and vigorous man who (after applying all the statutory checks in his favour) has been properly dismissed for unfitness and inefficiency, to call the school board into Court and insist that they shall there either make and prove charges of misconduct against him, or submit to judgment for a pension, is what I for one do not find consistent with the provisions of the statute, or the interests of the public.

"It was conceded that the Court has no power to review the judgment of removal on its merits, or at all, the regularity not being questioned, and I think the Court owes it the respect due to any final judgment or determination by the proper statutory authority. Nor do I think that it is to be regarded by the Court only in the abstract as a judgment under section 60 of the Act, without looking to the import and plain substance of it as a judgment in the particular case. So looked at it is a judgment of removal for unfitness by misconduct and inefficiency from fault. The pursuer says that it is erroneous in fact, and he reflects on the motives of his judges, or some of them, and thus (but only thus) represents his removal as without fault on his part. I think this is not relevant, for the judgment of removal is final, and not examinable on its merits in this Court.

"If a teacher who is not disqualified by age or infirmity may be well removed under section 60, without fault on his part, it must be for a cause which is not only satisfactory to the school board but approved by the Board of Education as good reason for the removal, which they confirm. I am unable to conjecture (within the bounds of reason and likelihood) such a cause, and the possibility of its occurrence may, I think, be prudently left for determination till an actual removal shall occur for a cause having such an aspect. I do not admit that a school board may (as has been supposed by way of illustration) direct new subjects to be taught in an old parish school which the schoolmaster is excusably unable to teach, or task him in any way beyond his reasonable powers, and then remove him for unfitness. Such a removal, on the report of the inspector, and confirmed by the Board of Education, is, I think, beyond the region of reasonable supposition, and a speculative consideration of it is at least foreign to the case which the pursuer presents; for he, being on the face of the judgment removed for unfitness and inefficiency, which the school board and Board of Education concur in attributing to his misconduct and fault, does not allege a cause of removal which involved no fault on his part, but only that the cause assigned by the proper authority was not true in fact, and that he was thus unjustly removed without any cause at all. It was not maintained that a judgment of removal for unfitness and inefficiency from misconduct and fault ought to specify the facts in which the misconduct and fault consist, or that it would be less assailable in such an action as the present if it did. I think the generality of expression is preferable, and do not suppose for a moment that the school board and Board of Education adopted the general terms without particular grounds established to their satisfaction in the individual case. Looking to the judgment on the one hand, and to the case stated by the pursuer on this record on the other, it seems to me impossible to represent the latter as consistent with the former, or otherwise than as a direct contradiction of it. I am myself of opinion that the Act of 1872 sanctioned a retiring allowance only in the case of infirm or aged teachers, to which case it was admittedly confined by the Act of 1861, which is referred to as the measure of the power and right which the

[1] Robb v. Logiealmond School Board, Feb 5, 1875, and May 21, 1875, *supra*, pp. 417 and 699.

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Prior to the passing of the Act of 1861 the dismissal of a teacher had to be justified before a civil court, and no alteration had been made in the law where civil rights were involved.

Argued for the defenders;—It was the duty of school boards, under the Act of 1872, to see to the efficiency of the schools, and so they were bound to remove an inefficient master. There was nowhere in the Education Act any provision entitling an inefficient schoolmaster to a pension, if the inefficiency arose from fault. Here the only claim for a pension was under the Act of 1861, but that Act only provided for pensions to masters removed for old age or infirmity, and the Act of 1872 did not add to these powers. The ground of removal was the test whether a pension was to be given or not. The pursuer had been removed for fault, and had no claim.

At advising,—

LORD NEAVES.—This is one of a class of cases which for a time will unquestionably involve some anxiety to all the parties interested. Matters are in a state of transition, and some time must elapse before the schoolmasters under the

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latter Act confers. I also think that this does not result from any rigid or strict construction of the words of the Act of 1872, but accords with the intention and plain reason of the Act, for no other case of legitimate or reasonably supposable removal under the Act without fault on the part of the teacher has been suggested or occurs to my mind; and the notion that the Legislature intended to confer a power and create a right conditioned on the opinion of a court of law on the question of fault or no fault on the part of the removed teacher, upon a general inquiry into the whole circumstances and merits of the removal, is one which I cannot adopt. It has been said that the Act of 1872 extends, with respect to old teachers, the power of removal without fault on their part. I do not think so, for I think it only further (and reasonably and beneficially) extends and facilitates the power of removal for fault. But if it be reasonably supposable that a teacher, who is neither infirm nor old, may nevertheless be properly removed under the Act of 1872 after observing all the checks provided for his protection, without fault on his part, it is not too much to require that a party appealing to this Court in reliance on so special a case should condescend on the particular facts which raise it. And these facts must consist with the notion of a just dismissal without fault on the part of the teacher; for that is the condition of relevancy in this view of the matter. But the pursuer condescends on no facts whatever. He only impugns the justice of his removal, and upon that, as the only medium, claims a retiring allowance. His case is, that on a true construction of clause 60 he is entitled to be compensated by a retiring allowance, on satisfying the Court that the judgment of removal (which, as such, the Court is precluded from reviewing) was an unjust judgment, which ought not to have been pronounced.

"To sustain the relevancy of such a case would, in my opinion, be not to put a liberal construction on a remedial statute, but to put an erroneous construction on a statute which is remedial in no other sense than every statute is remedial. The managers of the old parish schools (viz. the valued rent heritors who supported them) could always practically get quit of an unfit and inefficient schoolmaster by giving him a retiring allowance. The evil of the law was that they could not get quit of him except on that condition, the practical result being that teachers who really ought to be removed were retained to the detriment of education, rather than burden the rates with a pension to a man who had no just or reasonable claim to it. This evil was partially remedied by the Act of 1861, and more completely by that of 1872, both Acts providing (the latter by simple reference to the former) for a retiring allowance to aged and infirm teachers, and no others."

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new system are established, and before the time comes when those under the old system will have become extinct.

A person in the responsible position of a public schoolmaster is entitled to every fair protection against injustice. It is a serious thing for a man, through old age or under a change of circumstances, to be deprived of his position and means of maintenance. At the same time we must look to the intention and objects of the law, in what it has enacted. The pursuer complains of what has been done, or rather of what has not been done, by the school board of Glenshiel in regard to his office.

The clauses of the Act of Parliament which need to be considered are the 60th, and in connection with it the 55th section of the Education Act of 1872. The 60th section provides, in its 2d sub-section, that in the case of teachers of parish schools appointed previously to the passing of the Act who may be removed under the provisions of the section, the powers of the school board and the rights of the teachers shall be the same as were vested in the minister and heritors and in parish schoolmasters respectively by sections 19 and 20 of the Parochial and Burgh Schoolmasters Act, 1861.

In this case the schoolmaster was displaced from his office, and of that he cannot complain; but he complains that the school board did not exercise the powers conferred on them by the sections above mentioned of giving him a retiring allowance. It is answered that the retiring allowance is withheld because he was removed or dismissed in consequence of his own fault, and that in that case a retiring allowance cannot be demanded.

That gives rise to the questions, who are to determine that there is fault, in what way is the determination to be formed and intimated, and whether there can be any review of it by this Court? A body in such a position as the school board here occupies is, I think, bound to state that they withheld the allowance on statutory grounds. This the board here has done. They find on the strength of the special report of Her Majesty's inspector for their district, and from their own knowledge of the circumstances, that the teacher was "unfit by his conduct, and inefficient from his own fault," and they resolved, therefore, subject to the approval of the Board of Education, to dismiss him from his office. It cannot be said that the school board here have not brought themselves within the enactments of the statute, so far as regards the expressions used in their finding. If the reasons they allege are assumed to be true, they are clearly entitled to withhold the retiring allowance. The two things to be considered are—1st, whether it was necessary for the board to be more specific as to the nature or particulars of the fault found; and 2d, supposing the statement sufficient, whether this Court is competent to review their deliverance by allowing a proof or instituting an inquiry of their own as to the existence of fault. After careful consideration, I am of opinion that a large and almost unlimited discretion is reposed in school boards in this matter. I do not say that they could not be controlled if there was any appearance of their evading consideration of the questions before them, or of malice and bad faith in their proceedings. But there is nothing of that kind here. The board had a special report to the effect that the schoolmaster was inefficient, and in addition to that they had their personal knowledge. They state in their resolution that the master is unfit. How? Not from want of accomplishments or modern attainments, nor from physical weakness, but by his conduct, by his own fault. Was it, then, necessary for the board to go further and specify the particular head or name under

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which this fault falls? I do not think so; the words of the statute are "any fault." If he is not acquitted of fault at his removal, but, on the other hand, is charged with and convicted of fault, it is not necessary to have a detailed narrative of the fault complained of; all that seems to be required is that enough be specified to justify the conclusion arrived at.

In the Logiealmond case, in the other Division, a remit was made to the school board to state whether they found that there was fault, but the Court would not allow an investigation into the truth of the report. In so doing, the Court seems to have proceeded on the intelligible ground that in dealing with a public body their statements must be believed as true, unless the contrary appears; they must be assumed to do their duty properly, unless something can be shewn inconsistent with that view. So when the specific charges were furnished, which was done, perhaps, a little more in detail than here, no further inquiry was permitted.

On these grounds, I am for adhering to the Lord Ordinary's interlocutor, though I do not necessarily adopt all the views stated in his note.

LORD ORMIDALE.—I have come to the same result without any difficulty.

I do not understand that the pursuer complains that there was any departure from statutory forms in his dismissal, and if so, it cannot be said that the school board went beyond its powers. What the pursuer complains of is that, while he must be held to admit—not in express words, but still necessarily—that he has been dismissed by the school board as being "unfit by his conduct, and inefficient from his own fault" (which I concur with Lord Neaves in holding must mean misconduct), he has not received a retiring allowance. The question thus comes to be, whether the school board, not being bound to give a retiring allowance in such circumstances, were thus justified in withholding it?

The pursuer concludes for payment of a retiring allowance, just as if he had been guilty of no fault, and yet he sets forth in the third article of his condescendence the resolution of the school board dismissing him "as unfit by his own conduct, and inefficient from his own fault." And in the 4th article of his condescendence, again, he says, that he does not "admit that he is incompetent, unfit, or inefficient." Now, that is a somewhat peculiar statement as coming from the pursuer, and all the more when what follows is kept in view, viz., "on the contrary, he avers that he is at least as competent, fit, or efficient, as he was when appointed in 1860. In any view, however, he denies, and it is not the fact, that there has been any incompetency, unfitness, or inefficiency on his part, which is, or has been, due to his fault." He then calls upon the board "to specify in what particulars" he "has been guilty of fault in the discharge of his duties." The school board, whether they were bound to do so or not, have responded to this call, because we find both in their statement of facts, and in their answer to a previous article of the condescendence, a detailed narrative of the grounds upon which they dismissed him. If, as there stated, he neglected his duties and was intemperate, the board was not only entitled, but bound to dismiss him from the important position he occupied under them. It is true he denies the truth of their allegations, and that raises the question whether, merely because he denies the statements of the board, he is to be entitled to have a trial of the whole question in an action at law, an action beginning, it might have been, in the Sheriff-court, coming thence to this Court, and then

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going to the House of Lords. Now, I do not see in the Education Act of 1872 anything to suggest even that there is such a right or power in the schoolmaster; and if it did exist, I must say that it would, in my opinion, go a long way to destroy the beneficial objects of the Act, for all the time such a litigation depended the school and the scholars would inevitably be sustaining prejudice. But it is fortunate that the Education Act does not, in my opinion, give any countenance to any such litigation. On the contrary, it appears to me that it was intended by the Legislature that school boards—who are elected by those who are principally interested in the matter, the ratepayers—should have powers of dismissal subject only to certain checks, such as the necessity for a special report from the Government inspector, and then the approval of the Board of Education. The latter is the review provided by the statute. The whole matter is reported to the Board of Education, and if the resolution of the school board is there approved of that is an end to the matter.

I can conceive the possibility of such behaviour on the part of a school board in dismissing a schoolmaster, such as malice and oppression, or departure from the requisite forms, which, if brought under the review of this Court in a competent and relevant way, might result in the proceedings being quashed or set aside. But the present is most certainly not a case of that description, or anything like it.

Without, therefore, adopting all the views of the Lord Ordinary, or, on the other hand, saying that I consider them ill-founded, for it is unnecessary for me to do so, it is enough that I should express my concurrence, on the grounds I have indicated, with your Lordship, in adhering to the interlocutor complained of. At the same time, I am desirous of adding that I entirely approve of the following, which appears to have fallen from the Lord Ordinary:—"It would be contrary to the intention of the Act, and detrimental to the public interest, to put a school board which has dismissed a teacher in the same position as a defender in an action for slander, by requiring them to condescend upon and prove the *veritas* of the grounds on which they proceeded. The members of the board may be morally certain that the teacher is inefficient, intemperate, negligent, and frequently absent from duty, leading to the utter destruction of the school, without being able to establish much of it (except, perhaps, the condition of the school), on a trial in a court of law. It is not for the interest of the community that they should be deterred from dismissing the teacher, if they, the inspector, and the Board of Education, all concur in thinking that the interests of education require it, by the apprehension of a litigation with a dismissed teacher, in which they may be required to satisfy this Court also of the propriety of that step. The question may only regard a pension, but a pension means a higher school rate in a parish, and I am not disposed to countenance the notion that there must either be proof of delinquency in a court of law, or a pension and increased rate. This was not, I think, the intention of the Act, and so to construe it would be calculated to deter school boards from the due discharge of their duty." In every word of that passage, which I find in the Lord Ordinary's judgment, I concur, as expressing very clearly my own views on the subject.

LORD GIFFORD.—I concur, chiefly on the authority of the case of Logiealmond in the other Division, and on the very strong grounds given by the Lord Ordinary in his note. The difficulty which I have felt is that the 60th section of

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the Act of 1872 has provided that schoolmasters appointed before that Act came into operation shall have all the rights they had under the Act of 1861, and thus in reality continues their former status under which they held their office *ad vitam aut culpam*. It seems clear that schoolmasters appointed before the late Act cannot be removed merely at the pleasure of the board, but only for fault, and my difficulty is that the Act does not expressly provide who are to decide whether there has been on the part of the schoolmaster sufficient fault to warrant his dismissal. The Act does not say that the school boards shall be the judges in all matters of fault. The question thus comes to be, can we make out from the statute, taken as a whole, that the school boards are meant to be the final judges in such cases, and that their decision must be accepted as final, unless in such flagrant instances of oppression as those suggested by your Lordships? I think it is much to be regretted that the statute was not made more explicit on this matter. It is quite proper that school boards should be the judges of fault on the part of schoolmasters; they have the best opportunity of being able to judge of fault; and it would be a very unfortunate result if every dismissed schoolmaster, who did not also get a pension, could call on the school board to prove the fault alleged, and to shew to the satisfaction of the ordinary Courts of the country that the decision of the school board was well founded. Of course in such action the judgment would be liable to all the known processes of review.

I concur in the view that in the general case school boards are the sole judges of the fault which warrants dismissal and in no case should there be review, unless oppression or some such ground is averred and proved.

I cannot say that I have come to this conclusion without difficulty, because it is only to be come to by gathering a meaning from the statute which is not set forth in it.

I think, however, that the reasons set forth by the Lord Ordinary, and very strong reasons of expediency, lead to this result.

There is another thing which tends to this conclusion, namely, that there is no provision for the trial as to fault in the statute. I think that shews that the school board is just to form an opinion upon the question. If, then, the case came to be tried in a court of law, that Court would really try the case for the first time. It seems unreasonable that the school board, with all its means of private knowledge, should be obliged to come into Court to try a case of such a kind before a body of strangers, who are ignorant of all the facts and circumstances which influenced them.

In the case of Whitburn,[1] my judgment in which was acquiesced in, both parties moved for and obtained an allowance of proof, so I really had no opportunity of considering the question raised here. I remember I was most unwilling to go on with the proof, and most doubtful of its competency, but that case turned out to be a simple one, and raised no practical difficulty. I am glad that the question may now be considered as settled, and that questions as to the nature or sufficiency of fault for which schoolmasters are dismissed are not to be tried by ordinary proof in this Court.

LORD JUSTICE-CLERK.—I concur in the result of the opinions delivered by your Lordships, and I think it both sound and salutary. This schoolmaster was

[1] Not reported.

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dismissed for fault; it is for the school board to judge of that matter, and we are not here to review their decision. It thus becomes unnecessary for us to decide on the prejudicial question raised in the Lord Ordinary's note as to how far the school board have any power to give a retiring allowance to any but schoolmasters disabled by old age or infirmity. The Lord Ordinary points out that the 60th clause of the recent Act says nothing in regard to fault, but simply gives to the school board the same power as to retiring allowances as those which were possessed by the minister and heritors under the Act of 1861, and those powers were limited to cases of removal for incapacity arising from old age or infirmity. I wish it to be understood that in concurring in the proposed judgment I am not to be held as differing from the Lord Ordinary on that subject. I reserve my opinion should the question again arise. I think there is great weight in the Lord Ordinary's views, although as we are confirming the action of the school board it is unnecessary to give effect to them, even if we should think them sound.

THE COURT adhered.

GIFFORD & SIMPSON, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

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Gow's Trustees v. Mealls.

MRS ISABELLA M'LAREN OR GOW AND ANOTHER (John Gow's Trustees), Petitioners and Respondents.—*Sol.-Gen. Watson—M'Laren.*
DAVID MEALLS, Respondent and Appellant.—*D.-F. Clark—Lancaster.*

Property—Title—Servitude—Acquiescence—Sheriff—Possessory Judgment.—In 1814 the proprietor of a village feu A acquired the adjoining feu B, and occupied both down to 1842. Prior to 1814 the access to the back court of each was by means of a passage within its own boundary. During the period from 1814 to 1842 the proprietor sometimes used the passage on B as a means of access to the back court of A. From 1842, when the properties again came to be possessed separately (A having been sold under a bond and disposition in security granted over it alone in 1831), down to 1863, the use of the passage on B as an access to the back court of A was continued and increased, and in 1863 the passage on A was shut up, and from that time till 1874 the passage on B was exclusively used as the access to the back courts of both properties.

In a Sheriff-court process of interdict at the instance of the proprietor of A against the proprietor of B, to prevent him obstructing this passage on B, *held* (1) that the claim of the proprietor of A was for a servitude right of way over the property of B; (2) that as it was competent for the Sheriff to entertain and decide on the merits of that claim, it was incompetent for him to decline to do so, and confine himself to a mere possessory judgment; (3) that the disposition of A in security in 1831 could not be construed as conferring by implication the right of servitude, the use of the passage on B not being at that date essential to the convenient enjoyment of A; and (4) that there were no *termini habiles* on which prescription could be pleaded.

Observations on the case of Cochrane v. Ewart.[1]

2D DIVISION.
Sheriff of Stirling and Dumbarton.
M.

MRS ISABELLA M'LAREN or GOW and her daughter, as trustees of the late John Gow, proprietors of a feu in the village of Dunipace, in 1874 presented a petition in the Sheriff-court of Stirling against David Mealls, proprietor of the adjoining feu, in which they set forth "that the peti-

[1] Jan. 13, 1860, 22 D. 358, 32 Scot. Jur. 160—March 25, 1861, 23 D. (H. L.) 3, 4 Macq. 117, 33 Scot. Jur. 435.

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tioners and their predecessors, as proprietors of the subjects before described, have for a period of upwards of forty years, by themselves and their tenants, used" a roadway or passage through the respondent's subjects "as an access or entrance, not only for foot-passengers, but also for horses, carts, and cattle, to their property, and the back premises thereon; that at least for a period of upwards of seven years they have possessed and exercised the right of access as aforesaid by said roadway or passage to their said property and back premises," and craved interdict against a threatened interruption on the part of the respondent.

The defence was "a denial of the whole statements in the petition as to the situation and past use of the so-called roadway or passage referred to in the petition, under the explanation that the same is included in the measurement of the respondent's property, and belongs exclusively to him, and that any use thereof which the petitioners, or their predecessors or tenants, may have been allowed to obtain has not continued for forty years and has not been founded on any written title, but has been granted only during the pleasure of the respondent and his predecessors or authors, and cannot constitute a right of servitude, or entitle the petitioners to a possessory judgment."

The history of the petitioners' subjects, as disclosed in the titles, and in a proof before answer allowed by the Sheriff-substitute, was as follows:—

In 1806 Andrew Adam obtained a feu from John Adie of the subjects described as "All and Haill that piece of ground presently possessed by himself, and whereon he is building a house," extending in measure to 14 falls and 22 ells of ground Scots measure, and bounded, *inter alia*, by a hedge separating it from Thomas Fleming's feu (the respondent's subjects), together with the whole privileges and pertinents thereto belonging. Adam possessed the subjects till his death in 1841. In the year 1831, however, he executed a bond and disposition in security over the subjects, under which they were brought to sale in 1842, the year following Adam's death. They were purchased by Alexander Forsyth, and subsequently, after passing through several other hands, they came in 1863 to be vested in the person of John Gow, joiner in Dunipace. He died in 1864, leaving a trust-disposition and settlement conveying them to the petitioners, his wife and daughter, as trustees.

The history of the respondent's subjects was this:—

In 1801 John Thomson obtained a feu of them, described as "All and Whole the foresaid weaving shop and piece of ground, extending in measure to 28 falls 4 ells Scots measure, or thereby, as lately possessed by the said William Thomson," bounded, *inter alia*, by the feu subsequently given off to the petitioners' author, with the haill parts, privileges, and pertinents thereto belonging. In the same year Thomson disponed them to Thomas Fleming, who possessed them till 1814. In 1814 they were acquired by Andrew Adam, who had already, in 1806, obtained the adjoining feu above mentioned. In the disposition to him they were described as "All and Whole that weaving shop, now converted into a dwelling-house, and piece of ground, extending in measure to 28 falls and 4 ells Scots measure, or thereby," &c., with the pertinents. They were possessed by Adam till his death in 1841, when they passed to his two children, John and Jean Adam, who in 1873 sold them to the respondent, David Mealls, joiner in Dunipace.

The subjects were similar, and each consisted of a piece of ground, whereon houses were erected facing the road, and of a back court or yard behind. Each feu had originally an access from the road in front to the back premises by means of a passage within its own boundary, but closely

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adjoining the march between the two subjects. In the case of the petitioners' subjects, the southmost of the two, the passage to this back court had been through an arched pend at the extreme north end of the property, where it marched with the respondent's subjects.

In the case of the respondent's subjects, which were the northmost of the two, the access to this back ground was by means of an open space left at the south end of the buildings, and along the south march of their ground, where it marched with the petitioners' property.

From 1814 till 1842, while the two properties were in the same hands, the use of the pend and of the open space was at first indiscriminate as an access to the back ground of both, but after a time the open space came to be used exclusively as such access, and the pend to be used as a lye for carts and other purposes. This continued down to the time when John Gow acquired the property in 1863. In that year Gow, on the request of the police authorities, built up the pend, as having become a public nuisance from harbouring vagrants. He and his predecessors since the separation of the two properties following on Adam's death, as well as his successors, had full and undisturbed use of the open space on the respondent's ground as an access to their back yard, until it was threatened to be shut up and built upon by the respondent David Mealls in the beginning of 1874.

The Sheriff-substitute (Sconce), on 19th May 1874, pronounced an interlocutor, in which he found that the petitioners' demand was a pure claim of servitude, and required forty years' possession to sustain it; that any use which Adam might have had of the open space on the respondent's ground as an access to the petitioners' back court was only for his own convenience as proprietor of both subjects, and as in occupation of both, and did not create and could not be the foundation of the prescription of any servitude right in favour of the proprietor of the petitioners' subjects over the subjects now belonging to the respondent; that whatever might be the nature of the use of the open space had by the petitioners and their authors subsequent to Adam's death and the separation of the properties, it did not extend to the prescriptive period; and he therefore refused the petition.

The respondent appealed.

The Sheriff (Blackburn), on 16th July 1874, pronounced an interlocutor recalling the Sheriff-substitute's judgment, and containing, *inter alia*, the following findings:—"Finds that, since the year 1863, the petitioners and the late John Gow have used the said space, roadway, or passage without interruption as an access to the back premises of their said property, for carts, cattle, and foot-passengers: Finds that, from the year 1826 down to 1863 the said space, roadway, or passage has been used by the petitioners' predecessors in the property and occupation of the said subjects, and without interruption, in a similar manner, though not exclusively for any of these purposes, as has been the case since 1863: Finds that the back premises, belonging to the petitioners, consist of a byre and other similar buildings, and a courtyard or dung court, and that access to said premises for carts is necessary: Finds that the respondent has recently interrupted the petitioners and their servants in their use of the said access: Finds that although the *solum* of the said access is not claimed by the petitioners, they claim a right of access over the said ground: Finds in law that the petitioners' title is sufficient to carry such a right; but finds that in respect the petitioners' and respondent's properties for many years prior to 1842 belonged in property to and were occupied by the same proprietor, the late Andrew Adam, there has been 'confusion' prior to that year, and no right of servitude can have been constituted by prescrip-

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tion over the respondent's property: Therefore sustains the appeal, recalls the interlocutor appealed against, repels the defences, finds the petitioners entitled to a possessory judgment, ordains and interdicts the respondent in terms of the prayer of the petition, and decerns: Finds the respondent liable in expenses," &c.*

The respondent appealed to the Court of Session.

Argued for him;—(1) Both Sheriffs concurred in this, that it was impossible on the evidence to affirm the claim of Gow's trustees to a right of servitude. The logical result would have been to refuse the petition as the Sheriff-substitute had done. The Sheriff had gone wrong in limiting himself to a possessory judgment. In doing so he had declined to exercise a statutory jurisdiction. For it was a proper question of right which the petitioners had raised; and where it was competent to go to the Sheriff on a question of right, it was not competent to ask from him alternatively a possessory judgment as the petitioners had done. The Sheriff could only give a possessory judgment where his limited jurisdiction did not enable him to decide the question of right. (2) The Sheriff-substitute was right on the merits in holding that there was here no grant of a servitude—that there had been no acquisition of a servitude by prescriptive possession, for during a large part of the prescriptive period both subjects had been in the hands of a common proprietor, and *res sua nemini servit*,[1]—and that there was no room in the circumstances for applying the principle of implied grant as in the case of Cochrane v. Ewart.[2]

Argued for the petitioners, respondents in the Court of Session;—(1) The case was not strictly one of servitude. The right claimed was something less than a servitude—a right of access merely, arising out of the actings of parties, and which might be sustained on acquiescence, though less than the prescriptive period had passed. At any rate it was competent for the Sheriff to maintain it by a possessory judgment till the question of right was determined.[3] (2) The principle of the case of Cochrane v. Ewart did apply. There was an implied grant of this right of access to be inferred in the whole circumstances, *rebus ipsis et factis*, though there

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* "NOTE.—The Sheriff does not, on full consideration of the able argument on both sides in this case, think he is called upon to decide more than the possessory question.

"It is no doubt competent for the Sheriff to decide questions of servitude, but the present case does not properly raise the question of right for decision, and neither petitioners nor respondent have dealt with the case, in the petition and defence respectively, as a case involving a judgment decisive of the right.

"The judgment now given is based on a consideration of the principles laid down with great clearness in the House of Lords in the case of Ewart v. Cochrane, 22d March 1861, 4 M'Queen, 117.

"It is quite true that on the question of prescription the petitioners could not succeed; but on the equitable principle enunciated in the decision referred to their title may be sufficient to establish their right, and at all events is sufficient to entitle them to the possessory judgment they now seek."

[1] Bell's Prin., sec. 997; Ersk. 2, 9, 37; Donaldson's Trustees v. Forbes, Feb. 1, 1839, 1 D. 449, 11 Scot. Jur. 284.

[2] *Vide supra*, p. 729, note.

[3] Johnstone v. Murray, March 5, 1862, 24 D. 709, 34 Scot. Jur. 350; Thomson v. Murdoch, May 21, 1862, 24 D. 975, 34 Scot. Jur. 482; Calder v. Adam, March 2, 1870, 8 Macph. 645, 42 Scot. Jur. 319; M'Donald v. Dempster, Nov. 15, 1871, 10 Macph. 94; Stobbs v. Caven, March 14, 1873, 11 Macph. 530, 45 Scot. Jur. 340; M'Laren's Trustees v. Kerr, Oct. 25, 1873, *ante*, vol. i. p. 60.

was neither express grant or prescriptive possession.[1] (3) Things were not entire, for expense had been incurred in building up the old access on the petitioners' own property, and the respondent, having bought in the knowledge of the state of possession, could not be heard thereafter to complain.[2]

At advising,—

LORD JUSTICE-CLERK.—The precise state of the facts is material to the decision of this case, and we should therefore have them clearly before us.

The history of the case begins with the acquisition, by Andrew Adam, in 1806, of the subjects which now belong to the respondents. These he acquired, as original vassal, by feu-contract, which we have printed in the appendix, and which conveys to him a piece of ground, the exact measurement of which is given, and on which he is said to have been then building a house. This piece of ground he possessed by itself till 1814, when he purchased the adjoining subjects which now belong to the appellant, and which had been originally feued out, in 1801, to John Thomson. The conveyance in this case also was of a specific piece of ground of exact measurement. Adam thus, in 1814, became proprietor of both the respondents' and the appellant's subjects, and from 1814 he retained possession of both until his death in 1841. In the course of this possession he erected additional buildings on both. In 1831 Adam granted a bond and disposition in security over the first mentioned subjects, viz., those acquired in 1806, but this effected no change in the possession during his lifetime. In 1842, however, the year following his death, the subjects were brought to sale by the creditor under the power in his bond. After passing through one or two other hands the property was, in 1863, acquired by John Gow, the respondents' author.

Adam left a trust-disposition and settlement whereby he conveyed the other property, viz., that acquired in 1814, to his wife and children. This they retained till 1873, when they sold it to the appellant.

That is the history of the various transmissions of the two different subjects. Now, it appears that part of the first mentioned subject, that belonging to the respondents, consisted of an open shed or pend abutting on the march between the two properties, and adjoining a space which was then and still is open ground, belonging to the other property. This pend was used partly as a covered place for laying up carts, and partly as an access to the back ground or court. It is not clear when this shed or pend was erected, but it was so erected as to afford this passage or access when required. It did not give such ready and complete access as would have existed had there been no building at all, but it was sufficient for the necessary purposes of the proprietors. Adam was, however, in the habit sometimes of using this pend, and sometimes of using the open space adjoining, but forming part of the last mentioned or appellant's subjects, as a means of access to the back ground of the first mentioned or respondents' subjects. Latterly this open space came to be more and more exclusively used and the pend to be disused, until, in 1863, Gow, the then owner of the respondents' subjects, was called upon by the police authorities to build up the pend to prevent its becoming a public nuisance by harbouring vagrants and such like.

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[1] Preston's Trustees v. Preston, March 7, 1844, 22 D. 366, 16 Scot. Jur. 433.
[2] Muirhead v. Glasgow Highland Society, Jan. 15, 1864, 2 Macph. 420, 36 Scot. Jur. 201.

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From that date the open space on the appellant's ground has been used exclusively as an access to the back ground of both properties.

Adam's representatives having now sold their property to the appellant, he has raised the question whether the respondents are entitled, as matter of right, to the use of the open space belonging to him as an access to the back part of their property.

Now, there is no question that the whole of the open space over which the respondents claim a right of passage is within the feu of 1801, and belongs in property to the appellant. It is plain also that the claim of the respondents is to a right of passage or access to their own property, through or over the appellant's property, and therefore it is a claim to a proper right of servitude. It is not an innominate privilege in favour of the one subject and burdening the other which is claimed, but a proper right of servitude of way. The action, therefore, competently raised before the Sheriff the whole merits of the dispute between the parties, and not a mere possessory question. When a possessory judgment regarding an heritable right is made the foundation of action in the Sheriff-court, it is implied that the Sheriff is not in a position to settle the ultimate dispute between the parties; that he can only regulate possession *ad interim*, until the parties have obtained a decision of the Supreme Court on the merits of their case. But here the question is one of servitude; the Sheriff is competent to deal with it unreservedly, and he ought to have entertained and disposed of the merits of the question. I am of opinion that, in confining himself to a possessory judgment, he has gone wrong; and that, on the merits, we must return in substance to the judgment of the Sheriff-substitute.

There is no grant of a right of servitude founded on, and though there has been use to a certain extent and effect, there are no *termini habiles* on which prescription can be pleaded. The properties came into the same hands in 1814, and were possessed together from that date to 1842. During that time, therefore, prescription could not run in favour of one against the other—*res sua nemini servit.* From prescriptive use the law does indeed imply a grant. But the proprietor's own use can never imply a grant to himself. Not only so, but even if there had been any ground for saying that prescription was running prior to the union of the two properties—which there is not in the present case—that union would interrupt the currency of prescription. As, then, there was nothing on which to found prescription prior to 1842, and as, whatever may have been the state of possession since 1842, the prescriptive period has not yet run, there has been clearly no acquisition of a servitude by prescription in the present case.

There remains only to consider whether the claim now made falls under the principle recognised in the case of Cochrane v. Ewart, viz., that the use claimed is so essential to the convenient enjoyment of the respondents' subjects as to lead to the implication that when they were severed from the united property they carried with them this right of servitude. That there may be such cases is not denied. A proprietor may have so burdened a part of his property with uses—or, as the English call them, easements—that when he parts with the remainder the constitution of a servitude or servitudes may be implied in his grant; that along with the property which he is disponing there must be understood to go the privileges annexed, when they can reasonably be said to be essential to the convenient enjoyment of that which is conveyed. It is easy to imagine many circumstances in which questions of light, air, water, or drainage,

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must lead to this as an equitable conclusion. Such was the case of Cochrane v. Ewart. The Lord Chancellor there says,—"I consider the law of Scotland as well as the law of England to be, that when two properties are possessed by the same owner, and there has been a severance made of one part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant." . . . . "When I say it was necessary, I do not mean that it was so essentially necessary that the property could have no value whatever without this easement, but I mean that it was necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant." In these remarks I entirely concur.

The question then remains, was the use of this piece of ground, as an access, necessary for the convenient and comfortable enjoyment of the respondents' subjects as they existed at the time they were again separated from the appellant's? It is not enough to say that the common proprietor used his property as he thought most for his own benefit. Something more than that is needed. The use of the one subject must be necessary for the convenient and comfortable enjoyment of the other, so as to admit the inference of implied grant in the conveyance of the divided property.

The present case does not, in my opinion, stand the test of this rule, and does not therefore fall under the principle of the case of Cochrane v. Ewart. There were originally two separate subjects, each capable of being fully enjoyed by itself, and independently of the other. They were so possessed and enjoyed for some time prior to 1814, when they came into the hands of a common proprietor. That he used the one to give access to both is by itself a matter of no moment. Had he possessed a dwelling-house and a warehouse adjoining one another he might, for his own convenience, have used his dwelling-house as a means of access to his warehouse; but it could never be contended that when he sold his warehouse the buyer was to have, by implied grant, an entrance through the dwelling-house. Yet that would be as reasonable as the present contention. We have here two separate tenements each fronting the high road. That of the appellant's has certainly the more convenient access to the back ground of both. But that of the respondents' has a perfectly good and sufficient access whenever the proprietors choose to open it up, and it was sufficient when the tenements were separated. It is impossible to hold that the use of the appellant's ground was in any way essential to the comfortable and convenient enjoyment of the respondents' property at the date of the disposition in security in 1831; and, therefore, it is impossible to infer that the separation of the two properties in 1831 carried with it an implied constitution of a servitude over the former in favour of the latter.

The respondents' case, therefore, fails in every view.

LORD NEAVES.—The real question here is, whether this case comes under the same category as that of Cochrane v. Ewart,—whether, that is, these two properties having been at one time held by a common proprietor, when the one of them came to be again separated from the other, such a state of things was found to exist as naturally leads to the presumption that both parties were at one in the understanding that a servitude was created in favour of that which was separated over that which remained.

In determining this question, it is most material to inquire whether, if the

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properties were originally separated, there existed any right of servitude between them prior to their being united in the hands of a common proprietor. If there did not, and if the two properties were separately possessed and enjoyed without any such right of servitude having been created, then, though it may not be conclusive of the matter, the presumption is against the implied grant of a servitude by the common proprietor when he comes to part with one of them.

Just take the case of two adjacent fields which originally belonged to different proprietors coming into the hands of one man, and suppose that when united they are bounded on two sides by a high road. Though each has access to the high road the common proprietor may, for his own convenience, make a short cut diagonally from corner to corner, and so give each of them a slightly more convenient access to the high road through the other. If he, again, part with one of them, is that short cut to be kept up for ever? Certainly not. There must be some reasonable ground for saying that the servitude claimed is necessary for the convenient enjoyment of the part sold off, is, in fact, so necessary that the purchaser would not, as a reasonable man, have bought without it. Now, here, instead of being a reasonable necessity, the servitude claimed is rather a superfluous luxury. The same pend exists to the respondents as an access to their property which was used before, and even for a long time after the two properties came to be united under one proprietor. They can get through it all the access really required to their back premises. There is therefore a total want in this case of that reasonable necessity which alone can be the foundation of what is sought to be established—namely, an implied grant of a servitude, where there has been no express grant and no constitution by prescription.

Lord Ormidale.—In the present case we have to start with this most important circumstance that these two subjects were held by Adam under different titles, each containing accurate measurements, so that if the right of passage claimed by the respondents has been really acquired it must have been, originally at least, an encroachment upon the appellant's property. Still, though not expressly granted, it might have been acquired by prescriptive possession; and the petition is laid, in the first place, on that ground. There is also an alternative ground to the effect that if the petitioners failed on the first, if they could not make out prescriptive possession, they were still entitled to a possessory judgment in respect of seven years' possession. This latter part of their case was, I think, ultimately abandoned, or, at any rate, not seriously insisted in, in respect that nothing was to be gained by a possessory judgment, as the parties would be left to fight the question over again under another form of action. The question was one of servitude; the Sheriff had competent jurisdiction to try the case on that footing, and after the parties had gone deliberately into the more important question and led all the proof they could on that question, I am not satisfied that the petitioners could ultimately limit their demand to a possessory judgment. Their opponent was entitled, in my opinion, to say that as the matter of right had been competently raised and tried it required to be determined.

On the facts of the case there can be no doubt, I think, that not only was there no express grant of a servitude, but also there has been no acquisition of one by prescriptive possession. But there remains a question which, though

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not raised on record, must be determined in order to dispose of the whole case between the parties, and that is, whether there was not an implied grant of a servitude. Now, it is quite clear that the creditors, in 1831, and the purchaser from him, in 1842, could acquire nothing more than was in the bond and disposition in security by Adam to the former. But the question is, whether, on the principle of Cochrane v. Ewart, as decided in the House of Lords, the disposition in security did not include an implied grant of the right of passage in dispute. I agree, however, with your Lordships that the present case does not fall under the principle of Cochrane v. Ewart. In that case the Lord Chancellor stated that he held the law of England and Scotland to be the same in this matter, and he refers to the case of Pyer v. Carter,[1] where I find the principle still more clearly stated than even in the case of Cochrane v. Ewart. The Lord Chancellor says, in Cochrane's case,—"Anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant." And Baron Watson, in Pyer v. Carter, thus explains the word "necessary." By it "is to be understood the necessity at the time of the conveyance, and as matters then stood, without alteration, and whether or not, at the time of the conveyance, there was any other outlet for the drainage water, and matters as they then stood must be looked at for the necessity of the drainage." Now, although Cochrane's and Pyer's cases related to drains, the expressions used by the Lord Chancellor and Baron Watson are equally applicable here. The question therefore is, was the passage now claimed reasonably necessary for the comfortable enjoyment of the respondents' property at the time the disposition in security was granted, and as matters then stood? That has not, I think, been established. There was then existing the original access by means of the pend, quite sufficient for all reasonable uses and purposes; and looking at the nature of the two adjoining properties, the claim for another passage would, I think, at the date of the disposition in security, have been neither necessary nor reasonable.

This case therefore does not, in my opinion, fall within the principle of Cochrane v. Ewart, and I concur accordingly in the proposed judgment.

LORD GIFFORD concurred.

THE COURT pronounced this interlocutor:—"Find that the property of the appellant (respondent in the Sheriff-court) was originally feued out in 1801 by the feu-contract, No. 5/1 of process, and acquired by his author, Andrew Adam, in 1814, and that the measurement therein specified comprehended the ground in dispute: Find that the property of the respondents (petitioners in the Sheriff-court) was acquired by Adam in 1806, and that the title, No. 8/1 of process, also contained specific boundaries and measurement: Find that Adam, during his occupancy of both properties, used as an access to the back premises sometimes a pend or open archway erected on the property of the respondents, and sometimes the ground in dispute: Find that, in 1831, Adam granted a bond and disposition in security over the property of the respondents, and that the creditor, in 1842, sold this property under the powers of his bond, and it has been transmitted to the respondents: Find that, down to 1863, the ground in question has been from time to time used as an access to the back ground along

[1] Feb. 21, 1857, 1 Hurl. and Norm. 916.

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with the open archway: Find that the respondents' author built up the latter access in 1863, and that the only access since then has been over the ground in question: Find that the claim made under this petition is that of a servitude of way which the Sheriff was competent to decide: Find that no servitude has been constituted by prescription, and that the bond and disposition in security granted in 1831, which is the title of the respondents, did not convey to the disponee by implication any such right, and that the same is not essential or necessary to the enjoyment of the subjects disponed: Therefore, sustain the appeal; recall the judgment appealed against; refuse the prayer of the petition, and recall the interdict; assoilzie the appellant, and decern: Find the appellant entitled to expenses in both Courts," &c.

MILLAR, ALLARDICE, & ROBSON, W.S.—J. & A. PEDDIE, W.S.—Agents.

No. 127.
June 2, 1875.
Gourlay v. Hodge.

JOHN GOURLAY (Pinkerton's Trustee), Pursuer.—*D.-F. Clark—Guthrie Smith.*
WILLIAM HODGE, Defender.—*Sol.-Gen. Watson—Asher—Alison.*

Bankrupt—Sale—Security—Statute 1696, *c.* 5.—On 16th May 1874 P and Son, merchants, received from H £500, and granted the following written obligation:—"We have this day received from you £500; and we hereby promise to give you, within one month from this date, delivery-orders on stores in Glasgow for wheat, oats, beans, or Ind. corn, to the full value." P and Son then purchased grain in the market from various persons on credit, and between 22d May and 8th June handed delivery-orders therefor to the value of £238 to H. P and Son were sequestrated on 25th June.

In an action brought by the trustee on P and Son's estate, *held* (*rev.* judgment of Lord Young) that the deliveries of grain were reducible as granted within sixty days of bankruptcy in satisfaction or further security of a prior debt in preference to other creditors within the meaning of the Act 1696, cap. 5.

1ST DIVISION. Lord Young. B.

THE estates of James Pinkerton and Son, merchants in Glasgow, and of James Pinkerton senior and James Pinkerton junior, the individual partners, were sequestrated on 25th June 1874. On 16th May 1874 the bankrupt, James Pinkerton junior, on behalf of his firm, had received from his father-in-law, William Hodge, brickmaker and contractor, the sum of £500, granting at the same time a letter in the following terms:—"37 Hope Street, Glasgow, 16th May 1874.—Mr Wm. Hodge, 4 Great-Eastern Road.—Dear Sir,—We have this day received from you the sum of (£500) five hundred pounds sterling, and we hereby promise to give you, within one month from this date, delivery-orders on stores in Glasgow for wheat, oats, beans, or Ind. corn, to the full value, viz., £500.

"JAMES PINKERTON and SON."

Thereafter, at various dates between 22d May and 8th June 1874, Mr Hodge received from the firm delivery-orders for various quantities of peas, oats, and beans, of the value of £238, 5s., with a discharged account for the same. These goods were bought by the bankrupts on credit, and were not to be paid for till dates subsequent to 25th June 1874.

John Gourlay, as trustee on Pinkerton's estate, raised the present action against Mr Hodge, concluding for reduction of the account above mentioned, and of the deliveries of grain, and for declarator that the grain was fraudulently delivered to Hodge in order to defeat the rights of the other creditors of the bankrupts, and for decree to redeliver the grain, and failing redelivery, for payment of £238, 5s.

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The pursuer pleaded;—(2) The oats, beans, and peas specified in the foresaid account having been given in security of or satisfaction of a prior debt within sixty days of bankruptcy, contrary to the terms of the statute 1696, c. 5, the pursuer is entitled to have the transaction reduced and set aside as concluded for. (3) The parties being conjunct and confident, and delivery having been given without any just, true, and necessary cause, the transaction is null and reducible.

The defender pleaded;—(2) The goods in question having been delivered in partial implement of a contract of sale, under which the price had been paid by the defender, the action is untenable. (3) The action, so far as founded on the statute 1696, cap. 5, cannot be maintained, in respect the deliveries were made, not in satisfaction or security of a prior debt, but in fulfilment *pro tanto* of the bankrupts' obligations under the contract of 16th May 1874, which were the counterpart of the payment then made to them by the defender. (4) The deliveries not having been made to a conjunct or confident person without a just, true, or necessary cause, to the prejudice of prior creditors, they are not challengeable under the Act 1621, c. 18. (5) The defender having, under the transaction in question, paid the sum of £500 to the bankrupts within sixty days of bankruptcy, in consideration and on the faith of performance of their counter obligations as to delivery, and the deliveries made in pursuance of the contract having been of much less value than the said sum, the defender ought to be assoilzied.

A proof was taken before the Lord Ordinary. The material facts proved appear in the Lord President's opinion. There was no entry of the transaction in the business books of the defender.

The Lord Ordinary pronounced this interlocutor:—"Finds that the deliveries of the goods referred to in the summons and in the record were not in contravention of the Act 1696, c. 5: Therefore assoilzies the defender from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses, and remits," &c.*

* "OPINION.—I am of opinion that the deliveries of the goods referred to in the record were not contrary to the Act 1696. I think they were not voluntary within the meaning of that Act. The bankrupt was not volunteering a preference to his father-in-law over other creditors, but was doing exactly what was to be expected of him, in consequence of his obligation by the letter of 16th May 1874. As Mr Asher observed, there might have been difficulty in specifically enforcing that obligation, but there can be no doubt as to the true intent and meaning of it, and the honest duty of the obligant under it; and I think he acted only according to the true intent and meaning of it, and of his own obligation under it, when he granted delivery-orders, in pursuance of which the deliveries in question took place. No doubt such deliveries might have been made under circumstances which a Court of justice must have characterised as fraudulent; but there are no such circumstances here. I have no reason whatever, upon the evidence, to conclude that the deliveries now challenged were made otherwise than in honest pursuance of the obligation come under a very short while before,—on 16th May, when the £500 was advanced; and, seeing no reason to doubt the integrity of the whole matter, I am not of opinion that the rule of the Act 1696 applies to the effect of operating what would be, in my opinion, the substantial injustice of making the defender pay twice over for the same goods. I think the advance of £500 on 16th May was undoubtedly made in perfect good faith, and in reliance upon the obligation the defender received to supply him with oats for his horses. The only circumstance which makes one hesitate for a moment is, that the quantities were larger than were needed for the immediate consumption of the defender's stables, and probably, although on that matter the evidence is not so clear, larger than the stores of provender which the defender was in the habit of laying in within a similar

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The pursuer reclaimed, and argued;—A promise to grant a security will not entitle the bankrupts to grant the security within sixty days. This was not an ordinary business transaction, but a much larger one than usual. The deliveries here were made in implement of the prior obligation, and were therefore struck at by the Act 1696, c. 5.[1]

At advising,—

LORD PRESIDENT.—The pursuer is trustee on the sequestrated estate of James Pinkerton and Son, merchants in Glasgow. Sequestration was awarded on the 25th day of June 1874, and the object of the action is to reduce and set aside certain deliveries of grain made by the bankrupts to William Hodge, who is the father-in-law of James Pinkerton, one of the partners of the bankrupt firm, between the 22d day of May and the 8th day of June, within the period of constructive bankruptcy. The action seems to be laid not only on the Act 1696, but also on fraud at common law. But the ground of challenge relied upon in the argument was, that the deliveries were made in satisfaction of a prior debt, and were therefore challengeable under the Act 1696. The reply made is that the deliveries are not challengeable, because they were the natural performance of a prior obligation contained in the letter of 16th May 1874. It is necessary to attend, 1st, to the terms of the obligation contained in that letter; 2d, to the nature and circumstances of the deliveries made between 22d May and 8th June.

The letter is expressed in rather remarkable terms. It is signed by the bankrupts, Pinkerton and Son, and is addressed to Mr Hodge,—"We have this day received from you the sum of (£500) five hundred pounds sterling, and we hereby promise to give you, within one month from this date, delivery-orders on stores in Glasgow for wheat, oats, beans, or Ind. corn, to the full value, viz., £500." The defender represents this transaction as being a sale, and perhaps it partakes of the nature of a sale more than of any other nominate contract. It is a very peculiar sale, if it be a sale at all, because the purchaser immediately advances the price of the commodity he is to buy, while the corpus of the grain is not ascertained, but the seller comes under an obligation to deliver grain, or to deliver orders for grain, within one month. The delivery of any grain,

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period. But upon consideration, I am not greatly moved by either of those circumstances, for it is quite intelligible that a man who has advanced money to his ordinary fodder merchant, should take delivery-orders for the delivery of a larger quantity than he needs for immediate consumpt, and the quantities here are certainly not of such an amount as to excite any suspicion. They put him in the position of having a larger stock of fodder in store than he perhaps was accustomed to have, but he had advanced £500 to his fodder merchant in reliance that the fodder should be so delivered; and the deliveries not being under circumstances which even raise a suspicion of fraud, I think they must stand good to the defender who received them.

"I shall therefore find that the deliveries of the goods referred to in the summons and on record were not in contravention of the Act 1696, and I shall therefore assoilzie the defender from the conclusions of the summons, with expenses."

[1] *Authorities cited.*—Stiven v. Scott and Simson, June 30, 1871, 9 Macph. 923, 43 Scot. Jur. 511; Gibson v. Forbes, July 9, 1833, 11 S. 916, 5 Scot. Jur. 542; Taylor v. Farrie, March 8, 1855, 17 D. 639, 27 Scot. Jur. 266; Miller's Trustee v. Shield, March 19, 1862, 24 D. 821, 34 Scot. Jur. 416; Young v. Johnston, June 25, 1783, M. 1141.

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whether in possession of the bankrupts or not, subsequently acquired, and however acquired, would be fulfilment of their obligation.

Then the deliveries which actually were made were under somewhat peculiar circumstances. Various portions of grain are specified in the account, but none of them were in the possession of the bankrupts either at the date of the obligation or at the date of the delivery. They seem to have been acquired for the purpose of fulfilling the obligation. They were bought on credit from various parties, and the price of the different parcels of grain were all payable at dates subsequent to the sequestration. The delivery was made not by actual deliveries of grain, but by giving delivery-orders on persons from whom the grain was bought, or on storekeepers, with whom the sellers of the grain had lodged it.

I do not think the circumstances of the transaction are much disguised by the parties. James Pinkerton junior, one of the partners of the bankrupt firm, says in evidence,—"Prior to May 1874 my father-in-law told me he would not grant us any further accommodation in the way of bills, but that he would help us if we needed it by advancing money against grain to be afterwards delivered. It was in consequence of that I proposed this mode of accommodation on 16th May. It was understood between my father-in-law and me at the time that, in return for the £500, he should receive delivery-orders from us for grain to be consumed by himself in the course of his business. The delivery-orders we gave him were in pursuance of that bargain." It is plain that the object of the transaction was to afford money accommodation to the bankrupts, and that the counterpart of the contract was simply an obligation to pay off the defender by deliveries of grain. Mr Hodge does not express himself in the same way as his son-in-law, but his evidence comes to the same result. "I had intimated to him that I would give him no more accommodation bills, and that at any time I had money beside me I could purchase grain, so far as I pleased, for my horses. My son-in-law did not want accommodation at that time, and did not propose it. He inquired if I stood in need of grain, and said he was a little tight for money for the following day. I agreed to give him £500, and he was to give me grain at the market price as I required it for feeding purposes." In short, it came to this, that, in consideration of an actual payment of £500, the bankrupts undertook to make deliveries of grain to that amount as Hodge should require it in his business. Now, Hodge's business was that of a contractor, and he kept horses for the purposes of his business, and it was for the feeding of these horses that the grain was required. This was the only purpose for which it was required. But we know something about the extent of the business. The consumption was about 9¾ bolls per week, which is ascertained to be about £10, 17s. 4d. in money value. When, therefore, Hodge advanced £500, he must be held to have been buying grain for a whole year, which was entirely contrary to the custom of his business. Anything more unlike a business transaction it is impossible to conceive. But the question is, whether these deliveries of grain were in contravention of the Act 1696 as being in security or satisfaction of a prior debt. I cannot have the least hesitation in saying that they are exactly of that description. The obligation is to make the deliveries, and the deliveries are made in satisfaction of that prior obligation. It will not do to adhere to the exact words of the statute, because the statute has received a great deal of interpretation. Whether you regard this as a personal contract of sale, or as an advance of money with an obligation to grant a security, the result

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is the same; it is only an obligation to deliver goods, but no specific quantity of goods. It is of as general a kind as if it had been to pay money. Any grain which might be delivered at the option of the seller would be fulfilment of the obligation, and the buyer would have been very glad to get it so as to be secure of his £500. While the security is not specific, the right of the creditor who has advanced the money is not to demand immediate performance of the obligation. On the contrary, the performance here was to be postponed according to the convenience of the debtor. This makes the case fall under the Act 1696, c. 5. I am not going to enter into an exposition of the law, because I did so recently in the case of Stiven v. Scott and Simson. Referring, therefore, to the opinion I gave in that case, I am clearly of opinion that this transaction falls under the Act 1696, and that we ought to recall the Lord Ordinary's interlocutor, and decern in the reduction.

LORD DEAS.—I am so entirely of the opinion expressed by your Lordship that it is scarcely necessary that I should say anything. I agree that this was a very anomalous kind of transaction. Upon the face of the letter of 16th May 1874 I do not see how it can be said to have been a loan. The parties may have intended it to be a loan, but there is nothing in the letter to shew that repayment was contemplated. It comes nearer to a contract of sale than to any other nominate contract. But it is certainly not a contract of sale in the ordinary course of business. It is necessary, however, to observe that even in an ordinary contract of sale, if the purchaser thinks proper to pay the price, without getting delivery of the article, he becomes merely a personal creditor in the obligation to deliver. This cannot be more distinctly stated than in the words of Professor Bell:—"Every one who trusts his money or property on a mere personal engagement is a creditor; and there is in legal principle no distinction in the *jus ad rem* to which alone he trusts, whether the obligation be to pay money or to grant a deed; and bankruptcy, actual or constructive, stops the hand of the debtor from doing any act by which the condition of any one creditor is to be made better at the expense of the rest." While, however, that is the law, there has been what may perhaps be regarded as a relaxation of the strict rule recognised in certain very special circumstances, which will be found to have occurred in combination in each of the following cases:—Gibson v. Forbes, July 9, 1833, 11 S. 916; Taylor v. Farrie, March 8, 1855, 17 D., 639; and Miller's Trustee v. Shield, March 19, 1862, 24 D. 821. But in each of these cases the transaction took place, in the fullest sense, in the ordinary course of business; the right to immediate delivery was absolute; the goods, which formed the subject-matter of the transaction, were specific—distinguishable from everything else in the premises of the custodier—left there temporarily for the mere convenience of the other party, upon an express contract that the goods were held solely for him, so that although *bona fide* third parties, transacting on the footing of ostensible ownership, might have been safe, the custodier would have committed a fraud if he voluntarily dealt with the goods as a fund of credit, or in any way interfered with them for his own purposes. Such an arrangement may occasionally be so necessary or convenient as to be quite reasonable and legitimate. In the case of wine for instance, which formed the subject-matter of the case of Gibson, the purchaser may not have a cellar, immediately accessible, in which the wine can be safely placed and kept.

But in all these cases the subject-matter of the transaction was fixed and

specific. In the case of Gibson a difficulty arose from newer wine being, at a particular period, substituted, by agreement of parties, for the older wine. But that difficulty in law was obviated so soon as it was held in point of fact that the new wine was a mere substitute (for reasons explained) for the old, the quantity being the same, and equally ear-marked as formerly, by being described as the contents of particular bins.

In the case of Taylor v. Farrie the subject-matter of the transaction was likewise specific,—being a certain brick and tile work, with all its appurtenances, at Levenhall, near Musselburgh, along with the lease of the premises. There was a question of fact whether the transaction was for a partnership or a sale, but that was settled by its being found that the transaction was a sale. The rubric of the case, as reported, states the result too generally, by representing it as having been held "that the transference, having been specific implement of an obligation *ad factum præstandum*, and overtaken beyond the sixty days, was not voluntary or in satisfaction of a prior debt." It is true that expressions of that kind occur in the opinion of the consulted Judges, the authority of which is not to be questioned, but the opinion is to be read in connection with the case in which it was delivered, and that was a case in which the subjects sold were specific, although that is not pointed out otherwise than by stating (which, however, is done distinctly) what the subjects were.

In Miller v. Shield there was some excess in the quantity of 100 tons of guano, which formed the subject-matter of the transaction; but that objection was obviated by holding that, in point of fact, the quantity in the warehouse had been estimated at 100 tons, and that the nature of the transaction was not changed by its turning out unexpectedly to be somewhat more.

But when we examine the present case we find that the material features of these cases are totally awanting. It was impossible that the articles here could be set aside for the defender in the custody of the bankrupts, for the bankrupts had them not. They had not then themselves either purchased or obtained delivery of them. At the outset of the proof "counsel for the defender admitted that the grain specified in cond. 4 was not in possession of the bankrupts at 16th May 1874." That is the date of the letter relied on. And in the minute and answers now lodged we have it distinctly admitted that the purchases were not then made, and of course the delivery-orders ultimately handed to the defender, did not then exist. In his answers to the minute the defender further says,—The defender, when he received the delivery-orders, did not know where or from whom the grain to which they applied had been bought by the bankrupts, or whether it had been paid for by them. But he admits that none of the purchases, so far as they can be traced, have been paid for, and that the sellers (with the single exception of one, who has not been traced) have all been ranked for the prices in the sequestration,—a tolerably significant illustration of how transactions of this sort, if held not to be struck at by the statute, might operate to produce results which the statute was meant to prevent. The Lord Ordinary does not enable us to know whether he had in view any or which of the decided cases. He rests mainly, I think, on there being no fraud on the part of the defender. But while it was, no doubt, an object of the statute 1696 to limit the practicability of frauds, difficult or incapable of detection, an allegation of fraud is not necessary to bring a transaction within that statute. The great object was to prevent undue preferences, and promote equalisation among creditors. It is plain enough, on the face of the evidence of the bankrupt, James Pinker-

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ton junior, that he was conscious of insolvency at the time he asked and got the advance of £500 from his father-in-law, the defender. He says,—"I don't think I told him the bank had refused to discount our bills." But the fact was so, whether he told the defender or not, and the latter could not read the terms of the vague and indefinite acknowledgment he accepted for the money without seeing that it imported, to say the least of it, a very unusual and anomalous transaction between parties who stood in the relation they did to each other, calculated, if carried out, to keep him safe at the expense of whomsoever else the bankrupt might choose to subject to the loss.

At all events, the transaction was not one which comes under the category of any of the cases founded on by the defender. It is rather within the principle of the case of Stiven v. Scott and Simson, 30th June 1871, 9 Macph. 923, in which, although the circumstances are different, some of the observations I had occasion to make might, with little change of phraseology, be repeated here.

For these reasons, and those assigned by your Lordship, I think the Lord Ordinary's interlocutor must be recalled.

LORD ARDMILLAN.—This action of reduction, under the Act 1696, involves a question of some difficulty, and of great importance. Every question touching the equality and impartiality of administration in bankruptcy is important, and more particularly the construction of this statute of 1696 is important.

In the present case, the nature of the transaction, and the circumstances surrounding the transaction complained of, must be carefully kept in view; and in reference to these circumstances we must endeavour to apply the law, construing the statute according to its terms, having regard to the judicial interpretation thereof furnished by the decisions.

The Lord Ordinary has assoilzied the defender, and has clearly and forcibly explained the grounds of his opinion. After careful study of the authorities and of the Lord Ordinary's reasoning I have been compelled to come to a different conclusion.

I think that the transaction here challenged was in contravention of the Act 1696. The aspect most favourable to the defender in which the case is presented is that of a transaction for prepayment of "wheat, oats, beans, or Indian corn," to be supplied within a month by the bankrupts to the defender to the full value of £500. That sum of £500 was paid by the defender to the bankrupts on 16th May 1874, and the letter founded on, constituting the counter obligation, was then granted on receipt of the money. The price of the grain was to be "the full value," or the best market value, and the supply was to be delivered within one month, and to be procured from any store in Glasgow. These delivery-orders were accordingly given to the amount of £238, 5s., and the grain was to that value delivered accordingly. The whole of this transaction in all its parts, the payment of the £500, the granting of the counter obligation, the delivery-orders, and the actual deliveries of grain, were all within sixty days before bankruptcy. The sequestration was on the 25th June 1874.

I think it important to observe that on the 16th of May 1874 the grain was not in the premises or in the possession of the bankrupts. It was to be procured by them, and might be procured from any store in Glasgow. There was no separation, no specification or appropriation by marking, numbering, storing, or otherwise, of the article to be supplied. The defender says he wanted the oats to feed his horses, and that, in order to secure this, he made a prepayment, and

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stipulated for delivery within one month of a supply sufficient for ten months. As the price of what was to be delivered was the market price or full value the defender could have got the supply anywhere. The transaction was not for his benefit; but he, not unnaturally, transacted with the bankrupt, and for the benefit of the bankrupt, who was his son-in-law.

I do not proceed on the imputation or assumption of actual fraud. Fraud is not necessary to sustain a reduction under the Act 1696, and the trustee has not maintained that fraud, as a ground of reduction at common law, has been proved. But, on the other hand, it cannot be overlooked that the transaction originated, not in the defender's need of supply of grain, which could have been easily obtained, but in the bankrupt's need of pecuniary accommodation. It appears that one of the bankrupts being in need of money, and having been refused accommodation, called on the defender, his father-in-law, expressing a wish for assistance by loan or accommodation. The response is found in this transaction. The bankrupt himself states the matter thus:—"Prior to May 1874 my father-in-law told me he would not grant us any further accommodation in the way of bills, but that he would help us, if we needed it, by advancing money against grain to be afterwards delivered. It was in consequence of that I proposed this mode of accommodation on 16th May." The advance was made accordingly, but it is admitted that it was not entered in the defender's books. It was not an ordinary purchase.

A debt was thus constituted. The defender was creditor, and the debtor's obligation was to repay the advance in money's worth by delivery-orders of grain. Every delivery-order on a store in Glasgow for the kinds of grain mentioned in the letter was, when followed by delivery, a repayment *pro tanto* of the advance, an extinction *pro tanto* of a prior debt. Had the grain been at the date of the transaction in the possession of the bankrupts, and sold as a lot of grain in his possession, or, had it been even in another store, set apart and identified so as to be susceptible of discriminating recognition as the particular grain to be delivered, a different question would have been raised, but in this case no specific and separated quantity of grain was set aside or was susceptible of distinction and appropriation, as the particular subject of the transaction, as the lot or lots of grain which the defender had purchased and which the bankrupt was bound to deliver. There could indeed be no such specific appropriation, for the grain was procured from time to time by the bankrupts, and till the delivery-orders were given it was entirely at their disposal.

These facts,—1st, that accommodation to the bankrupts, rather than the purchase of grain by the defender, was the purpose and intention of the transaction of 16th May 1874, and that by the advance a prior debt was constituted; 2d, that the stipulated mode of repaying the advance was by giving within a month delivery-orders on any stores in Glasgow; 3d, that the grain was in no manner separated, marked off, or specificated, and that the obligation was general, and the grain remained till delivery entirely under the control and at the disposal of the bankrupts, and that all the orders and the deliveries were within sixty days of bankruptcy; and, 4thly, that there was no contract for immediate delivery, and no right to enforce immediate delivery or delivery earlier than within one month;—are beyond question, and are most important. Viewing them in combination I have arrived at the conclusion that the transaction was truly for the accommodation of the bankrupts, and that the delivery-orders and deliveries were given in contravention of the Act of 1696.

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The grain might be procured by the bankrupts, and might be delivered from any store in Glasgow; and accordingly it appears to have been procured from different persons, but not paid for, and the sellers of the grain to the bankrupts are ranking for the price on the sequestrated estate. Thus a new debt has in each case been created, and new creditors have been created, in order to repay to the defender the advance of £500 on 16th May 1874. It appears to me that in order to pay the prior debt to the defender the creditors who supplied the grain were wronged. But all the creditors in the sequestration who have no legal preference are on an equal footing, and therefore the sequestrated estate has been wronged, and the wrong is precisely such as the Act of 1696 strikes at. The object of the statute is equitable, and in accordance with the spirit of our bankrupt laws. It is to prevent preference, and to secure and protect the just administration and equal distribution of the bankrupt estate. It cannot be doubted that the defender was a prior creditor, and that this sum of £500 was a prior debt due by the bankrupts. Nor can it be doubted that the orders for delivery of grain were given in repayment of the debt. It is said that the deliveries were not voluntary, but in fulfilment of an obligation. In a certain sense that is true, for every man is bound to pay his debts, and the payment of debt is always in fulfilment of obligation. But the transference of effects on the eve of bankruptcy to one of many creditors, so as to give to that creditor a preference, cannot, in the face of this statute, be supported merely by the plea that there was an obligation to pay the debt.

The judicial construction of the statute,—that is, the construction put on the statute by decisions of the Court,—is attended with some difficulty. But the sound construction is, in my opinion, according to the views which have been so clearly explained by your Lordship in the chair, and by Lord Deas.

When the bankrupt's obligation to deliver goods in repayment of an advance is general, applicable, it may be, to a particular description of goods, such as wine or grain or iron, but not applicable to any specified and identified goods,—where the party making the advance has no control, no right or power of disposal of the goods, but the entire right of disposal remains with the bankrupt, then there is no defined or specific obligation to deliver the particular goods. They might, in the present case, have been procured anywhere, and were delivered only under a general obligation. Besides this, immediate delivery could not have been enforced. The defender on making the advance could not demand implement even of the general obligation earlier than within one month, and, during that month, the grain remained within the reach and at the disposal of the bankrupt.

On applying one's mind to the construction of this statute, apart from the decisions which have been pronounced, it seems to me difficult to avoid the conclusion that the transaction was in contravention of the Act. The words of the Act support that conclusion, and the intent of the Act was clearly to cut down such a transaction. The difficulty is created by the decisions. But on careful comparison of the decisions in the cases where the transaction was sustained,[1] and the decision in the cases where the transaction was reduced,[2] I arrive at the

[1] Gibson v. Forbes, Taylor v. Farrie, and Miller's Trustee v. Shield, *vide supra*, 740.

[2] Tod's Trustee v. Union Bank, Dec. 16, 1851, 14 D. 200, 24 Scot. Jur. 87; Stiven v. Scott and Simson, 30th June 1871; and Inglis v. Mansfield, in House of Lords, April 10, 1835, 1 Sh. and M'L. 203, 7 Scot. Jur. 472.

conclusion that the distinction drawn by Professor Bell is well founded (2 Bell's Coms. 226), and that where the obligation to deliver is general, and not specially applicable to separated or identified goods, and where it is postponed,—not capable of immediate enforcement, but leaving the goods in the interval at the disposal of the bankrupts, then the transaction cannot stand, but is struck at by the Act 1696. The exposition by Mr Bell, which I need not repeat, is, to my mind, very satisfactory, and none of the decisions adverted to, when rightly appreciated with reference to the facts in each case, appear to me to impair the authority of his statement of the law.

There is no case where a transaction challenged under this statute has been sustained in circumstances like the present.

I have only to add the expression of my adherence to the opinion given by your Lordship in the chair in the case of Stiven v. Scott and Simson, where the authorities were considered and explained, an opinion in which I concurred when it was pronounced, and the reperusal of which I have felt to be most instructive, and I think it conclusive of the present question.

LORD MURE.—I concur in thinking that the transaction here in question was in contravention of the Act 1696, cap. 5, and in coming to this conclusion I do not consider that we are in any respect departing from the rules laid down in the cases of Gibson v. Forbes and Miller's Trustee v. Shield, which have been referred to. In these cases the obligation was specific to deliver the particular goods there in question, which had belonged to the bankrupt at the date of the original transaction, and the property of which was held to have been then transferred. But in this respect the present case is altogether different, for at the date of the obligatory letter the bankrupt does not appear to have had any grain to deliver. The letter, moreover, is rather peculiar in its terms. It distinctly acknowledges receipt of £500 then advanced, and by this the debt is unequivocally incurred, and in order to pay this debt the bankrupt undertakes to give delivery-orders on stores in Glasgow for grain to the value of £500. The obligation, therefore, is quite general in its terms. There is no undertaking to deliver any specific parcels or quantity of grain, but it is simply an undertaking on the part of the bankrupt to deliver to the defender by means of orders upon stores in Glasgow any grain he chose to the value of £500 which might come into his hands in the course of his trade. This is, in my opinion, the fair import of the undertaking, as appearing upon the face of the letter of the 16th of May, and this view of the matter is confirmed by the defender's admissions in the answers to the pursuer's minute. From these it appears that none of the grain delivered to the defender was in the possession of the bankrupt on the 16th of May, but had been acquired by him after that date, and was transferred to the defender without having been paid for, while the parties from whom it was purchased are ranked as creditors on the bankrupt estate. Now, if under an obligation of this description no bankruptcy had occurred, it does not appear to me that the creditor could have demanded delivery of any particular parcel or quantity of grain, had the debtor neglected to fulfil his obligation. All that the creditor could have demanded by way of action would have been delivery of grain to the value of £500, with an alternative conclusion for payment of £500 in the event of failure to deliver.

It was in this view, therefore, not imperative on the debtor to deliver any particular grain. It was, on the contrary, optional to him to give delivery-

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orders for whatever grain it might be most convenient for him to dispose of at the time. So that when the orders for delivery of the grain in question were handed over to the defender by the bankrupt, which they were at different dates subsequent to the 16th of May, the delivery of such orders was, in my opinion, a voluntary act on the part of the bankrupt, as regarded that order, done in satisfaction of the debt by him to the defender on the 16th of May, to the prejudice, and in preference of his other creditors, and so struck at by the provisions of the statute.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor: Find that the deliveries of grain sought to be reduced were made by the bankrupts in satisfaction or further security of a prior debt in preference to other creditors within the meaning of the statute 1696, c. 5: Therefore reduce, decern, and declare in terms of the reductive conclusions of the summons; and further, in terms of the petitory conclusions, decern and ordain the defenders to make payment to the pursuer of the sum of £238, 5s., with interest at 5 per cent from 8th June 1874 till payment: Find the defender liable in expenses, and remit," &c.

WEBSTER & WILL, S.S.C.—ROBERT A. BROWN, L.A.—Agents.

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Veasey v. Malcolm's Trustees.

MRS CHARLOTTE MALCOLM or VEASEY AND HUSBAND, Pursuers.—*D.-F. Clark—Balfour.*
WILLIAM MALCOLM AND OTHERS (Malcolm's Trustees), Defenders.—*Pearson.*

Writ—Testing-Clause.—In a case in which a testator, who died in March 1874, had left a codicil with a defective testing-clause, which had been supplemented after his death, *held* (*rev.* judgment of Lord Young) that the deed was probative.

Conveyancing (*Scotland*) *Act*, 1874 (37 *and* 38 *Vict. c.* 94), *secs.* 38 *and* 39. —*Question*, how far the provisions of secs. 38 and 39 of the Conveyancing Act, 1874, as to the authentication of deeds, have a retrospective effect.

2D DIVISION.
Lord Young.

THIS action was raised on 1st December 1874 by Mrs Veasey and her husband against the trustees and beneficiaries under the settlement of her uncle, Alexander Malcolm, who died on 14th March 1874, to have it found that the following codicil executed by her father four days before his death was a valid and effectual testamentary writing:—"Codicil to the will of Alexander Malcolm, March 10, 1874.—I, Alexander Malcolm, desire to give my niece, Charlotte Malcolm or Veasey the portion that would have gone to her late sister Barbara, thereby excluding Barbara's son, James Malcolm Jeakes, from any share in my estate. I also desire to give to each of my two maidservants, viz., to Susan Fullarton and to Elizabeth Leckie, the sum of £9, 19s. each. Signed by me in presence of the two witnesses, who have also signed in the presence of each other: That is to say, I have signed these presents, written on this and the preceding page by my wife, Mrs Elizabeth Ash Carter or Malcolm, at my and her residence, Glenmorag, Dunoon, upon the 10th day of March 1874, before these witnesses—Mrs Jane Carter or Burnett, relict of James Burnett Burnett of Monboddo, Kincardineshire, and John Reid, surgeon, Dunoon,—this testing-clause, from the word 'other,' on the eighth line from the top of this page, being written by James Gibson, clerk to Bannatynes, Kirkwood, and M'Jannet, writers, Glasgow. (Signed) ALEX. MALCOLM. Jane Burnett, witness; John Reid, witness, surgeon."

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It was admitted that the deed, as it stood at the death of the testator, finished with the words "each other," and that it was not holograph of the testator, but was written by his wife, and signed by him on the date, at the place, and before the witnesses as set forth in the testing-clause; that after his death, but before the deed was founded on in action, the trustees allowed the pursuers' agents access to the deed to insert a testing-clause *quantum valeret*.

The admissions were made on the part of the pursuers without prejudice to their maintaining that it was irrelevant to inquire when the testing-clause was written, seeing that it was now duly tested.

The defenders pleaded;—(1) The writing in question is not probative, nor validly tested, and is defective in the solemnities required by law. (2) The writing in question not being holograph of the testator, and having at the date of his death been incomplete and improbative, and the attempted completion thereof having been unauthorised and unwarrantable, the defenders are entitled to decree of absolvitor.

The Lord Ordinary pronounced the following interlocutor:—"Sustains the defences; assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses," &c.*

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* "NOTE.—It is, I think, a sound general proposition that the succession to a person deceased must be governed by the law as it stood at the time of his death. It is assuredly true with respect to the legal succession of intestates, and it is no less so, in my opinion, with respect to the validity of deeds founded on, whether for the purpose of excluding the legal succession, or of superseding or controlling prior deeds of admitted validity. The principle is, that at the moment of the death of any person leaving property the law recognises rights in others, either according to its own rules of succession *ab intestato*, or according to those other rules, equally certain and important, which determine the manner in which or the conditions subject to which the legal succession may be superseded. The rights thus recognised may remain unsatisfied for a longer or shorter period according to circumstances, but they exist from the death of the person whose succession is in question, and subsequent legislation will presumably regard them, and in the absence of cogent language to the contrary will be interpreted so as to exempt them from its operation.

"In this case the testator died in March 1874, when the law denied validity to affect succession to any instrument which was neither tested nor holograph. The law, therefore, cast his succession either on his legal heirs, or on those in whose favour those heirs were excluded, by tested or holograph deeds; and it is not disputed that (leaving out of view the instrument on which the pursuer relies) he left tested deeds whereby he effectually disposed of his whole property.

"The first question is, whether or not the instrument founded on by the pursuer is to be regarded as a tested deed. It is admitted, on the one hand, that it was not tested at the maker's death, and, on the other, that it is so now—a testing-clause (though in unusual terms) having been added since his death. It is also admitted that no space was designedly left for a testing-clause, and that the addition made since his death is crowded between the last words of the deed and the subscription in a manner which clearly indicates that it was not contemplated or intended when the subscription was adhibited. The *post mortem* addition relied on as a testing-clause is in fact such as might have been made to any untested deed, where there was the possibility of inserting it above the subscription.

"I am unable to regard the case as falling within the rule of the cases which sanction the 'filling in' or 'filling up' of a testing-clause after execution. The idea in these cases is the filling up of a blank or of blanks, according to the purpose for which they were obviously or presumably left, and for such an idea there is here no place.

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The pursuers reclaimed. Besides maintaining that the deed was probative under the former law, they founded on secs. 38 and 39 of the Conveyancing Act, 1874.

Argued for the defenders;—The decisions relating to *inter vivos* deeds were not applicable to *mortis causa* deeds. If the pursuers' argument was right, that it was irrelevant to allege that the testing-clause had been filled up after the testator's death, it would depend entirely on the person into whose hands the deed came whether it should be made a valid deed or not. Further, this deed was obviously considered to be complete; it was intended to stand or fall as it stood at the date of the testator's death. The after insertion of a testing-clause in such deed was a very different thing from "filling in" a testing-clause, or correcting an error in the clause.[1]

Lord Justice-Clerk.—The Lord Ordinary has sustained the defences, and found that the codicil is not a probative instrument. He seems to have proceeded upon two grounds, first, that no blank was left for the filling in of the testing-clause; and, secondly, he is not satisfied that the general rule which sanctions the filling in of the testing-clause after execution is applicable to *mortis causa* deeds.

I am unable to concur in these grounds. It is well settled, and, indeed, almost a necessary consequence of the requirements of the Act 1681, c. 5, that if there has been no fraud and no error in the filling up of the testing-clause it is no ground of challenge that it has been filled up after the date of signature, or even after the death of the granter of the deed, provided it be complete when produced *in judicio*, after which it cannot be altered. The testing-clause is a narrative of facts, which can only be written after the deed is signed. When there is more than one party to the deed a certain interval must almost necessarily elapse between the subscription and the attestation of it by the testing-

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"I entirely disapprove of the law regarding the testing of deeds, as it existed in March 1874, and am glad it has since been reformed, but I must nevertheless recognise rights which arose under the law before it was altered.

"The second question is, whether the pursuer can take benefit to the corresponding prejudice of the other interests represented by the defenders from the provisions of secs. 38 and 39 of the Act of 1874, and I am of opinion that she cannot. I do not mean to decide that these provisions apply only to deeds executed, or coming into operation, subsequent to the Act, but only that they do not destroy rights which arose, and were recognised by the law as existing prior to the Act. If and in so far as retrospective effect can be given to these provisions without conflicting with rights established before the Act—not necessarily by judgment, but in the estimation of the law—I express no opinion against such retrospective effect being allowed." . . .

[1] *Authorities.*—Statutes 1540, c. 117, 1579, c. 80, 1593, c. 179, 1681, c. 5; Bell on the Testing of Deeds, p. 116, &c.; Menzies' Lectures (3d ed.), p. 123; M. Bell's Lectures, i. p. 221; Duff's Feudal Conveyancing, p. 19; Dury and Doig v. Dury, March 11, 1753, F.C. and M. 16,936; Brown, March 11, 1809, F.C.; Bank of Scotland v. Telfer's Creditors, Feb. 17, 1790, F.C. and M. 16,909; Blair v. Earl of Galloway, Nov. 15, 1627, 6 S. 51; Leith Banking Co. v. Walker's Trustees, Jan. 22, 1836, 14 S. 332, 8 Scot. Jur. 163 (reported under name British Linen Co. v. Ker and Johnston and Others); Macleod v. Cuninghame, July 20, 1841, 3 D. 1288, 13 Scot. Jur. 570, aff. August 13, 1846, 5 Bell's App. 210; Shaw v. Shaw, March 6, 1851, 13 D. 877, 23 Scot. Jur. 381; Hill v. Arthur, Dec. 6, 1870, 9 Macph. 223, 43 Scot. Jur. 171.

clause. The law has consequently been thoroughly fixed that the testing-clause may be filled up *ex intervallo*. No. 128.

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The whole question was thoroughly discussed in the case of Hill v. Arthur. There the settlement was executed in an hospital, a few hours before the testator's death. Several years after the testator's death the deed was produced in process in the Sheriff-court, the testing-clause being still blank. The deed was borrowed up, the testing-clause filled up, and the deed thereafter returned to the process. The question was, whether the fact of the deed having been produced in process was a bar to the testing-clause being filled up, and we held that it was. But that question would never have arisen if the general rule were not applicable to *mortis causa* settlements.

I need not go over the decisions, though I may observe that the case of Macleod v. Cuninghame is clear and strong in favour of the pursuer. I shall content myself with referring to two cases cited in Bell on the Testing of Deeds, a valuable treatise, of which the antiquity is not against it, since at the time Mr Bell wrote such questions were more common and at least as well understood as they are at present.

The first case is that of Dury and Doig v. Dury, March 11, 1753, F.C. The granter of the deed had signed it so close to the writing that there was no room for filling up the testing-clause. To correct this the writer erased part of the deed and wrote it in a closer form, but notwithstanding this the testing-clause was crowded in, partly at the side, and partly under the granter's subscription, so that it was clear from inspection that the testing-clause had not been written out till after the subscription of the deed. Lord Kaimes, who reports the case, says that the Court were a good deal divided, and that he gave his own opinion against the validity of the deed, on the ground that what was below the subscription could not be authenticated by it. But the majority of the Court sustained the deed as probative.

The other case is not reported, but is referred to by Mr Bell on p. 119, Arthur and Fullerton v. Marshall. A bond was signed by the principal debtor, and the testing-clause, in so far as he was concerned, was regularly filled up. It was afterwards signed by the two cautioners in presence of two witnesses, but the date and place of signing and the names and designations of the witnesses to the last subscriptions were not filled up. One of the cautioners got possession of the bond, and instantly put it on record. When the creditor came to learn this he went to the keeper of the record, who allowed him to fill up the testing-clause, but there was said to be an error in filling up the date, both as to time and place. The cautioner brought a suspension and reduction of the deed, in which Lord Eskgrove, Ordinary, sustained the bond as a good ground of action, and the Court unanimously adhered. The Lord President observed,—"A testing-clause may be filled up at any time before it be produced in judgment. It may be filled up the day after the parties have subscribed the deed, and, consequently, at any time. The putting of the deed on record was evidently a trick."

These opinions are weighty, and sufficient for the decision of this question. The defenders' counsel drew a distinction in respect to the after filling up of the testing-clause between deeds *inter vivos* and deeds *mortis causa*, but I am not aware of any decision which sanctions the distinction.

It is unnecessary to go into the second question raised upon the statute of 1874. I am of opinion that on the law as it stood prior to the coming into

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operation of the new statute it is not relevant to say that a testing-clause has been filled up *ex intervallo*, it not being alleged that it was not truly filled up. I am therefore for altering the interlocutor of the Lord Ordinary, and finding that the codicil is probative under the Act 1681, c. 5.

LORD NEAVES, LORD ORMIDALE, and LORD GIFFORD concurred, expressly reserving their opinions on the retrospective effect of sections 38 and 39 of the Conveyancing Act, 1874.

THIS interlocutor was pronounced:—"Alter the said interlocutor: Find that the codicil libelled is a probative writ, in terms of the statute 1681, c. 5, and decern in terms of the conclusions of the libel: Find the defenders liable in expenses," &c.

HAMILTON, KINNEAR, & BEATSON, W.S.—DEWAR & DEAS, W.S.—Agents.

No. 129.
June 4, 1875.
Webster & Co. v. Cramond Iron Co.

WEBSTER AND COMPANY, Pursuers.—*Balfour—Brand.*
THE CRAMOND IRON COMPANY, Defenders.—*D.-F. Clark—M'Kechnie.*

Reparation—Breach of Contract—Specific Damage.—An iron company sold iron pipes to the owner of a cotton mill to be used in the mill, but failed to deliver them timeously. In an action of damages the millowners failed to prove specific pecuniary damage, but proved that they were put to trouble and inconvenience before they could obtain fulfilment of the contract. *Held* that they were entitled to moderate damages for the trouble and inconvenience.

Observed (*per* the Lord President) that where a breach of contract is proved, even in respect of time, an award of damages must follow; that if no inconvenience has been suffered the damages will be nominal; but that if trouble and inconvenience have been caused, though no specific damage is proved, the damages will be substantial.

1ST DIVISION.
Ld. Curriehill.
M.

IN September 1873 Webster and Company, cotton manufacturers, Eaglesham, advertised for piping, without mentioning their names, or the purpose for which the piping was wanted. The Cramond Iron Company replied to the advertisement, stating, *inter alia*,—"We have also 9 pipes, 48 inches diameter by 9 feet long, flanged, for sale, price £8, 10s. per ton here, or £9, 5s. per ton in trucks at Glasgow. Terms, net cash on delivery to railway. These pipes are as good as new, having been but very little used." A few days afterwards they wrote in another letter,—"The piping is as good as new. The large pipes were used for a turbine wheel." On 23d September Webster and Company purchased, and soon afterwards paid for, 63 feet of the large piping. On 11th November they wrote,—"We are to use the pipes for a turbine." After some delay the piping was sent, but was found to be defective, and sound pipes were not delivered till February 1874.

Webster and Company raised this action against the Cramond Iron Company, claiming £300 damages for the loss which they had sustained by the delay.

They averred that when they advertised for the pipes they wanted them for the purpose of conveying water to a turbine wheel to be used for driving their mills, that it was of importance to them to obtain the piping at the time when they required delivery as their mills were at a stoppage until it was supplied, that they sent intimation to the defenders on 5th November to forward the pipes, and that they had sustained serious loss through the delay.

The defenders averred that "there was no stoppage of the mills caused

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through the non-delivery of the piping. . . . Even if the piping had been delivered earlier the mills were not in a state to resume working sooner than they did."

A proof was led. It appeared that the defenders had no valid excuse for the delay in delivering the pipes, at least for the period between 25th December and 11th February, and a long correspondence between the parties shewed that the pursuers had a good deal of trouble and annoyance before they succeeded in obtaining delivery, and that the pursuers' mill was stopped during all that time. On the other hand, the following facts were elicited as to the cause of the stoppage of the mill. The mill consisted of two parts, the "main mill" and the "wing." The "main mill" was at first driven by a 45-feet wheel, which broke down on 11th September 1873, and the pursuer resolved to replace it by a turbine wheel. The shafting and gearing of the new wheel was not ready till about the same time as the pipes were delivered. Therefore the "main mill" could not have been worked sooner even if they had been delivered. The "wing" was worked by a smaller wheel, turned by the same stream of water as the large wheel, and could be worked separately from the "main mill." Evidence was adduced for the pursuers to shew that, though they could not work the "wing" safely without pipes to carry off the water, if they had had the pipes they might have worked it.

The Lord Ordinary, on 31st December 1874, pronounced this interlocutor:—"Finds that the defenders in September 1873 sold to the pursuers certain iron pipes for the use of their cotton-mill at Eaglesham: Finds that said pipes ought to have been all delivered to the pursuers not later than 23d December 1873: Finds that three of said pipes when delivered were cracked and unfit for use, and were known by the defenders to be so: Finds that sound and sufficient pipes were not supplied by the defenders until 7th February 1874, and that, in consequence of the defenders' failure to supply the pipes, the pursuers were unable to work that part of their mill known as the 'wing' from 25th December 1873 to 11th February 1874, and that they have thereby sustained loss, injury, and damage, for which the defenders are responsible: Finds that said damage amounts to the sum of £64 sterling: Ordains the defenders to pay the same to the pursuers, with interest from the 31st day of December 1874 till paid, and decerns: Finds the pursuers entitled to expenses, subject to modification."*

The defenders reclaimed. At advising,—

LORD PRESIDENT.—The Lord Ordinary has found, first, that a contract was made between the pursuers and defenders, and secondly that the contract was broken. In both of these findings I concur. It is, however, important to observe that the breach of contract was in respect of time only. The pipes were ultimately delivered in February 1874; and delivery was accepted in performance, though too tardy performance, of the contract. In these circumstances the pursuers are entitled to damages for breach of contract to the extent to which they have sustained damages, but to no greater extent. It lies on them to shew wherein they have sustained damage. That is the point in which this case

* His Lordship's view of the evidence is summarised in the following sentences from his note:—"I think that the stoppage of the 'main mill' between 25th December 1873 and 11th February 1874 was not attributable to the defenders' delay in supplying the pipes. As regards the 'wing,' however, the case appears to me to stand in a different position."

The import of the evidence on this point is stated in the Lord President's opinion.

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presents some difficulty. The object of the pursuers in ordering the pipes is sufficiently set forth on record. They tell us that they "were in want of a quantity of iron pipes, which they intended to fit up at their mills, for the purpose of conveying water to a turbine wheel to be used for driving their mills, and accordingly they advertised for piping." Further, that "certain negotiations followed, and in the course thereof the defenders represented that the large pipes had been used for a turbine wheel, and that the pursuers could have the piping immediately. It was of importance to the pursuers to obtain the piping at any time required by them, as their mills were at a stoppage until it was supplied and fitted up."

The whole record is framed on the same footing, that the piping was wanted for the specific purpose of conducting water to drive a turbine wheel.

But it turned out in the course of the evidence that the delay which took place in the delivery of the pipes was not the cause which prevented the pursuers from driving their turbine wheel, because there were other things wanting. It came out, however, that there was another wheel on a higher level, and it is now suggested that the pipes might have been made useful in connection with that wheel to work the "wing" of the mill.

Now, in the first place, that idea is not to be found in the record. But it is more important to observe that it must be made out, first, that the pipes would have enabled the pursuers to work the wing; 2d, that they intended to do so; and, 3d, that they could have done it at a profit. Otherwise no damage is shewn. The question whether they could have worked the wing is left in some doubt on the evidence. As to the intention, I have no doubt that there was no such intention. It is entirely an afterthought. Then such evidence as there is goes to shew that the experiment, if tried, would have resulted in loss and not profit. Therefore I am unable to concur in the remaining finding of the Lord Ordinary "that in consequence of the defenders' failure to supply the pipes the pursuers were unable to work that part of the mill known as the wing."

But the question remains, what is to be the verdict, for we are here in the position of a jury. The contract and the breach of it are established. That leads of necessity to an award of damages. It is impossible to say that a contract can be broken even in respect of time without the party being entitled to claim damages—at the lowest, nominal damages. In directing a jury I should have stated that principle, and told them that if they were satisfied that the pursuers were not put to any serious inconvenience they might give the smallest imaginable sum, but if they thought that, though no specific damage had been proved, the pursuers had been put to serious inconvenience and trouble, then their duty was to give something more substantial. This latter view occurs to me as the one which is applicable here. The correspondence shews that this affair caused considerable annoyance and trouble to the pursuers, and I propose to fix the damages at £10.

LORD DEAS concurred.

LORD ARDMILLAN.—I think there has been a failure on the part of the defenders to implement their contract. The pipes were not delivered in due time; some of them, I think three of them, were cracked, but they were all delivered and not rejected. If special or actual damage had been proved to have been caused by the failure the defenders would, to that extent, have been liable. But I am of opinion that no such damage has been proved. The pipes were

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purchased without specification of the purpose for which they were to be used. But it very soon appeared, and it is beyond dispute, that the purchase really was in order to supply the means of working "the main mill" by the "turbine wheel."

But the stoppage of the main mill, and the delay in fitting up and working the turbine wheel, was not caused by the delay or the fault of the defenders, and in regard to the claim for damages on that ground I think that no actual damage has been proved. At the same time a breach of contract by the defenders is necessarily a wrong to the pursuers, and a wrong for which some amount of damages may well be claimed. There must have been, to some extent, inconvenience, annoyance, and anxiety, even in regard to the main mill and the turbine wheel. The damage could not have been great, but, failure having been proved, some damage is due.

As to the other ground of damage,—the stoppage and loss of profit from the stoppage of the "wing" mill,—I concur in the opinion of your Lordships. I think that the using the pipes for working the "wing" was not intended, as contemplated, at the date of the transaction. Damage on this ground is not within the record. Damage from loss of such use of the "wing" was not the natural consequence, or the contemplated consequence, of failure to fulfil the contract. I think that Professor Bell's statement of the law (1 Com. 449, 5th ed.) is eminently clear and convincing, and I need not repeat it. Applying that law, I think no damages are due as regards alleged loss of profit by stoppage of the "wing." That ground of damage is an afterthought.

On the whole matter, I think that a small sum of damage, such as your Lordship suggests, should be awarded.

LORD MURE concurred.

A judicial tender of more than £10 had been made by the defenders on 10th July 1874.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Find that in September 1873 the defenders sold to the pursuers certain pipes for the use of the pursuers' cotton-mills at Eaglesham: Find that the defenders failed timeously to deliver said pipes in terms of the said contract, and that they were not delivered till 7th February 1874: Find that the defenders thus committed a breach of contract to the loss, injury, and damage of the pursuers: Assess the damages at £10 sterling: Decern against the defenders for the said sum of £10: In respect of the tender, No. 6 of process, find the pursuers entitled to expenses prior to the 10th July 1874, and find the defenders entitled to expenses subsequent to that date."

A. KIRK MACKIE, S.S.C.—FINLAY & WILSON, S.S.C.—Agents.

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Forrester, &c. v. Robson's Trustees.

ROBERT FORRESTER AND OTHERS, Pursuers.—*Sol.-Gen. Watson—Guthrie Smith—Johnstone.*
THE TRUSTEES AND EXECUTORS OF THE LATE ROBERT ROBSON, Defenders.—*D.-F. Clark—Lorimer.*
Et e contra.

Insurance—Partnership—Trust.—Two trading companies obtained, in the name of a person who was a partner of both firms, an advance from an insurance

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office, repayable by instalments, upon the security of a policy of insurance which they opened on the life of that partner, he being the youngest member of both firms. The policy was payable to the "executors, administrators, and assigns" of the insured, but the premiums were paid by the companies. Upon the death of the insured the contents of the policy were realised, and a large balance remained after deducting the debt still due to the insurance office. *Held*, in a question between the firms and the executors of the deceased partner, that the proceeds of the policy belonged to the firms.

Trust—Proof—Statute 1696, *c.* 25—*Partnership.*—*Held* (*dub.* Lord Gifford) that it was competent to prove *prout de jure* that the right to a policy of insurance, taken in name of the partner of a company, belonged to the company.

2D DIVISION. Lord Young. R.

ROBERT FORRESTER, coalmaster in Glasgow, and George Cowie and Sons, coalmasters, Airdrie, brought an action against the testamentary trustees of the late Robert Robson, coalmaster, Glasgow, for declarator that the pursuers, in certain proportions, were entitled to the sum of £3570, 9s. 4d., the proceeds of a policy of insurance on Mr Robson's life, effected with the English and Scottish Law Life Assurance Association for the sum of £5000, after deducting therefrom the sum of £1429, 10s. 8d., being the balance due to the assurance association of an advance made by them to the firms of Forrester and Robson, coalmasters, Glasgow, and the said George Cowie and Sons, in security of which advance the policy was assigned to the assurance association.

Robson's trustees defended the action on the ground that the contents of the policy belonged to them, and brought a counter action against the pursuers for payment of the balance of £1429, 10s. 8d. retained by the assurance association to meet the debt due to them.

The Lord Ordinary allowed a proof, which established the following facts:—

In 1870 the companies of Forrester and Robson and George Cowie and Sons having occasion to borrow £3500, applied to the English and Scottish Law Life Assurance Association, who agreed to make the advance on the security of a policy of insurance for £5000 on the life of Robert Robson, the money being repayable by instalments in five years. Robson's life was selected, because, being the youngest member of the two firms, his life was insurable at a lower premium.

The proposal for a loan, and the proposal for a policy of insurance, were in Robson's name alone. The policy was payable to Robson's "executors, administrators, and assigns," and was undistinguishable from one which he might have opened on his life for behoof of his executry; but the proof shewed that it was opened by the two companies to serve as a security for the loan to them. A bond and assignation of the policy in security was granted in favour of the assurance association by Robson and four sureties. The deed contained no obligation to keep up the policy by payment of the premiums, and there was no contract or arrangement among the parties as to what was to be done with the policy when the debt was paid up. The money was advanced by the assurance association in December 1870.

It was proved by the books of Forrester and Robson, and by letters and receipts of that firm, that the two companies of Forrester and Robson and George Cowie and Sons were interested in the loan in the proportions of four-sevenths to the former and three-sevenths to the latter; and in these proportions they paid the interest and premiums, and such of the instalments of principal as had been paid.

The company of Forrester and Robson was dissolved as at 31st December 1872, on the terms specified in an agreement dated 7th March 1873, the import of which was that Robson should retire with a sum of money

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and Forrester should take the company property and undertake their obligations. The share of the balance of the debt due to the assurance association by Forrester and Robson was entered in a state of affairs of that firm made up at the time of the dissolution, but the policy was not entered as an asset of the company.

Robson died, aged about thirty, on 13th June 1874, leaving a trust-settlement in favour of the defenders in the principal action.

Upon Robson's death the assurance association consigned the sum contained in the policy, under deduction of the balance due to them on the loan.

The pursuers pleaded;—(1) The foresaid policy having been effected solely on account and at the expense of the parties interested in said loan and in connection therewith, and having been all along kept up by them or their assignees in the proportions foresaid, they alone or their assignees are entitled to the proceeds thereof in said proportions. (2) The said Robert Robson having, by said agreement of dissolution, transferred to Mr Forrester the whole interest of himself and his firm in said policy, Mr Forrester is entitled to four-sevenths of the proceeds thereof. (3) The said Robert Forrester having, at said dissolution, undertaken the sole responsibility for his firm's share of the balance of said loan, and having subsequent thereto paid such share of the instalments of said loan and interest, and of the premiums of insurance on said policy, as the same respectively fell due, is entitled to said share, being four-sevenths of the proceeds of the policy. (4) There being a balance of said loan and interest remaining due to the assurance association at the death of Mr Robson, the association were only liable under said policy for the difference between said balance and the sum thereby assured, and the pursuers are entitled to declarator of their right to such difference, as concluded for.

The defenders pleaded;—(2) The said policy of assurance having been effected by the late Mr Robson on his own life, and the sum thereby assured being made payable to his executors, the pursuers are not entitled to any part of the proceeds thereof, these being the property of the defenders, as executors under Mr Robson's trust-disposition and settlement. (3) The pursuers having had no assurable interest in the late Mr Robson's life, and not being vested in his life policy by any assignation from him, have no right to the contents thereof. (4) In any view the pursuers have no right to said proceeds, except to the extent of the premiums advanced by them on said policy. (5) The pursuers' alleged right to said policy can only be established by the writ of the late Mr Robson.

The Lord Ordinary, having conjoined the actions, pronounced the following interlocutor:—"In the action at the instance of Robert Forrester and George Cowie and Sons, repels the defences for Robson's trustees, and finds, decerns, and declares in terms of the conclusions of the summons; and, in the relative counter action at the instance of Robson's trustees, sustains the defences, assoilzies the defenders, Robert Forrester and George Cowie and Sons, from the conclusions of the action, and decerns: Finds the defenders, Robson's trustees, liable in expenses in both actions," &c.*

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* OPINION.—(After a narrative of the facts)—"The question is, to whom the policy belongs; and I am of opinion that it belongs to the pursuers in the leading action—viz., Forrester and George Cowie and Sons; and that the defenders have no right to it, or good claim under it. It was opened and kept up by the pursuers at their own expense, and for their own purpose, as a security for the

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Robson's trustees reclaimed.

Argued for them;—The pursuers must prove that the policy standing in Robson's name was held by him in trust for the two firms, and parole proof to this effect was inadmissible.[1] Even if the proof could be looked at, there was nothing like an arrangement disclosed that the policy was to be the exclusive property of the firms. They had a certain interest in keeping up the policy, in order to protect them against the insurance office calling up the loans. But their interest ended there. Supposing that the debt had been fully paid up while Mr Robson was in life, they could not have kept the policy up as a speculation.[2] It was said that want of insurable interest was an objection which was only competent to the insurance office, but it was an important element in discovering the true nature of the transaction. The parties were not likely to have opened a policy under which it was doubtful whether they would be able to recover. The two firms could not have prevented Mr Robson keeping up the policy for his own benefit. All that they could have claimed would have been reimbursement of the premiums paid by them.

Argued for Forrester and others;—An allegation that a fund standing in the name of an individual belonged to a copartnery of which he was a

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loan which they obtained from the assurance association. Robson, while a partner of Forrester and Robson, had of course his share of the interest effeiring to that company, but, on the dissolution of the company, when he was paid out and retired in favour of Forrester, the whole of that interest, with the corresponding liability, attached to Forrester alone. Nor do I attach importance to the circumstance that in the state made-up at the time of dissolution the policy is not entered as a company asset, for at that time it had no surrender value, and was of no appreciable value in the market, but was in truth a burden necessary to be borne in connection with the loan.

"A life insurance is generally a very expensive kind of security, but it has a speculative element which may possibly (however greatly the chances are against it) render it very profitable to the borrower; for ordinary calculations may be falsified by the premature death of the assured, to the effect of enabling the borrower to pay the debt thereby secured, with the proceeds of a policy on which he has paid only a single premium. If, in the present case, Robson had died immediately after the loan was made and the policy opened, I cannot think it doubtful that the proceeds of the policy would have been applicable in payment of the debt to the exclusive benefit of the borrowers, and that his executors could not have maintained a claim against them on the footing that their debt was in truth paid out of the estate of the deceased, which had passed to them. Then, if the policy was theirs, to the extent of the debt for which they opened and pledged it, I am unable to find a principle for holding that the amount of the debt was the limit of their right, and that anything in excess belonged to others.

"According to the actual facts, the debt, when the policy became payable, had been reduced to £1429, 10s. 8d. I am clearly of opinion that to this extent the policy is available to the pursuers; and being unable to divide the interest in it, either according to the original amount of the debt, or the amount remaining unpaid when it fell due, I am constrained to find that it is entirely the property of the pursuers, and that the defenders have no right in it. It has unexpectedly, and contrary to ordinary calculations, turned out a valuable property, by reason of the premature death of Robson; but, on what I conceive to be sound and established legal principles, I must give the benefit to those who paid for it, although having considerable sympathy with the family whose interests are represented by the defenders; for undoubtedly the premature death of their husband and father was the immediate event which brought unexpected gain to the pursuers."

[1] Stat. 1696, c. 25. [2] Stat. 14 Geo. III. c. 48.

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member could be proved *prout de jure*.[1] But parole proof was not necessary in the present case, the whole material averments of the pursuers being proved by the books of Forrester and Robson, which must be held to be Robson's writ. In regard to the objection founded on the want of insurable interest, it was now well settled that it was sufficient that there should be an insurable interest when the policy was effected.[2] Moreover, the objection was only pleadable by the insurance office.[3]

At advising,—

LORD JUSTICE-CLERK.—This belongs to an important class of cases, but after hearing the able argument for the reclaimers I have no doubt that the Lord Ordinary's judgment is entirely right.

If the proof taken is competent it seems to establish beyond doubt that Robson never had any individual interest in the policy. He had an interest as partner of the firm of Forrester and Robson, and also as a partner of the joint adventure constituted by the transaction, but beyond that he had no interest in the policy. He was put forward by the joint intervention of the two firms of Forrester and Robson and George Cowie and Sons. His name was used for the obvious reason that he was the youngest partner of either company. The proposal for a loan was made in his individual name, he giving four other persons as securities. The loan was to be repayable in five years. In his proposal for a loan Robson offers to insure his life. The proposal for a loan was made entirely on behalf of the two companies who wished to borrow the money; and it follows that the proposal for insurance was part of the same loan transaction.

With regard to the competency of the proof, where the allegation is not trust but partnership, the Act 1696 does not apply. The fact that a partner holds on behalf of the company may be proved *prout de jure*.

I had at first some difficulty as to how far the companies could have kept up the policy as a speculation after the debt was paid. But I am satisfied upon the cases cited that it is sufficient that they had an insurable interest when the policy was opened. It is impossible to maintain that it is necessary to investigate from time to time how far the parties continue to have an insurable interest.

In short, the policy was opened solely for partnership purposes, and it is the sole property of the partners.

LORD NEAVES.—I concur. I have no doubt as to the competency of the proof.

LORD ORMIDALE.—I am of the same opinion.

Although many points were raised in the argument two questions only have appeared to me to involve any difficulty.

The first is, whether the Trust Act of 1696 applies to this case, and so excludes all evidence but the writ or oath of the alleged trustee, the late Mr Robson. I concur with your Lordships in opinion that the Trust Act does not apply to this case. It is admitted that Robson was a partner of Forrester and Robson. It is admitted also that the object of the policy was to enable For-

[1] General Assembly of the General Baptist Churches v. Taylor, June 17, 1841, 3 D. 1030, 13 Scot. Jur. 455; see also Lindsay v. Barmcotte, Feb. 19, 1851, 13 D. 718, 23 Scot Jur. 315.

[2] Dalby v. The India and London Assurance Company, Dec. 2, 1854, 15 Scott's Common Bench Rep. 365.

[3] Lindsay v. Barmcotte, *supra*.

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rester and Robson, and Cowie and Sons—who, I think, must be taken as joint adventurers with Forrester and Robson in this matter—to obtain a loan. Robson's representatives cannot maintain that because the policy was in his name it was his property. It is clear, I think, that it was not; and, indeed, it was not disputed that it could not be so as long as the purpose for which it was obtained was not fulfilled. I must hold, on the contrary, that the policy was the property of the two firms to the extent of their respective interests in it, and their respective liabilities for the loan. This being so, I cannot hold that the Trust Act applies. The late Mr Robson was not a trustee at all in the sense of that Act. The principle of mandate or agency applied to his position in the matter rather than that of trustee. If I am correct in this, proof *prout de jure* was admissible, as shewn by the cases which were founded on in the course of the discussion, and, in particular, that of the Baptist Churches v. Taylor, 3 D. 1030; and looking at the whole evidence in the case there can be no doubt that the policy belonged to the two firms, and not to Mr Robson individually.

The other question of any importance in this case is, what is to become of the surplus proceeds of the policy after its original purpose has been satisfied. If we hold that down to Robson's death it belonged to the joint adventurers, it follows that the proceeds of the policy then fell to be divided among the parties to whom it belonged, according to their respective interests therein. It might, no doubt, have been stipulated that after serving the purpose of a security for the loan it was to go to Robson or his representatives, but no such stipulation was made.

I therefore agree in the result at which the Lord Ordinary has arrived, and am of opinion that his interlocutor brought under review ought to be adhered to.

LORD GIFFORD.—I should have had some difficulty in holding that the Act 1696 was not applicable to this case. I prefer to put my judgment on the ground that the evidence satisfies the Act. I think it is quite sufficiently proved by competent evidence that the policy of assurance, although in the name of Robson alone, really belonged to the firms of Forrester and Robson and Cowie and Son, and was part of their assets. We have, in the first place, the proposal for a loan, which must be read in conjunction with the proposal for an insurance. It is proved by the books of Forrester and Robson, which must be held as Robson's writ, that the loan was a joint adventure, and that the policy was taken out merely as part of the transaction, and to be used as a security for the loan. Now, if the loan was a company matter, it is difficult to see how the policy could be an individual concern. The two formed one transaction, and are really inseparable. Then we have letters and receipts from Forrester and Robson to Cowie, some of them holograph of Robson, asking and acknowledging payment of Cowie's share of the premiums. What had Cowie to do with the premiums if the policy was a separate transaction of Robson's? The documentary evidence also shews that the policy was part of the loan transaction, and was effected and paid for by the company just as the loan itself was.

THE COURT adhered, but of consent found no expenses due.

T. J. GORDON, W.S.—RONALD, RITCHIE, & ELLIS, W.S.—Agents.

THE SCHOOL BOARD OF THE PARISH OF SELKIRK, First Parties.—
Sol.-Gen. Watson—Pearson.
THE SCHOOL BOARD OF THE BURGH OF SELKIRK, Second Parties—
D.-F. Clark—Kinnear.

No. 131.

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Selkirk Parish School Board v. Selkirk Burgh School Board.

School—School Board—Education Act, 1872, *sec.* 23.—Where, prior to the passing of the Education Act, 1872, the parish school of a parish partly landward, partly burghal, was situate within the burgh, *held* that, on separate school boards being elected for the landward district and the burgh, in virtue of the 23d section of that Act, the school became vested in the school board of the landward district, and not in that of the burgh.

THIS special case was brought for the purpose of determining whether, under the provisions of the Education (Scotland) Act, 1872, the old parish school of the parish of Selkirk, together with teacher's house and land attached thereto, or either of them, was vested in and under the management of the school board of the parish of Selkirk, the party of the first part, or of the school board of the burgh of Selkirk, the party of the second part.

2D DIVISION. R.

The case set forth that, prior to the passing of the Act of 1872, the parish of Selkirk was partly landward, and partly burghal, and included the royal burgh of Selkirk. According to the census of 1871 the population of the landward district of the parish was about 1000, and the population of the burgh about 4500.

At an early period, prior to the passing of the statute of 1696, entituled "Act for settling of Schools," there were established within the parish and burgh of Selkirk a grammar or Latin school and an English school. These schools were carried on under one roof, but they were separate schools, and taught by separate teachers. It was to the former of these schools that the question in this case had reference. The latter soon came to be known as the burgh school, and was maintained and managed entirely by the corporation.

The corporation of the burgh of Selkirk, as proprietors of lands within the landward part of the parish, were always amongst the largest heritors of the parish. In the year 1718 a vacancy having occurred in the mastership of the grammar school, the corporation appointed to the vacancy without the consent of the other heritors. The validity of this appointment was disputed in the Court of Session, on the ground that the corporation, as a heritor, had only one vote, and that the appointment was therefore void. The matter was, however, compromised, and an agreement was entered into in 1719 whereby the corporation were, for the future, to be allowed two votes in the appointment of schoolmaster, and were taken bound to pay one-half of the salary of £200 Scots, and to furnish a schoolhouse.

This agreement was acted on by both parties from its date down to the passing of the Education Act of 1872.

The school-house was several times rebuilt, and its site changed, and the cost was always defrayed by the corporation, assisted by a voluntary contribution from the other landward heritors.

The site of the school-house was always within the burgh.

In 1863, greater accommodation being required in both schools, the burgh school, which had hitherto been under the same roof as the parish school, was removed, at the cost of the burgh, to a different site, and the whole of the old building was handed over to the parish school, which was managed and maintained as formerly until the passing of the Act of 1872.

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June 5, 1875. Selkirk Parish School Board v. Selkirk Burgh School Board.

This school was, from its foundation down to the date of the passing of the Education Act, 1872, the only parish school of the parish of Selkirk, and it was always treated as falling under the statutory provisions relating to parish schools; and, in particular, under the provisions of the Acts 43 Geo. III., cap. 54, and 24 and 25 Vict., cap. 107, but subject always to the conditions of the agreement of 1719. The school had all along been largely resorted to by the children of persons resident within the burgh, and in a lesser proportion by children of persons residing within the landward district.

In the year 1868, on the application of the schoolmaster of the parish of Selkirk, the heritors provided for him a dwelling-house and garden, in terms of the said Acts 43 Geo. III., cap. 54, and 24 and 25 Vict., cap. 107, which was the house and garden to which the question in this case referred. One-half of the cost was paid by the landward heritors other than the corporation, and the other half by the corporation, in terms of the 13th section of the said Act of 43 Geo. III.

When the Education (Scotland) Act, 1872, came into operation a question was raised, whether it had the effect of vesting the parish school and schoolmaster's house above referred to in the school board which had been elected under its provisions for the parish of Selkirk, or in that which had been elected for the burgh.

It was maintained for the first party, the school board of the parish, that the school was the parish school of the landward district of a parish partly landward and partly burghal, and as such was, together with teachers' houses and land attached thereto, vested in them and under their management, as the school board of the parish of Selkirk, under the provisions of the Education (Scotland) Act, 1872, and, in particular, under the 23d section of that Act.*

It was maintained for the second party, the school board of the burgh, that the school was not and never had been the parish school of the landward district within the meaning of the 23d section, and that the school, with its pertinents, being situated in the burgh of Selkirk, was vested in them and under their management as the burgh school board, in terms of the Act.

Argued for the first parties;—The school in question was a parish school, and admittedly situated in a burgh, but, inasmuch as it was the parish school of the landward district of a parish partly landward, partly burghal, it fell not under the rule contained in the 23d section of the Education Act, but under the exception, and was vested not in the school board of the burgh, but in the school board of the landward district, which was erected into a separate parish under the Act.

Argued for the second parties;—The exception contained in the 23d clause was intended to cover the case of parishes partly landward and partly burghal which were in the position of having two schools, one for the landward the other for the burghal part of the parish. That a parish

* 35 and 36 Vict., c. 62, the Education (Scotland) Act, 1872, sec. 23, enacted that "the parish and other schools which have been established, and now exist in any parish under the recited Acts (1696, c. 26, 43 Geo. III., c. 54, 1 and 2 Vict., c. 87, and 24 and 25 Vict., c. 107), or any of them, together with teachers' houses and land attached thereto, shall be vested in and be under the management of the school board of such parish, or if situated in a burgh, then of the school board of such burgh, unless such parish school is the parish school of the landward district of a parish partly landward and partly burghal, in which case it shall be under the management of the school board of such district from and after the election of such school board."

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school should be the parish school of the landward district of a parish partly landward, partly burghal, implied that there should be another parish school as the parish school of the burghal portion. It might well be that the school of the landward district might be built near the burgh, and when the Act, of 1872 came to be applied might be found within the limits of the burgh as fixed by the 9th section,* without being any the less exclusively the parish school of the landward district as it existed before the passing of the Act. It was intended by the exception in section 23 to carry such school to the school board of the new parish; not to carry off from the burgh a school which was the parish school of both the landward and burghal district, and was situated within the burgh.

Besides, the reading contended for by the first parties would leave no school to fall under the rule contained in the 23d section, and if situated in a burgh to become vested in the school board of a burgh. The exception would swallow up the rule. For (1) the recited Acts did not establish burgh schools proper, and therefore the 23d section did not apply to them; and (2) the exception would carry all schools partly landward, partly burghal, though situated in the burgh, to the school board of the landward district.

At advising the opinion of the Court was delivered by the

LORD JUSTICE-CLERK.—This special case has been presented to us by the school boards of the parish and burgh of Selkirk, who have a question depending between them as to the property of certain school buildings and the teacher's house and land attached thereto, which are situated within the burgh of Selkirk, but which prior to the Education Act of 1872 were used as the parish school of the parish of Selkirk.

The facts of the case are very fully and at the same time fairly stated by the parties, who have shewn both wisdom and moderation in adopting the method of a special case for the determination of their dispute.

It is the opinion of the Court, which I am now to announce, that the school buildings in question belong to the school board of the parish of Selkirk.

I may make this preliminary observation, that I do not think the prior agreements from 1719 down to 1863 in regard to the educational arrangements of the burgh and parish of Selkirk enter much into the decision of the present question. It is admitted that the school was, prior to the passing of the Education Act of 1872, the proper and only parochial school of the parish of Selkirk maintained by the heritors, of whom the burgh was one. The contributions of the burgh under those agreements, though considerable, do not affect its character.

The present question depends mainly upon the construction to be put upon the 23d section of the Education Act, 1872. But in order to arrive at the proper interpretation of that section we must consider the previous sections which lead up to it.

The Act first defines in section 1 the terms "parish" and "burgh."

"Parish" means "any parish which does not wholly consist of a burgh or

* 35 and 36 Vict., c. 62, the Education (Scotland) Act, 1872, enacts, sec. 9, that "the area of every such burgh shall, for the purposes of this Act, be taken to be the limits within which the municipal, or where there are no municipal, then within which the police assessments thereof are levied."

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part of a burgh within the meaning of this Act, and shall include any school district formed under this Act."

"Burgh" signifies (1) any royal burgh, (2) any parliamentary burgh, and (3) certain populous places not falling under the first two heads, and specified in schedule A appended to the Act.

Then the 8th section provides that "within twelve months after the passing of this Act (6th August 1872) a school board shall be elected in and for each and every parish and burgh in accordance with the provisions of this Act."

And the 9th section provides that "the area of a parish shall, for the purposes of this Act, be exclusive of the area of any burgh or part of a burgh situated therein for which a school board is required to be elected, and the area of every such burgh shall, for the purposes of this Act, be taken to be the limits within which the municipal, or where there are no municipal, then within which the police assessments thereof are levied."

The effect of these provisions is that there can no longer be a parish, in the sense of the Act, which is partly burghal, partly landward. When at the date of the Act coming into operation a parish had a district partly within the municipal or police boundaries of a burgh, and partly landward, all that lies within the municipal or police boundaries is carried to the new burgh school board, and what remains is handed over to the school board of the parish.

The 23d section provides, in regard to the existing school-houses, that the parish and other schools which have been established and now exist in any parish under the recited Acts, or any of them, together with teachers' houses and land attached thereto, shall be vested in and be under the management of the school board of such parish, or, if situated within a burgh, then of the school board of such burgh. That is the general enactment, but there is introduced an exception in these words, "unless such parish school is the parish school of the landward district of a parish partly landward and partly burghal, in which case it shall be under the management of the school board of such district from and after the election of such school board." Now, these are the words which we have to construe. Any ambiguity that there may be arises upon the words "the landward district of a parish partly landward and partly burghal." But it is clear that that expression cannot refer to the time when the question shall arise, because, under the operation of the Act, there can be no such thing as a parish partly landward and partly burghal. The word "parish," therefore, cannot be intended to mean a parish as after the passing of the Act, but as before the passing of the Act. It must in fact have a meaning different from that assigned to it in the interpretation clause. This, I think, will remove any difficulty which might have been felt in construing the section. To bring a school within the exception in clause 23 it is necessary—1st, that it be situated in a burgh; 2d, that prior to the passing of the Act it was the parish school of a parish partly landward and partly burghal; 3d, that it be the parish school of the landward district of such parish when the Act came into operation; and 4th, that it be the school of a district which, under the Act of 1872, comes to be managed by a school board distinct from the burgh school board.

Now, the school in question appears to fulfil all these requirements,—1st, it is situated in a burgh; 2d, prior to 1872 it was the school of a parish partly landward, partly burghal; 3d, it was the parish school of the landward district of that parish when the Act of 1872 came into force; and 4th, it was the school

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of a district which, after 1872, was to be managed by a school board distinct from the burgh school board. I know of no other description of school which could fulfil the requisites of this exception.

It was indeed maintained in argument that if this was the meaning of the exception there was no meaning left for the principal enactment, and that the construction which we are inclined to put upon the exception would have the effect of rendering the rule nugatory, for there would be no school which could fall under it. The exception would swallow up the rule. But that argument neglects to keep in view the definition of the term "burgh" in the interpretation clause of the Education Act. Several cases may be figured in which schools would fall under the rule in section 23, and not under the exception. For instance, where a school is the school of a parish lying outside a royal burgh, but wholly within the municipal or parliamentary boundary of the burgh, or where it is the school of a parish consisting wholly of a parliamentary burgh or part thereof, or of a parish lying wholly within one of the populous places enumerated in schedule A.

THIS interlocutor was pronounced:—The Court "are of opinion, and find in answer to the first query that, under the provisions of the Education (Scotland) Act, 1872, the school in question, together with the teacher's house and land attached thereto, is vested in and under the management of the party hereto of the first part as the school board of the parish of Selkirk," &c.

GIBSON & STRATHERN, W.S.—DOW & LOCKHART, S.S.C.—Agents.

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Kinnear v. Kinnear's Trustees.

JOHN BOYD KINNEAR, First Party.—*M'Laren.*
JOHN HOOD AND OTHERS (Charles Kinnear's Trustees), Second Parties.—*Adam.*

Entail—Trust—Direction to Entail Moveables.—A testator by his trust-disposition and settlement directed his trustees "to settle and secure my lands and estate of K. herein specially before conveyed, and the plate, paintings, and other plenishing in the mansion-house thereof, . . . by deed or deeds of strict entail," to his eldest son and the heirs-male of his body, whom failing, to a series of substitutes. On the testator's death the institute under the entail, maintaining that "plate, paintings, and other plenishing" could not be made the subjects of a valid entail, objected to the trustees going through the form of executing a deed of entail to include them, and demanded that they should be delivered to him in fee-simple. In a special case presented by the institute and the trustees to have the point at issue between them determined, *held* that the testator's intention being clear, the invalidity of the proposed entail was not so manifest as to entitle the Court, in the absence of the substitute heirs of entail, to refuse effect to the testator's directions, and that the trustees were bound to include "the plate, paintings, and other plenishing" in the deed of entail to be executed by them, leaving the institute to challenge it in a competent process with the proper contradictors.

Question, Whether it could competently be made a condition of a strict entail that the heirs of entail in succession should always possess certain specific moveable subjects.

2D DIVISION. R.

THE late Charles Kinnear of Kinloch, in the county of Fife, who died 9th April 1874, by his trust-disposition and settlement and codicil conveyed to John Hood and others, the parties of the second part to this special case, as trustees, his whole estate, heritable and moveable, and directed them, *inter alia,* "to settle and secure my lands and estate

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This school was, from its foundation down to the date of the passing of the Education Act, 1872, the only parish school of the parish of Selkirk, and it was always treated as falling under the statutory provisions relating to parish schools; and, in particular, under the provisions of the Acts 43 Geo. III., cap. 54, and 24 and 25 Vict., cap. 107, but subject always to the conditions of the agreement of 1719. The school had all along been largely resorted to by the children of persons resident within the burgh, and in a lesser proportion by children of persons residing within the landward district.

In the year 1868, on the application of the schoolmaster of the parish of Selkirk, the heritors provided for him a dwelling-house and garden, in terms of the said Acts 43 Geo. III., cap. 54, and 24 and 25 Vict., cap. 107, which was the house and garden to which the question in this case referred. One-half of the cost was paid by the landward heritors other than the corporation, and the other half by the corporation, in terms of the 13th section of the said Act of 43 Geo. III.

When the Education (Scotland) Act, 1872, came into operation a question was raised, whether it had the effect of vesting the parish school and schoolmaster's house above referred to in the school board which had been elected under its provisions for the parish of Selkirk, or in that which had been elected for the burgh.

It was maintained for the first party, the school board of the parish, that the school was the parish school of the landward district of a parish partly landward and partly burghal, and as such was, together with teachers' houses and land attached thereto, vested in them and under their management, as the school board of the parish of Selkirk, under the provisions of the Education (Scotland) Act, 1872, and, in particular, under the 23d section of that Act.*

It was maintained for the second party, the school board of the burgh, that the school was not and never had been the parish school of the landward district within the meaning of the 23d section, and that the school, with its pertinents, being situated in the burgh of Selkirk, was vested in them and under their management as the burgh school board, in terms of the Act.

Argued for the first parties;—The school in question was a parish school, and admittedly situated in a burgh, but, inasmuch as it was the parish school of the landward district of a parish partly landward, partly burghal, it fell not under the rule contained in the 23d section of the Education Act, but under the exception, and was vested not in the school board of the burgh, but in the school board of the landward district, which was erected into a separate parish under the Act.

Argued for the second parties;—The exception contained in the 23d clause was intended to cover the case of parishes partly landward and partly burghal which were in the position of having two schools, one for the landward the other for the burghal part of the parish. That a parish

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school should be the parish school of the landward district of a parish partly landward, partly burghal, implied that there should be another parish school as the parish school of the burghal portion. It might well be that the school of the landward district might be built near the burgh, and when the Act. of 1872 came to be applied might be found within the limits of the burgh as fixed by the 9th section,* without being any the less exclusively the parish school of the landward district as it existed before the passing of the Act. It was intended by the exception in section 23 to carry such school to the school board of the new parish; not to carry off from the burgh a school which was the parish school of both the landward and burghal district, and was situated within the burgh.

Besides, the reading contended for by the first parties would leave no school to fall under the rule contained in the 23d section, and if situated in a burgh to become vested in the school board of a burgh. The exception would swallow up the rule. For (1) the recited Acts did not establish burgh schools proper, and therefore the 23d section did not apply to them; and (2) the exception would carry all schools partly landward, partly burghal, though situated in the burgh, to the school board of the landward district.

At advising the opinion of the Court was delivered by the

LORD JUSTICE-CLERK.—This special case has been presented to us by the school boards of the parish and burgh of Selkirk, who have a question depending between them as to the property of certain school buildings and the teacher's house and land attached thereto, which are situated within the burgh of Selkirk, but which prior to the Education Act of 1872 were used as the parish school of the parish of Selkirk.

The facts of the case are very fully and at the same time fairly stated by the parties, who have shewn both wisdom and moderation in adopting the method of a special case for the determination of their dispute.

It is the opinion of the Court, which I am now to announce, that the school buildings in question belong to the school board of the parish of Selkirk.

I may make this preliminary observation, that I do not think the prior agreements from 1719 down to 1863 in regard to the educational arrangements of the burgh and parish of Selkirk enter much into the decision of the present question. It is admitted that the school was, prior to the passing of the Education Act of 1872, the proper and only parochial school of the parish of Selkirk maintained by the heritors, of whom the burgh was one. The contributions of the burgh under those agreements, though considerable, do not affect its character.

The present question depends mainly upon the construction to be put upon the 23d section of the Education Act, 1872. But in order to arrive at the proper interpretation of that section we must consider the previous sections which lead up to it.

The Act first defines in section 1 the terms "parish" and "burgh."

"Parish" means "any parish which does not wholly consist of a burgh or

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part of a burgh within the meaning of this Act, and shall include any school district formed under this Act."

"Burgh" signifies (1) any royal burgh, (2) any parliamentary burgh, and (3) certain populous places not falling under the first two heads, and specified in schedule A appended to the Act.

Then the 8th section provides that "within twelve months after the passing of this Act (6th August 1872) a school board shall be elected in and for each and every parish and burgh in accordance with the provisions of this Act."

And the 9th section provides that "the area of a parish shall, for the purposes of this Act, be exclusive of the area of any burgh or part of a burgh situated therein for which a school board is required to be elected, and the area of every such burgh shall, for the purposes of this Act, be taken to be the limits within which the municipal, or where there are no municipal, then within which the police assessments thereof are levied."

The effect of these provisions is that there can no longer be a parish, in the sense of the Act, which is partly burghal, partly landward. When at the date of the Act coming into operation a parish had a district partly within the municipal or police boundaries of a burgh, and partly landward, all that lies within the municipal or police boundaries is carried to the new burgh school board, and what remains is handed over to the school board of the parish.

The 23d section provides, in regard to the existing school-houses, that the parish and other schools which have been established and now exist in any parish under the recited Acts, or any of them, together with teachers' houses and land attached thereto, shall be vested in and be under the management of the school board of such parish, or, if situated within a burgh, then of the school board of such burgh. That is the general enactment, but there is introduced an exception in these words, "unless such parish school is the parish school of the landward district of a parish partly landward and partly burghal, in which case it shall be under the management of the school board of such district from and after the election of such school board." Now, these are the words which we have to construe. Any ambiguity that there may be arises upon the words "the landward district of a parish partly landward and partly burghal." But it is clear that that expression cannot refer to the time when the question shall arise, because, under the operation of the Act, there can be no such thing as a parish partly landward and partly burghal. The word "parish," therefore, cannot be intended to mean a parish as after the passing of the Act, but as before the passing of the Act. It must in fact have a meaning different from that assigned to it in the interpretation clause. This, I think, will remove any difficulty which might have been felt in construing the section. To bring a school within the exception in clause 23 it is necessary—1st, that it be situated in a burgh; 2d, that prior to the passing of the Act it was the parish school of a parish partly landward and partly burghal; 3d, that it be the parish school of the landward district of such parish when the Act came into operation; and 4th, that it be the school of a district which, under the Act of 1872, comes to be managed by a school board distinct from the burgh school board.

Now, the school in question appears to fulfil all these requirements,—1st, it is situated in a burgh; 2d, prior to 1872 it was the school of a parish partly landward, partly burghal; 3d, it was the parish school of the landward district of that parish when the Act of 1872 came into force; and 4th, it was the school

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of a district which, after 1872, was to be managed by a school board distinct from the burgh school board. I know of no other description of school which could fulfil the requisites of this exception.

It was indeed maintained in argument that if this was the meaning of the exception there was no meaning left for the principal enactment, and that the construction which we are inclined to put upon the exception would have the effect of rendering the rule nugatory, for there would be no school which could fall under it. The exception would swallow up the rule. But that argument neglects to keep in view the definition of the term "burgh" in the interpretation clause of the Education Act. Several cases may be figured in which schools would fall under the rule in section 23, and not under the exception. For instance, where a school is the school of a parish lying outside a royal burgh, but wholly within the municipal or parliamentary boundary of the burgh, or where it is the school of a parish consisting wholly of a parliamentary burgh or part thereof, or of a parish lying wholly within one of the populous places enumerated in schedule A.

THIS interlocutor was pronounced:—The Court "are of opinion, and find in answer to the first query that, under the provisions of the Education (Scotland) Act, 1872, the school in question, together with the teacher's house and land attached thereto, is vested in and under the management of the party hereto of the first part as the school board of the parish of Selkirk," &c.

GIBSON & STRATHERN, W.S.—DOW & LOCKHART, S.S.C.—Agents.

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Kinnear v. Kinnear's Trustees.

JOHN BOYD KINNEAR, First Party.—*M'Laren.*
JOHN HOOD AND OTHERS (Charles Kinnear's Trustees), Second Parties.—*Adam.*

Entail—Trust—Direction to Entail Moveables.—A testator by his trust-disposition and settlement directed his trustees "to settle and secure my lands and estate of K. herein specially before conveyed, and the plate, paintings, and other plenishing in the mansion-house thereof, . . . by deed or deeds of strict entail," to his eldest son and the heirs-male of his body, whom failing, to a series of substitutes. On the testator's death the institute under the entail, maintaining that "plate, paintings, and other plenishing" could not be made the subjects of a valid entail, objected to the trustees going through the form of executing a deed of entail to include them, and demanded that they should be delivered to him in fee-simple. In a special case presented by the institute and the trustees to have the point at issue between them determined, *held* that the testator's intention being clear, the invalidity of the proposed entail was not so manifest as to entitle the Court, in the absence of the substitute heirs of entail, to refuse effect to the testator's directions, and that the trustees were bound to include "the plate, paintings, and other plenishing" in the deed of entail to be executed by them, leaving the institute to challenge it in a competent process with the proper contradictors.

Question, Whether it could competently be made a condition of a strict entail that the heirs of entail in succession should always possess certain specific moveable subjects.

2D DIVISION. R.

THE late Charles Kinnear of Kinloch, in the county of Fife, who died 9th April 1874, by his trust-disposition and settlement and codicil conveyed to John Hood and others, the parties of the second part to this special case, as trustees, his whole estate, heritable and moveable, and directed them, *inter alia*, "to settle and secure my lands and estate

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of Kinloch herein specially before conveyed, and the plate, paintings, and other plenishing in the mansion-house thereof, . . . by deed or deeds of strict entail, whereby they shall dispone and convey the same, heritably and irredeemably, to John Boyd Kinnear, my eldest son, and the heirs-male of his body; whom failing, to Charles George Hood Kinnear, my second son, and the heirs-male of his body; whom failing," &c. There were then specified the different conditions, prohibitions, reservations, and provisions under which the deed of entail was to be granted, including the three cardinal prohibitions against altering the order of succession, alienating, and contracting debt; and the trust-deed then proceeded,—"Which deed of entail to be executed by my trustees shall be so framed as to bind the institute or person in whose favour the same is directly granted as well as the heirs of entail, and shall contain all clauses necessary to render the same a strict, valid, and effectual entail according to law, any special directions as to clauses herein contained in nowise derogating from my trustees' power to amend the same and add new clauses for effectually carrying out my intention and desire."

The trustees were proceeding as directed to execute a deed of strict entail of the estate of Kinloch, and they proposed to include, under this deed of entail, the plate, paintings, and other plenishing, in the mansion-house of Kinloch.

To this Mr John Boyd Kinnear, the institute heir of entail, who was the party of the first part to this special case, objected. He maintained that none of the articles just mentioned could competently be made the subjects of a strict entail; and that, in respect that the substitution of heirs to him under the fetters of an entail in the late Mr Kinnear's trust-deed as to the plate, paintings, and other plenishing in the mansion-house of Kinloch was inept, he was entitled to obtain forthwith, from the trustees, the parties hereto of the second part, a conveyance or delivery of these articles in fee-simple.

On the other hand, the trustees maintained that they were directed by the truster, and therefore bound to insert these articles in the deed of entail to be executed by them.

None of the substitute heirs of entail were parties to the special case.

The questions in law submitted to the Court were:—"(1) Whether Mr Boyd Kinnear, the party hereto of the first part, is entitled to obtain forthwith from the trustees, the parties hereto of the second part, a conveyance or delivery of the plate, paintings, and other plenishing in the mansion-house of Kinloch in fee-simple? Or, (2) Whether the trustees are bound to include in the deed of entail to be executed by them not only the heritable subjects which the truster directed to be entailed but also the said plate, paintings, and plenishing?"

Argued for Mr John Boyd Kinnear, the first party;—(1) If the object of the truster could not be carried out effectually, the grantee was entitled to a conveyance in fee-simple, and was not bound to submit to the execution of an abortive deed.[1] (2) An entail of moveables was incompetent under the Act of 1685, and was invalid even *inter hæredes*.[2] (3) The trustees were, in any view, not entitled to take any other steps to protect the moveables from the acts of the institute and other heirs of entail than merely to include them under the deed of entail.

[1] Gordon v. Gordon's Trustees, March 2, 1866, 4 Macph. 501, 38 Scot. Jur. 232.

[2] Veitch v. Young, May 25, 1808, F.C.; Baillie v. Grant, May 21, 1859, 21 D. 838, 31 Scot. Jur. 465.

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They were not entitled to make it a condition of the right of the heir to possession of the heritable estate that he should not dispose of the moveables.

Argued for the trustees, the second parties;—(1) They were specially empowered to insert in the deed of entail to be executed any clauses necessary to render the testator's intention effectual. Without maintaining that an entail of moveables would be effectual, there was no incompetency in making it a condition of holding a heritable estate under a strict entail otherwise valid that the heirs in succession should always retain possession of certain specific moveables. They were, therefore, bound to insert a condition to that effect in the entail to be executed by them, and so to carry out the testator's intention and desire. (2) It might be that an entail of moveables was not protected either by the Act of 1685, or by the Rutherfurd Act. But to speak of an entail of moveables was a misuse of terms. There might, nevertheless, be an obligation on an heir of entail in possession of a proper entailed estate to retain moveables which he would not be entitled to disregard. If he took under the will of a testator he would take subject to any condition the testator chose to impose, and could not retain the estate and disregard the conditions. (3) An entail of moveables, if not good generally, was at least good *inter hæredes*, and they were therefore bound to execute the deed as directed by the testator *valeat quantum*.[1] (4) At any rate, to give the first party the benefit of the case of Gordon v. Gordon's Trustees, it was necessary for him to shew that the deed of entail, if executed, would be *ex facie* invalid, and this he had failed to do.

At advising the opinion of the Court was delivered by

LORD NEAVES.—This case belongs to a class involving questions of considerable delicacy. A testator appoints a deed to be executed in favour of certain persons under certain conditions or restrictions. After his death, instead of his intentions being literally carried out, it is proposed by his heir, or other person favoured, that his directions be ignored, and that the intended deed be not executed, on the ground that if his directions were followed they would be unavailing to attain the end he had in view.

That is undoubtedly a position which our law and practice recognises as competent to the heir in certain cases. Gordon of Cluny's case is an example of this. It arose in a different form from the present, because the form of a special case, whether suitable to the occasion or not, was not then authorised, and there was no choice but to try the question by declarator. The testator, Colonel Gordon, had directed his trustees to entail lands to be purchased with the residue of his moveable estate, which was very considerable, and this by deed of strict entail in favour of his two natural sons *nominatim*, and their heirs whatsoever. The question raised was, whether the testator's directions were to be carried out, or whether the person first favoured was to receive the property at once in fee-simple, upon the ground that no such entail was feasible. It was held that he was entitled to receive the property at once and in fee-simple.

That is precisely what is here demanded by Mr Boyd Kinnear. And we have to consider whether the case of Gordon is a precedent which we ought to follow.

Mr Kinnear asks us, in the first question, whether he is entitled to obtain forth-

[1] Earl of Leven v. Montgomerie, 1683, M. 3217; Maule v. Maule, Dec. 2, 1817, F.C.; Sandford on Entail (ed. 1842), p. 251.

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with from the trustees a conveyance or delivery of the plate, paintings, &c., in the mansion-house of Kinloch in fee-simple. If this case were identical with that of Gordon it seems clear that, apart from the question whether the course he has taken is a proper way to raise the question, Mr Kinnear would be entitled to a conveyance or delivery of these things in terms of his demand. But I am of opinion that this case cannot be identified with or assimilated to that of Gordon. Gordon's case turned upon a point which does not find its parallel in the present case. If we are to sanction the disregard of the testator's directions, on the ground that if carried out they would be ineffectual, then we must be satisfied that this is clearly and incontrovertibly the case. If it admits of any doubt the question must be tried in a proper action with the proper contradictors having interest to try it.

In Gordon's case the direction was to execute a deed of strict entail, in terms of the "foresaid Act of the Parliament of Scotland passed in the year 1685, entituled 'Act concerning Tailzies,' of the whole of the foresaid lands so to be purchased as aforesaid, to and in favour of my said eldest son John Gordon, now Captain John Gordon, and his heirs whatsoever; whom failing, to my said youngest son, Charles Gordon, and his heirs whatsoever," &c. What that meant in the case of natural sons I do not very well know. But, apart from that difficulty the Court held that it was in law impossible to make such an entail. Taking an elementary and obvious view of the law, they said that a destination to a person and his heirs "whatsoever" is not an entail. The essential characteristic of an entail is that the natural order of succession should be tailzied or cut off; whereas an entail in favour of a man and his heirs whatsoever would be a direction to preserve the natural order of succession at common law, which is not the course contemplated or authorised by the Act 1685. The Court, therefore, held that the testator's directions were just an attempt to make an entail which would be suicidal, and instead of enforcing the testator's directions to his trustees to make a deed, which, if made, would be a nullity, they ordered the property to be conveyed to the pursuer in fee-simple. The ground of judgment is very clearly stated in the opinion of Lord President M'Neill.

Now, if the present case came up to that of Gordon, I should hold the latter to be a precedent which we might follow. But it cannot be said, in the absence of all those who are interested to object, that the directions of this testator are so self-contradictory and self-destructive that we are entitled to pass them by, and order the property to be conveyed or delivered to the claimant at once in fee-simple. I give no opinion on the question whether or not the directions of the testator could be carried out in such a way as to be effectual. It may be possible to secure moveable property in the way he desired, or it may not. But I do not feel myself called upon to decide that question where the competent parties to try it are not here. It is sufficient to say that the nullity or self-contradiction of the testator's directions is not so clear and so well recognised as to entitle us in this short-hand way to pass by those directions, and do that which would, at any rate, be contrary to his intention.

There have been decisions and dicta which more or less nearly touch the point on its merits, but the current of authority is not so clear as to warrant us in sanctioning the neglect of the testator's directions, and in giving in fee-simple what he desired to be entailed.

If the heir is correct in the view he takes of his right then the executing of the requisite deeds is only postponing for a time those rights. He will suffer no

substantial injury from the form being gone through, which, with all parties in the field, we may ultimately find nugatory and null.

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We are, therefore, of opinion that the first question in the special case should be answered in the negative, and the second in the affirmative.

THE COURT was of opinion, and found "that Mr Boyd Kinnear, the party of the first part hereto, is not entitled to obtain from the trustees, the parties hereto of the second part, a conveyance or delivery of the plate, paintings, and other plenishing in the mansion-house of Kinloch, in fee-simple; and that the said trustees are bound to include in the deed of entail to be executed by them not only the heritable subjects which the truster directed to be entailed but also the said plate, paintings, and plenishing, and decern."

MELVILLE & LINDESAY, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

GEORGE PENDREIGH, Petitioner and Appellant.—*D.-F. Clark*—*J. A. Crichton.*

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Bankrupt—Discharge—Preference—Statutes 19 *and* 20 *Vict. c.* 79, *sec.* 151, *and* 23 *and* 24 *Vict. c.* 33, *sec.* 3.—The 151st section of the Bankruptcy Act, 1856, enacts that if a bankrupt shall have been personally concerned in or cognisant of the granting of any preference he shall forfeit all right to a discharge.

In an application by a bankrupt for his discharge, after the lapse of two years from the date of the sequestration, *held* that the terms of the above section were imperative, and that the Court was bound, *ex proprio motu*, although there was no appearance for the trustee and creditors, to enforce them.

1ST DIVISION. Sheriff of Midlothian. M.

Vide ante, Carter (Pendreigh's Trustee) v. M'Laren and Co., Oct. 26, 1869, 8 Macph. 64, 42 Scot. Jur. 33, H. of L. May 9, 1871, 9 Macph. H. L. 49, 43 Scot. Jur. 381.

George Pendreigh, whose estates, as an individual and as a partner of the firm of J. and G. Pendreigh, were sequestrated on 16th March 1869, presented, on 27th October 1874, to the Sheriff of Midlothian, a petition for his discharge, under section 146 of the Bankruptcy Act, 1856.

There was produced along with the petition this report of the trustee on the sequestrated estate, Mr Frederick Hayne Carter, C.A.,—"In terms of section 146th of the 'Bankruptcy (Scotland) Act, 1856,' the trustee begs to report that the aforesaid George Pendreigh has, except in one respect, complied with all the provisions of the statute; and, in particular, that he has made a fair discovery and surrender of his estate; that he has attended the diets of examination; and that his bankruptcy has arisen from innocent misfortunes, as well as heavy losses in business, and not from culpable or undue conduct.

"The trustee regrets, however, to report that the said bankrupt was concerned in the granting of preferences to two creditors in the sequestration. See the case of Carter (Pendreigh's Trustee) v. D. M'Laren and Company, 9th May 1871, 9 Macph. (H. of L.) 49."

No appearance was made by the trustee or by any of the creditors.

On 22d January 1875 the Sheriff-substitute (Hamilton) ordered a copy of the proceedings to be transmitted to the Accountant in Bankruptcy "that he may have an opportunity of reporting whether the bankrupt has fraudulently concealed any part of his estates or effects, or whether he has wilfully failed to comply with any of the provisions of the Bankrupt Statutes."

The Accountant, on 2d February 1875, reported that "in his opinion, the trustee's report, so far as regards the two points specified in the Sheriff's interlocutor, is correct, and that there is nothing unfavourable to the bankrupt to report on these two heads.

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"The Accountant begs to draw the Sheriff's attention to the concluding paragraph in the trustee's report on the bankrupt's conduct, in which he reports that the bankrupt was concerned in the granting of preferences to two creditors in the sequestration, and refers to the case of Carter (Pendreigh's Trustee) v. D. M'Laren and Company. The Accountant, however, is of opinion that, even assuming that the bankrupt was concerned in the granting of the preferences above mentioned, it was not an act of fraudulent concealment, such as is referred to in the 3d section of the 'Bankruptcy Amendment (Scotland) Act, 1860.'" [1]

The Sheriff-substitute (Hallard), on 5th March 1875, pronounced this interlocutor:—"In respect the trustee reports that the petitioner was concerned in the granting of preferences to two creditors in his sequestration, finds, in terms of the 151st section of the 'Bankruptcy (Scotland) Act, 1856,' [2] that the petitioner has forfeited all right to a discharge: Therefore refuses the prayer of the petition, and decerns." *

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[1] 23 and 24 Vict. c. 33, sec. 3.—"The said Court, in either Division thereof, or the Lord Ordinary, or the Sheriff, may refuse the application for the discharge of any bankrupt, although two years have elapsed from the date of the sequestration, and although no appearance or opposition shall be made by or on the part of any of the creditors, if it shall appear from the report of the Accountant in Bankruptcy or other sufficient evidence that the bankrupt has fraudulently concealed any part of his estate or effects, or has wilfully failed to comply with any of the provisions of 'The Bankruptcy (Scotland) Act, 1856.'"

[2] 19 and 20 Vict. c. 79, sec. 151.—"If the bankrupt shall have been personally concerned in or cognisant of the granting, giving, or promising any preference, gratuity, security, payment, or other consideration, or in any secret or collusive agreement or transaction as aforesaid, he shall forfeit all right to a discharge, and all benefits under the Act, and such discharge, if granted, either on or without an offer of composition, shall be annulled; and the trustee or any one or more of the creditors may apply by petition to the Lord Ordinary to have such discharge annulled accordingly."

* "NOTE.—The foregoing judgment has been pronounced with regret and with much hesitation. But the terms of the trustee's report, when taken along with the 151st section of the statute, seem to exclude any other result.

"The Bankruptcy Act of 1856 (section 146) makes it imperative to grant a discharge after the lapse of the statutory two years, when no appearance is made to oppose it. That provision has been altered by section 3 of the amending Act of 1860. The Lord Ordinary or Sheriff may refuse, although no appearance or opposition be made, which is the case here, 'if it shall appear from the report of the Accountant in Bankruptcy, or other sufficient evidence, that the bankrupt has (1) fraudulently concealed any part of his estate or effects, or (2) has wilfully failed to comply with any of the provisions of the Bankruptcy (Scotland) Act, 1856.'

"On the two points remitted to him under the statute of 1860 the Accountant in Bankruptcy entirely absolves the petitioner. There is no fraudulent concealment. There is no wilful failure to comply with any statutory requisite.

"Does the case, then, go back to the statute of 1856, and must the discharge be granted in respect no one appears to oppose? Can the 151st section of that statute be thus shut out altogether, in respect there is no one here to plead it against the petitioner?

"The Sheriff-substitute owns that he was at one time much impressed with this view, as also with the safeguard provided in the final words of section 151 that any creditor may hereafter open up and obtain the annulment of any discharge granted, if he can shew that it is liable to objection under that enactment. It may be pleaded to prevent the discharge, or it may be pleaded to annul the discharge, but it must be pleaded, and there is no one pleading it here, as the petition is unopposed.

"But the Sheriff-substitute has unwillingly come to be of opinion that under section 3 of the later statute he is bound, even in absence of all opposition, to

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The petitioner appealed under the 170th section of the Bankruptcy Act, 1856.

Argued for him;—After the lapse of two years from the date of the sequestration the bankrupt was entitled, under the provisions of the 146th section of the Act of 1856, to his discharge if no creditor appeared to oppose. He was prepared to make the declaration required by the 147th section, that "he has not granted or promised any preference or security, nor made or promised any payment, nor entered into any secret or collusive agreement or transaction to obtain the concurrence of any creditor to his discharge." The 151st section did not apply, because the bankrupt could not be held to have been "personally concerned in or cognisant of" the granting of the preference founded on. Nor could the provisions of that section be enforced against him under any circumstances unless pleaded by the trustee or an opposing creditor. And lastly, the 3d section of the amending Act of 1860 only authorised the Court *ex proprio motu* to refuse a petition for discharge after two years have elapsed where it appeared (1) that the bankrupt had fraudulently concealed any part of his estate or effects, or (2) had "wilfully failed to comply with any of the provisions" of the Bankruptcy Act, 1856. Admitting that giving a preference might be held a failure to comply with these provisions, the giving of that preference must be wilful, implying moral delinquency, to entitle the Court under the 3d section of the Act, 1860, to enforce *ex proprio motu*, and without any opposition on the part of creditors, the provisions of the 151st section of the Act of 1856.

LORD PRESIDENT.—No doubt the 151st section of the Bankruptcy Act, 1856, is a very stringent and hard provision; but we must take it for granted that the Legislature had good reason for enacting it, and must give it effect.

The 150th section is also a severe provision in the case of a creditor who has obtained his preference without fraud. For however much he may be innocent of fraud, and actuated by the desire merely to expedite an arrangement among the body of creditors, still if he comes within the letter of that section he forfeits his debt and the penalty besides.

We were of opinion in the case of Carter v. M'Laren and Co.[1] that the 150th section contained certain words, "if no cause be shewn to the contrary," which enabled us to consider whether the preference was fraudulently obtained or not. But we were set right by the House of Lords,[2] who seem to me to have construed the section very much as if these words were not there at all.

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determine the question whether or not the bankrupt is in law entitled to obtain his discharge. This question must be determined not merely under the Act of 1860, but under the Act of 1856, of which the force and effect are fully reserved. The trustee reports that the bankrupt has been concerned in granting preferences. Section 151st attaches forfeiture of all right to a discharge as a penalty for that offence. The conclusion seems irresistible.

"In the able argument with which the Sheriff-substitute was favoured, reference was made to the case of Cooper, 5th November 1872 (11 Macph. 38, 45 Scot. Jur. 29.) It was pressed as an anomaly to refuse the discharge here, where there was no moral blame, while in that case a bankrupt convicted of embezzling trust-funds was found entitled to obtain it, mainly on the ground that sufficient expiation had been made by undergoing sentence of three months' imprisonment. The Sheriff-substitute feels that anomaly very strongly. But to Cooper's case the 151st section of the statute did not apply. Here it seems to interpose an inflexible barrier."

[1] October 26, 1869, 8 Macph. 64, 42 Scot. Jur. 33.

[2] May 9, 1871, 9 Macph. H. L. 49, 43 Scot. Jur. 381.

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The 151st section is even more absolute and imperative in its terms than the 150th. Its words in fact could not be plainer, and though it bears hardly in the present case I am of opinion that we have no choice but to give it effect.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT refused the appeal.

WADDELL & M'INTOSH, W.S.—Agents.

No. 134. June 7, 1875. Duke of Montrose v. Earl of Camperdown, &c.

THE DUKE OF MONTROSE, Pursuer.—*D.-F. Clark—Keir.*
THE EARL OF CAMPERDOWN, Defender.
THE MINISTER OF KILMARONOCK, Defender.—*Sol.-Gen. Watson—Balfour.*

Teinds—Sub-valuation—Approbation.—In an action brought in the Teind Court in 1874 for approbation of a report of sub-commissioners dated in 1629, valuing the teinds of certain lands, which merely reported that all parties being summoned and called there compeared the heritor, "and is cōtent that the auld rentall of the said lands of . . . stand in tyme cuming as it is and hes bein, to wit, xij bolls meill, baith for p'sonage and viccarage teynds in cais the titular be yr^wt^ cōtentit." Objection to the report, to the effect that the sub-commissioners had not pronounced any direct finding as to the value of the teinds of the lands, *repelled*, and decree of approbation pronounced.

Observed (*per* Lord President) that where an old rental was produced, either by the titular against the heritor, or by the heritor against the titular, the party entitled to object in either case being duly summoned, and not appearing, the sub-commissioners might report the rental as the true value of the teinds.

TEIND COURT. Teind Clerk.

THE Duke of Montrose, as proprietor of lands in the parish of Kilmaronock, raised this action of approbation of the report of the sub-commissioners for valuing the teinds of lands in the Presbytery of Dumbarton, dated 1629-30, against the Earl of Camperdown, as the titular, and the Rev. William B. S. Paterson, minister of the parish.

An objection was raised by the minister to the approbation of the valuation of the lands of Wester and Mid Catter belonging to the Duke.

The report of the sub-commissioners, so far as affects the present question, was as follows:—

"Kilmaronock Paroche.

"Att Dumbartane the third day of September @no Jajvic. and twentie nyne yeiris:

"Conveinit Wm. Tempill of Fulwood c'vnar; Ion Conyghame of Drumquhaskill, &c.

"The qlk. day anent the valuaoun of the trew worth of the lands w^t^in the said parochin of Kilmaronok and shrdme. of Dumbartane In stok @ teynd the heritors being duly subit to haif cōperit and nane cōperand, The sub commissioners c'tinewis the valuaoun of the saids till thair first meitting and ordanes that the haill heritors and titular be subit at the fischalls instance cōforme to the proces.

"At Dumbartane the third of December 1629.

"Convenit Wm Tempill of Fulwod, C'venar, &c.

"The qlk. day p'tiss sūmoundit being callit upoun cōforme to the process:

"Compeirit Thōas Buchanane of Midcattir, lyand within the parochin of Kilmaronok, and is cōtent that the auld rentall of the said lands of Midcattir stand in tyme cūming as it is and hes bein, to wit, xij bolls meill, baith for p'sonage and viccarage teynds in cais the titular be yr^wt^ cōtentit."

. . . . . .

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"Att Dumbartane the sevint of Januar 1630,—
"Convenit Walter McAulay of Ardincapill, &c.
"The qlk. day all p'tiis being callit upoun cōforme to the proces:
"Compeirit James Lekkie, portioner of Westir Cattir, for himself, and Pat. Lekkie, his broyr, equall portioner wt him of the said lands, and yt the said James for him selff, and in name of his said broyr, Is cōtent that the auld rentall of the saids lands stand in tyme cūming as it is and has bein thir xl yeiris bypast, swa that the titular be cōtentit yrwt, to wit . . . ix bolls meill for the p'sonage teynd yrof wt v merkes of viccarage yeirlie."

. . . . . .

The minister objected to the approbation of the sub-valuation, inasmuch as it did not bear either (1) that proof of the rental or value of the lands or teinds had been led, or (2) that the minister was cited or appeared, or (3) that the titular was contented that the old rental should stand in time coming as it had in time byepast, and inasmuch as (4) the sub-commissioners did not find or declare the quantities of victual and sums of money stated in the old rental to be the value, nor did they report that they were satisfied that these quantities and sums were the value of the teinds of the lands either in respect of the consent of parties or the non-opposition of the titular, or upon any other ground.

Argued for the pursuer;—It was sufficient that the report of the sub-commissioners bore that all parties were called. Neither the titular nor the minister appearing to oppose, they were entitled to accept the old rentals produced as determining the value of the teinds without farther probation.* There could be no doubt that though they did not expressly value the teinds at the amount of the old rental such was their implied intention.[1]

Argued for the minister;—The sub-commissioners had reported in the present case without completing their duty. Having got something towards a judgment in the shape of an old rental they recorded that, but neither pronounced, nor intended to pronounce, any judgment upon the true value of the teinds.

LORD PRESIDENT.—The only objection to the validity of this valuation which the minister now insists in is one taken to the form in which the report of the sub-commissioners is made, as far as regards the lands of Mid and Wester Catter. It has been argued for him that neither as to the one nor the other of these lands is there anything that can properly be called a valuation contained in the report of the sub-commissioners but that what is contained in the report having reference to these lands is something altogether different from a valuation.

* The King's letter of February 1628 declared,—
"That old rentals shall stand for a valuation when the parties consent or do not object thereto."
This letter the Lords Commissioners, on 22d February 1628, ratified by minute in the following terms:—
"22d February 1628.—Anent old rentals to stand for valuations—
"The Lords ratifies his Majesties letters, whereby it declares that old rentals should stand for valuation if the parties make no opposition."
Further, the Lords Commissioners, by their minute of 2d March 1631, found and declared as follows:—
"2d March 1631.—The Lords sustanes the valuations upon a rentall without probation holden *pro confesso*."
See Connell, vol. ii., Ap. p. 78, *et seq.*

[1] Richmond v. Officers of State, July 19, 1871, 9 Macph. 1020, 43 Scot. Jur. 562.

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Now, the presumption, at all events, is against that contention. For although the sub-commissioners may not have been professional men, skilled in drawing legal documents, they appear to have had a good general notion of what was required of them, and that was to fix in all time coming the value of the teinds of each parcel of lands, and report that to the commissioners. They received directions how they were to proceed in ascertaining this value in the different circumstances that might arise. And among other things that were told them very authoritatively was this—"That old rentals shall stand for a valuation when the parties consent or do not object thereto."—King's letter of February 1628. This was repeated in different words but to the same effect, viz. "that old rentals should stand for a valuation if the parties make no opposition."—Minute of commissioners, 22d February 1828. Another form of this direction is to be found in one of the Acts of the commissioners of date 2d March 1631—"The Lords sustanes the valuations upon a rentall without probation holden *pro confesso*." I take all this to mean that though no other proof of actual value was brought yet if an old rental was produced and the party entitled to object failed to appear on being duly cited he was to be held confessed. That seems to me to be the result reduced into a rule and acted upon in practice in the commissioners' deliverance of 1631.

Now, there is nothing inconsistent with this in the report which we have regarding these lands of Mid and Wester Catter.

With regard to Mid Catter we have this statement,—"Compeirit Thōas Buchanane of Midcattir, lyand within the parochin of Kilmaronok, and is cōtent that the auld rentall of the said lands of Midcattir stand in tyme cūming as it is and hes bein, to wit, xij bolls meill, baith for p'sonage and viccarage teynds in cais the titular be yr^{wt} cōtentit."

And with regard to Wester Catter we have the statement that James Leckie appeared for himself and his brother portioners in the lands, and "is cōtent that the auld rentall of the said lands stand in tyme cūming as it is and has bein thir xl yeiris bypast, swa that the titular be cōtentit yr^{wt}, to wit, ix bolls meill for the p'sonage teynd y^{r}of w^{t} v merkes of viccarage yeirlie."

Now, we have seen that if an old rental is produced, either by the titular against the heritor, or by the heritor against the titular, the party entitled to object in either case being duly summoned and not appearing, that rental may be reported by the sub-commissioners as the true value of the teinds. That is just what is done here. The rentals, called in one case merely the "auld rentall," and in the other the "auld rentall as it is and has bein this xl years by-past," are produced by the heritors, and the titular being duly summoned opposes nothing to them, and the sub-commissioners therefore report them, in language which seems to be a perfectly distinct expression of what they intended, namely, that the valuation as fixed by the rentals should be the valuation in all time coming.

Apart altogether from the great respect which we have been taught by a recent decision to pay to the merest expression of everything that calls itself a sub-valuation, I should not have had much difficulty in sustaining the language here used as quite sufficient to express the views of the sub-commissioners, provided the document is what it bears to be, viz. their report.

Lord Deas.—The main objection taken to this valuation is, that it was necessary that the sub-commissioners should give their own judgment as to the value, and that here they gave no judgment.

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Now, apart from any precedent, I should have been disposed to say that such a judgment might be implied. It would be too strict to hold that it must be set forth expressly that they valued the teinds of each parcel of lands at so much. A clear indication of their opinion of the value is all that could be reasonably required.

But in the case of Richmond[1] we have, I think, a precedent, for unless this doctrine had been sanctioned we could not there have come to the decision which we did. The only difference between that case and this is, that there the titular was present, while here, although summoned, he did not appear. But that does not make a difference which will support the defenders' contention that express words of judgment are required. The presence or absence of the titular does not affect that question. There is quite enough here to indicate the judgment, and I therefore concur with your Lordship in approving of this sub-valuation.

LORD ARDMILLAN, LORD MURE, and LORD CRAIGHILL concurred.

THE COURT pronounced this interlocutor:—"Repel the pleas stated for the defender, and ratify, allow, and approve: Find and declare in terms of the conclusions of the libel, but find no expenses due, and decern."

DUNDAS & WILSON, C.S.—GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—Agents.

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Bruce's Trustees v. Bruce.

2D DIVISION.

R.

COL. HAMILTON BRUCE'S TRUSTEES.—*Moncreiff—G. Watson.*
ANDREW HAMILTON TYNDALL BRUCE, Second Party.—*Lee—Low.*

Succession—Testament—Legacy—Falsa Demonstratio.—By a holograph codicil the late Col. Hamilton Bruce bequeathed to his son, Mr A. H. T. Bruce, "all the gas companies' shares that were lately bought by me from Mrs T. Bruce's trustees for £300." There were no gas companies' shares purchased by the testator for £300; but he had, about six months before the date of the codicil, purchased from Mrs Bruce's trustees, as one transaction, shares in various gas companies for £798, and some shares in a steelyard for £2. *Held* that the words "for £300" must be taken as mere *falsa demonstratio*, and were not used as taxative of the bequest, and consequently that the legatee was entitled to the whole gas shares (but not the steelyard shares), purchased by the testator from Mrs Bruce's trustees.

M'EWEN & CARMENT, W.S.—W. & J. COOK, W.S.—Agents.

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Macbride v. Hamilton and Son.

PETER MACBRIDE, Pursuer.—*D.-F. Clark—Trayner.*
HAMILTON AND SON, Defenders.—*Sol.-Gen. Watson—Mackintosh.*

Contract—Damages—Compensation—Defence.—A tradesman entered into a written contract to furnish and fit up machinery by a certain date. The time was allowed to run out without anything being done, and the tradesman having afterwards completed the work sued for the contract price. The defenders did not dispute the sufficiency of the work, but they averred that another definite time had been verbally substituted for the time originally stipulated, and they resisted payment on the ground that the pursuer had failed to execute the work within the time agreed on, and had thereby occasioned them loss to an amount

[1] *Supra*, p. 773.

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exceeding the sum sued for. *Held*, on the principle that one party is not entitled to enforce performance of a contract if he has himself violated an express condition thereof, that the defenders were entitled to have their claim of damages liquidated in the action at the pursuer's instance, and set off against the contract price.

Observed that where no time is expressly stipulated within which work is to be completed a claim for damages on the ground that the work was not completed within a reasonable time cannot be pleaded *ope exceptionis*.

Question, what would have been the result had the definite time expressly stipulated in the original contract been subsequently departed from without the substitution of another definite time.

1st Division. Lord Shand. B.

PETER MACBRIDE, copper and tinplate worker, sued Hamilton and Son, calenderers, Glasgow, for the sum of £475, being the contract price of certain apparatus fitted up by him in the premises of the defenders.

By letter dated 10th July 1873 the pursuer offered to make and fit up for the defenders in their premises in Glasgow a set of steam drying cans with framing, and a double cylinder diagonal steam-engine. The price of the whole was ultimately fixed at £395, and upon 31st October 1873 the defenders accepted the offer in writing, stipulating that the machinery should "be completed and ready for starting by the middle of January 1874, or earlier if possible."

By letters dated 13th and 15th November the parties agreed that an engine of considerably larger dimensions should be substituted for that first contracted for, the price being raised to £475, but no stipulation was made that further time should be given for the execution of the work.

The pursuer averred that he duly made and fitted up the apparatus.

The defenders did not deny that the work had been otherwise duly performed, but they explained that the pursuer failed to fit up the machinery within the time agreed on, or within any reasonable time, and that they suffered loss in consequence to an extent exceeding the amount sued for, and made the following statement;—"More particularly, the pursuer having been bound as aforesaid, under the original agreement, to fit up said machinery by the middle of January 1874, represented to the defenders, towards the end of 1873, that he would be unable to overtake the work by that time. The defenders agreed to allow delay on condition of the work being completed shortly after the time fixed. The pursuer, however, failed to take any steps for beginning the work, and in the month of April the defenders wrote him complaining of the delay, and thereupon a meeting took place between the defenders and pursuer, when an agreement was made to the effect that the defenders should forthwith sell off their old cans and frames, so as to have their premises cleared for the pursuer, and that on getting three days' notice of the time when the premises should be clear the pursuer should proceed to fit up the new machinery, and should have the same completed and ready for working within a fortnight after the premises had been cleared. In pursuance of this arrangement the defenders sold off their old cans and framing, and had their premises cleared for the new machinery upon the 13th May 1874, and on 11th May 1874 intimation was given to the pursuer that the premises would be clear and ready for him on 14th May. The pursuer accordingly took possession of the defenders' premises on or about 14th May, but instead of completing the fitting up of said machinery by 28th May as agreed on, he wrongfully failed to complete the same till the 4th of August, notwithstanding of the repeated complaints by the defenders, made both verbally and in writing, and although he knew and was informed that the defenders' business was being stopped or seriously interfered with, and that the defenders held him liable in damages for their

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loss. The time taken by the pursuer in fitting up said machinery was altogether unreasonable. The whole of that work could, with ordinary diligence, have been completed within a fortnight. The loss sustained by the defenders through the pursuer's said default is not less than £700. The defenders are in course of raising action against the pursuer for said sum." *

The pursuer pleaded;—(3) The defenders are not entitled to set off their alleged illiquid claim of damages against the pursuer's claim for work done and machinery supplied.

The defenders pleaded;—The pursuer not having duly executed his contract, and the defenders having in consequence sustained loss and damage to an amount in excess of the sum sued for, the defenders are entitled to absolvitor.

The Lord Ordinary, on 6th April 1875, pronounced the following interlocutor:—"Repels the pursuer's third plea in law, and appoints the cause to be enrolled to fix the mode of trial: Reserves all questions of expenses, and allows the pursuer, if so advised, to reclaim against this interlocutor." †

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* This action of damages was raised by the defenders at the date of lodging their defences, and the record was closed before the present action came on for debate in the Inner-House.

† "NOTE.—In October 1873 the pursuer undertook to make and fit up for the defenders, in their premises in Glasgow, a set of steam drying cans with framing, and a double cylinder diagonal steam engine.

"In accepting the pursuer's offer to execute this work the defenders stipulated in writing that the work 'shall be completed and ready for starting by the middle of January 1874, or earlier if possible.' By letters, dated 13th and 15th November 1873, the parties agreed that an engine of larger dimensions should be substituted for that first contracted for, but no stipulation was made that farther time should be required or given for the execution of the work.

"The pursuer, having completed the work, now sues for the contract price, which is admitted to have been £475. The defenders decline to pay the amount, on the ground that the pursuer failed to execute his contract within the time stipulated, and thereby occasioned them loss and damage to an amount exceeding the sum sued for.

"The question between the parties which was discussed in the procedure-roll is, whether the defenders' claim for loss thus sustained is maintainable as an answer to the pursuer's demand.

"The pursuer maintains that he is entitled to have instant decree, and that the defenders must constitute their claim by a separate action of damages, and cannot maintain it to any extent as a defence to this action. I am of opinion that the defence may be maintained in this case without a counter action, and that consequently the pursuer is not entitled instantly to the decree which he asks.

"The case is not one of mutual debts unconnected with each other, in which the defenders seek to set off a claim of compensation arising out of a totally different transaction from that which is the subject of the pursuer's claim. To that class of cases the statute of 1592, c. 141, applies, but I think that statute has no application to a case like the present.

"The dispute between the parties arises here in reference to their mutual obligations under the same contract; and (1) It seems to be only proper and just that if the pursuer has not fulfilled his contract in all its essentials, and if the defenders have not obtained the advantage for which they stipulated, they should not be bound to pay the pursuer the contract price, but should be entitled to resist payment to the effect of obtaining implement of the obligation in their favour, and if that cannot now be given on the terms arranged then as a substitute the loss and damage they have sustained; and (2) it is desirable in

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The pursuer reclaimed, and argued;—While the pursuer's claim was ascertained and undisputed the defenders' counter claim was altogether

such cases if possible to avoid the necessity for two actions between the parties where one will serve the purpose.

"The case is distinguishable from the ordinary one of goods sold and delivered, in respect the defenders had to give over their premises to the pursuer for the execution of his contract, and that the work to be executed and services to be performed were such as required a special contract, with sufficient time to enable the particular machinery to be prepared and afterwards fitted up. Time must, I think, be regarded as of the essence of the contract, because the defenders expressly stipulated in the contract that the work should be done by a day fixed. A certain indulgence or relaxation of the stipulation on this subject was apparently given by the defenders; but it appears from their statements, with reference to which no explanation has been given by the pursuer at the adjustment of the record, that the machinery was not fitted up until the 4th of August, notwithstanding repeated complaints and remonstrances regarding the delay, and an intimation that the defender's business was in the meantime stopped or seriously interfered with, and that the pursuer would be held liable in the damages thus resulting. Copies of letters complaining of the delay, dated 14th April, 20th May, 5th and 15th June, and 7th and 11th July 1874, have been produced, confirming these statements. But in the meantime, and with reference to the present question, the statement itself is of importance as shewing that the work was completed in the knowledge on the part of the pursuer that the defenders did not abandon the stipulation for the execution of the work within a certain time beyond any limited indulgence which their actings may be held to have sanctioned, and that although they permitted the work to go on, they did so under notice that a claim to be reimbursed the loss and damage which they were suffering from the non-implement of the contract would be made.

"The case is thus different from that in which goods are furnished or services performed after the stipulated time without notice that the party is held to have committed a breach of contract and a claim intimated and reserved. In a case in which no such notice had been given, and no claim intimated, I should be disposed to hold that the defender was not entitled to resist instant decree by pleading a claim of damages in defence.

"The present case, as presented, is one in which the defenders deny that the pursuer has duly implemented his contract, although it is admitted that if he had done so the sum for which he sues would be the correct amount payable. In one sense the stipulated price or condition is the counterpart of the material supplied and services performed; but the defenders agreed to give the price only for the work done by a certain day, and as time enters essentially into the contract the defence is that the pursuer failed to perform his part, and so is not entitled to decree for the full amount, but only for any sum due after deduction of the amount of the defender's loss, which, in this particular case, is stated to have been greater even than the amount sued for. In this view it is denied on the facts, as appearing from the record, that the pursuer's claim is liquidated. The amount payable is, no doubt, fixed by the contract, if it be assumed that the pursuer's contract was implemented, but this the defenders dispute. The pursuer maintains that having allowed him to perform the work the contract must be taken to have been executed, and the amount due is therefore liquid, and now prestable; but I think this argument is unsound, for the pursuer was substantially in possession of the defenders' premises, and I do not think the defenders were bound at the last moment, and it may be after part of the work had been done, to turn him out, and to enter into a new contract with another person with all the consequent loss, unless they were prepared to allow the pursuer to go on, on the footing of holding the contract as duly executed. Indeed, it is not maintained that the defenders have no claim of damage, but only that their claim cannot be pleaded in defence to this action.

"If the contract had contained a stipulation for a reasonable sum per day by

illiquid. Time was not of the essence of the bargain. The only mention of time in the correspondence was the middle of January 1874, and

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way of pactional penalty, in the event of delay on the pursuer's part in executing the work, it appears to me the case would have been directly within that of Johnston v. Robertson, March 1, 1861, 23 D. 646, 33 Scot. Jur. 335. In that case it is no doubt true the circumstance that the rate of compensation for delay had been settled was mentioned by several of the Judges as entering into their judgments, but it appears to me that the rule should be the same whether the parties have or have not fixed the rate of compensation. A claim is not liquidated until the period of time to which the claim of loss applies has been ascertained, and the defence does not therefore admit of instant verification, even where a rate of pactional penalty has been fixed, any more than the present.

"I think the sound general rule, which may be the subject of exceptions arising from special circumstances, or the special terms of a particular contract, is that in cases of mutual contract a party in defence is entitled to plead and maintain claims in reduction or extinction of a sum due under his obligation, where such claims arise from the failure of the pursuer to fulfil his part of the contract. Claims thus arising were sustained in defence in the cases of Taylor v. Forbes, 2d December 1830, 9 S. 113, 3 Scot. Jur. 67; Stewart v. Campbell, 12th November 1834, 13 S. 7, 7 Scot. Jur. 30, and in the case of Johnston already mentioned, while in the case of the Scottish North-Eastern Railway Company v. Napier, 10th March 1859, 21 D. 705, 31 Scot. Jur. 350, the Lord President illustrates what appears to me to be the general rule by reference to the case of master and servant, where he expresses the view that a claim for wages may be met by a claim for loss caused by misconduct in the service,—a view acted on in ordinary practice in the Sheriff-courts, where such cases are generally sued.

"In the case of an action for freight, resisted on the ground that the goods carried have been damaged, it is not, I think, so clear in principle as in the present case that the claim may properly be maintained in defence, because the damage is not necessarily the result of carelessness on the part of the carrier, but may arise from inherent defect, or the perils of the sea, and a tedious inquiry with doubtful results may be necessary. In the case of landlord and tenant it has been frequently held that a claim of rent cannot be well met in defence by claims of damage, but I think the explanation is to be found in the fact that the two obligations are not contemporaneous. Where they are so, or where it is plain that the landlord has failed to perform an essential condition of the contract, I am of opinion that a defence may be pleaded in the action at his instance for payment of rent. Thus, if a landlord sued for a year's rent, and the defence were stated that access to the premises could not be and was not obtained until four months after the term of entry, it appears to me the defence claiming a deduction would be properly taken up in the action at his instance. The same principle, I think, applies to the present case.

"The pursuer, in argument, maintained that, in a case of goods sold and delivered, a defence of loss on account of non-performance of the contract by delivery of the goods within the time stipulated would not be competent, and that this case was in no different position.

"For the reason already stated, I think this case materially differs from that now supposed, but I am not prepared to hold that even in such a case the counter claim could not be competently sustained in the action on the contract. If, after a buyer of goods has suffered damage from the seller's delay to supply them within the stipulated time, and has intimated his claim for the loss sustained, and that he is about to buy in goods against the contract in the open market, the other party should still offer to supply the goods, the buyer would, I think, be right in taking them in place of buying from others, and if he did so, under reservation of his claim for loss caused by the seller's delay, I should hold that in that case, as in the present, in an action on the contract for the price, he would be entitled to set up his counter claim for loss caused by the failure of the seller to fulfil the contract in one of its essential particulars.

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that had been obviously departed from. After a part of the time had run, the defenders ordered a much larger steam-engine than that contracted for. The result was that the original stipulation as to time must be held to have flown off, leaving the work to be done merely in a reasonable time. The case was thus altogether different from Johnston v. Robertson,[1] where the contract contained an express stipulation that the work should be completed by a specified day, and a sum of liquidated damages was stipulated for in the event of non-completion.

At advising,—

LORD PRESIDENT.—This action is brought for the recovery of £475, being the contract price of certain machinery and apparatus made and fitted up by the pursuer for the defenders in their premises in Glasgow in the course of last year.

The defence is, that "the pursuer not having duly executed his contract, and the defenders having in consequence sustained loss and damage to an amount in excess of the sum sued for, the defenders are entitled to absolvitor." The defence is founded on an allegation, not that the contract has been unskilfully or insufficiently performed, or that the machinery and apparatus are unfit for the purpose designed, but only that the pursuer has been in fault in the matter of time, and that he did not fit up the machinery and apparatus within the time stipulated in the contract. The amount of damages sustained by the defenders is of course illiquid, but they maintain that they are entitled to have their defence given effect to, and the damages liquidated in this action, because their claim is one arising out of the contract sought to be enforced. The defence takes the form, that the pursuer, who seeks payment under the contract, is not entitled to payment, because he has committed a breach of contract.

On the other hand, the pursuer replies to this by his third plea,—"The defenders are not entitled to set off their alleged illiquid claim of damages against the pursuer's claim for work done and machinery supplied." That plea has been repelled by the Lord Ordinary, who holds that the defenders are entitled to have their damages liquidated in this action, and set off against the contract price, so as to entitle them, if the damages amount to the sum sued for, to absolvitor.

The question whether a claim of this kind can be maintained *ope exceptionis* is always one of nicety. The general proposition is clear, that where a party seeks to enforce a contract he must shew that he has performed, or been ready to perform, his part of the contract. This, however, was a special contract, though not of an unusual kind. It was not an ordinary sale of goods to be delivered, but a contract to make and fit up machinery in the premises of the employers. If the machinery is good, it would be a very unusual course for the employers to refuse to allow it to be put up in their premises because it was not put up within the time stipulated. Such a course would in general be very inexpedient for both parties. Accordingly it is well understood that if a breach of contract occurs in point of time that gives rise, not to the rejection of the subject, but to a claim of damages for any loss occasioned by the delay. It would be very un-

"I have thought it right to state fully the ground of my judgment in this case, because it raises a point of general importance, and I am not aware of any previous case which has occurred for decision in which the question has arisen so purely as here."

[1] Johnston v. Robertson, March 1, 1861, 23 D. 646, 33 Scot. Jur. 335.

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desirable to interfere with that established custom, with which we are thoroughly familiar, by resorting to any subtle principle of law.

All this renders the question the more difficult and delicate. In Johnston v. Robertson[1] the employers were found entitled to set off a claim of damages sustained by reason of delay in the execution against the contract price sued for by the contractor. One distinguishing feature of that case was that the damages were liquidated by the contract; for the Court held that the £5 to be paid by the contractor for every week during which the works should remain unfinished, was not meant as a penalty, but a liquidation of the actual loss contemplated as likely to be suffered by the employers in consequence of the delay. But that was only one point in the case, and although it occupies a conspicuous place in the opinions of the Judges, the judgment of the Court, as I understood it, was that the damages, whether liquidated or illiquid, might be set off against the contract price sued for, provided there was breach of an express condition of the contract in point of time. In that case there was a careful and precise stipulation that the building was to be completed, and the keys delivered over by a specified day. There could be no doubt that there was breach of contract in point of time. I think it was the opinion of all the Judges that if there had been no express provision in the contract as to time, and the only complaint of the employers had been that the work was not completed in reasonable time—which is an implied condition in all contracts—that would not have led to the same result, since there would not have been a breach of the particular contract sued on, and the plea would not have been available in the same way against the contractor, that he had not performed his part of the contract, and, therefore, could not recover.

The question comes to be essentially whether an express condition as to time was violated by the contractor, or whether the state of matters, not under the original contract, but as afterwards modified by the conduct of the parties, was merely that the contractor was bound to have the machinery fitted up within a reasonable time. If the contractor was tied down to a particular time by the words of the contract the case comes within the rule of Johnston v. Robertson,[1] but if he was only bound to finish the work in reasonable time the damages for delay must be liquidated in a separate action.

To solve that question, it is necessary to look at the written contract. By the letter of 10th July 1873 the pursuer offers to put up certain steam drying cans, and a double cylinder diagonal steam-engine, particularly described, the whole to be fitted up to the entire satisfaction of the defenders. The price of the cans and framing was £373, and the price of the steam-engine £62, making in all £435. By a subsequent letter of 31st October 1873 this price was diminished by a reduction of £40. Thereupon, by a letter of the same date, the offer was accepted by the defenders. The acceptance is followed by this proviso,—"It is understood that the above shall be completed and ready for starting by the middle of January 1874, or earlier if possible."

I think that is an express stipulation as to time in the contract, and if the case had stood there, and the pursuer had failed to complete the contract by the middle of January, the present defence could have been stated with effect.

On 13th November 1873 the pursuer proposes an alteration on the terms of

[1] *Supra*, p. 780.

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the contract in regard to the size of the steam-engine, increasing its price from £62 to £142. This suggestion is acted on and accepted by the defenders by their letter of 15th November. In this alteration of the contract nothing was said as to time. If the matter had remained there the original time must still have been held as part of the contract. It is not suggested in the subsequent letters that any additional time was required because the steam-engine was to be of larger size. No additional time was asked or given.

The time within which the contract was to be performed ran out without anything being done. Here unquestionably the pursuer was in breach of the contract. If he had fitted up the machinery in February or March of last year it would have been clearly open to the defenders to refuse to pay the contract price without deduction of damages occasioned by the pursuer's breach of contract in point of time. But that is not what happened. The employers gave indulgence in point of time, not expressly, but by submitting to the delay apparently without any intention to make a claim of damages on account of it. If after that any question had been raised, whether the contractor was entitled to demand full payment of the price without submitting to a deduction for delay, a very peculiar question would have been raised, and it might have been plausibly contended that all that could be demanded by the defenders was damages for the work not being done in reasonable time, and that this claim could not be pleaded *ope exceptionis*.

But, according to the defenders' averments, the matter does not stop there. They allege that there was a new agreement made, which they state thus:—"More particularly, the pursuer having been bound as aforesaid, under the original agreement, to fit up said machinery by the middle of January 1874, represented to the defenders, towards the end of 1873, that he would be unable to overtake the work by that time. The defenders agreed to allow delay, on condition of the work being completed shortly after the time fixed. The pursuer, however, failed to take any steps for beginning the work, and in the month of April the defenders wrote him complaining of the delay, and thereupon a meeting took place between the defenders and pursuer, when an agreement was made to the effect that the defenders should forthwith sell off their old cans and frames, so as to have their premises cleared for the pursuer, and that, on getting three days' notice of the time when the premises should be clear, the pursuer should proceed to fit up the new machinery, and should have the same completed and ready for working within a fortnight after the premises had been cleared. In pursuance of this arrangement, the defenders sold off their old cans and framing, and had their premises cleared for the new machinery upon the 13th May 1874; and on 11th May 1874 intimation was given to the pursuer that the premises would be clear and ready for him on 14th May."

Then they go on to aver the breach of contract:—"The pursuer accordingly took possession of the defenders' premises on or about 14th May; but instead of completing the fitting up of said machinery by 28th May, as agreed on, he wrongfully failed to complete the same till the 4th of August."

This new obligation is more precise than that contained in the original contract. No doubt it was a verbal agreement, but it is not the worse for that, provided it is proved. It comes in place of the original agreement. So the contract now sought to be enforced by the pursuer consists not only of the original written offer and acceptance, but of that offer and acceptance with the letters of November 1873 and the subsequent verbal agreement of April 1874:

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and unless he can show that he has performed that contract, he is not entitled to recover, or at least he is not entitled to recover the whole amount sued for. That verbal agreement if proved will place the defenders in the same position as the defenders stood in the case of Johnston v. Robertson.

I am, therefore, for adhering to the interlocutor of the Lord Ordinary.

LORD DEAS.—I agree in much which your Lordship has said; and, at all events, I agree in the result.

If the original written agreement had stood, I should have had no doubt that the pursuer must be held not to have performed his part of the contract, unless he finished the work within the time stipulated, and a claim of damages on account of his failure would have been clearly competent by way of exception to this action. But the parties seem subsequently to have substituted a reasonable time for the definite time originally stipulated. I agree with your Lordship that, if the time had been originally fixed merely as a reasonable time, the claim for damages could not have been pleaded by way of exception, although even in that case I should have been rather disposed to think that as a counter action had been raised, in which there was a closed record, the two cases, being in the same position, might have gone to trial together. It is very much on account of the delay which would otherwise be occasioned that the rule has been established that illiquid counter claims cannot be pleaded by way of exception. The element of delay does not apply to the present case, where the two actions are in the same state of preparation. But it is not necessary to determine that question. For the understanding as to a reasonable time was followed by an agreement, according to the defenders' averment, fixing the time within which the work was to be done. Without saying that a verbal agreement is altogether on the same footing with a written agreement, the important point is, that the whole contract connects together so as to make time an essential element. The original contract as to time was never, indeed, departed from, except conditionally.

Taking these two considerations together,—first, that the two actions are in the same position, and, secondly, that time was of the essence of the contract, I am prepared to adhere to the interlocutor of the Lord Ordinary.

LORD ARDMILLAN.—I do not think this case comes strictly under the legal category of compensation. It rather presents itself to my mind as falling under the principle that one of the parties to a mutual contract cannot enforce it against the other if he has violated it himself.

If the contract had borne some specific date for the delivery of the machinery,—that is, for erecting it in the premises of the defenders,—I should have had no doubt that the contractor could not have sued for the contract price, without laying himself open to a claim for damages for delay in fulfilling his contract.

If no specific time for completion had been mentioned in the contract there would have been more difficulty. I am disposed to think that if no time for completion was stipulated, and if it was necessary to go into an inquiry as to what, under all the circumstances, was a reasonable time, then that would have been a different case from the present, and the defender would not have been entitled in such a case to maintain *ope exceptionis* a claim of damages against the pursuer in respect of unreasonable delay in fulfilling the contract.

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Here, however, the case was different. Indulgence or relaxation of the contract in regard to time was granted for a certain reason; but matters were not permitted to rest on that footing, with a stipulation for reasonable time. The defenders have alleged, and undertake to prove, a verbal agreement to the effect that they should displenish their premises and clear out to enable the pursuer to work, and that the pursuer, on getting due notice, should proceed to fit up the new machinery, and should have the same completed within a fortnight after the premises had been cleared. The fortnight from that date is a definite period, substituted for the indefinite period called a reasonable time, which was the intermediate state of the contract. As soon as this agreement was made the defenders had a right to keep the pursuer to the contract.

I think the fact that the counter action has been raised is of little importance, though it furnishes a suitable way of trying the question of damages.

In the first case which I have put, *i.e.*, if the parties had stood on the original contract, in which a definite time was stipulated, no counter action would have been necessary.

In the second case, *i.e.*, if no definite time had been stipulated, I think that a counter action would have been necessary, and that the question of damages, as a set-off against a demand for the price, could not have been tried in this action *ope exceptionis*.

If the new agreement which has been alleged by the defenders is proved the defenders will be entitled to set off the claim for damages against the pursuer's demand for the contract price.

I concur in the opinion of the Lord Ordinary, and think we should adhere to his judgment.

LORD MURE concurred.

LORD PRESIDENT.—I do not attach the same importance to the fact that the counter action has been raised as Lord Deas appears to do. If this defence is not pleadable *ope exceptionis* there is no defence to this action, and the pursuer is entitled to instant decree. It will not do to say that the cases are ripe to be tried together, for there would be nothing to be tried in the action on the pursuer's claim.

THE COURT adhered.

FRASERS, STODART, & MACKENZIE, W.S.—J. & R. D. Ross, W.S.—Agents.

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NEIL LAMONT, Pursuer.—*Asher—Rhind.*
DANIEL CUMMING, Defender.—*Sol.-Gen. Watson—Brand.*

Common Property—Mutual Gable.—A erected a mutual gable in a burgh, partly on his own ground and partly on that of B, without leaving fireplaces and vents on the side of B's property. Afterwards, when B came to build a house on his ground, he made fireplaces and vents in the gable, and also heightened it. *Held* that B's operations were not in excess of his rights as joint owner of the gable, no injury to A being alleged.

1ST DIVISION. Ld. Curriehill. M.

THIS was an action by Neil Lamont, spirit-merchant, Renfrew, against Daniel Cumming, flesher there, concluding for declarator that the pursuer was the sole proprietor of the west gable of his house in High Street, Renfrew; or otherwise, that the said gable was a mutual gable betwixt the pursuer's property and the defender's, and in either event that the

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defender had "illegally and unwarrantably encroached upon the pursuer's said property, and interfered with said gable by making openings therein to the depth of nearly the whole gable, and resting therein joists of the floors of new buildings in the course of erection by the defender on the ground belonging to him to the west of the pursuer's said property, and by building on and increasing the height of said gable and altering the chimneys therein belonging to the pursuer, and by removing slates from the roof of the pursuer's house adjoining said gable and otherwise."

The defence substantially was that, the gable being mutual, the defender was entitled to use it in the manner complained of for building his own house. It appeared on a proof that the wall was a mutual gable, and the result of the proof otherwise was thus expressed by the Lord Ordinary:—"What he (the defender) seems to have done is this, he has built a two-storey house on part of his ground, and he has inserted some joists in the gable to support the floor of his second storey; he has also turned the recess in the gable into a fireplace, and he has slapped a vent in the gable from that fireplace to the chimney head. And as his house is a few feet higher than the pursuer's, he has raised the height of the gable. In doing so, he had to remove temporarily a few of the slates of the pursuer's roof, but these were carefully replaced. I think it is proved that all the operations have been well executed, and that they have caused no injury or damage to, and that they in no way endanger the safety of the gable, or any other part of the pursuer's property."

The pursuer, previous to this action, had presented an application for interdict in the Sheriff-court, which was dismissed, on the ground, *inter alia*, that it raised a question of heritable right.

The Lord Ordinary, on 4th January 1875, pronounced this interlocutor:—"Finds that the pursuer is not the sole and exclusive proprietor of, and has not the sole right to and interest in, the west gable of the house belonging to him, situated on the south side of the High Street of Renfrew, and described in the summons: Finds that said gable is a mutual gable, and is the common property of the pursuer as proprietor of said house, and of the defender as proprietor of the subjects adjoining said gable on the west: Therefore decerns and declares in terms of the alternative declaratory conclusion of the summons to that effect: Finds that the operations of the defender complained of in this action were not illegal or unwarrantable: Assoilzies the defender from all the other conclusions of the action, reserving to the pursuer any claim competent to him against the defender for payment of part of the value of said mutual gable, and to the defender his defences thereagainst as accords, and decerns: Finds the defender entitled to expenses," &c.*

* "NOTE. . . .—It appears to me that the defender has in no way exceeded his legal rights, and that he was fairly entitled to do what he has done. This is not a case, such as has often occurred, of a conterminous proprietor, or of one of several proprietors of a tenement laid out in flats, making important alterations on a mutual wall or common stair, where these have been originally designed and constructed as part of the conterminous subjects, or of the flatted tenement. Here the pursuer's author has thought fit to build partly on his neighbour's ground and partly on his own a wall as the gable of his own house, but which he knew and intended should afterwards be used as the gable of his neighbour's house when such should be built. But as a gable without joist holes, and without a fireplace and vent, is of little use, and as the first builder has no right to limit his neighbour (unless by paction, which is not here alleged) as to the height to which he shall afterwards carry his house, it would be altogether inequitable to hold that the neighbour, when he came to make use of that gable, should be debarred from making (consistently with safety) all the

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The pursuer reclaimed, and argued;—In common property neither party is entitled to do anything to the subject without the consent of the other. That was the distinction between common property and common interest.[1] It had never been decided that a mutual gable was an exception to that general rule.[2]

The respondent argued that he was entitled to make any reasonable use of the mutual gable so long as he did no injury to it or to the property of his neighbours.

At advising,—

LORD PRESIDENT.—The pursuer of this action is the proprietor of certain subjects in the High Street of Renfrew, and amongst others of a house, the west gable of which is the subject of dispute.

He maintains under this summons, in the first place, that this gable is entirely his own property, built entirely upon his own ground; and, in the second place, and alternatively, that at all events it is a mutual gable, and, on that footing, he asks it to be found that the said gable is a mutual gable between the pursuer's property and the defender's, and in either event that certain operations of the defender are illegal.

The Lord Ordinary has found that the pursuer is not the exclusive proprietor of the gable in question, and in that finding I concur. The question depends a good deal on the evidence as to the boundaries of the two properties. Into this evidence it would be idle for me to go in detail. It is sufficient to say that I am quite satisfied with the result of the Lord Ordinary's judgment.

We must, therefore, take it that the gable is a mutual gable in the ordinary sense,—that is, that it was originally built according to the time-honoured custom of burghs in Scotland, the resulting rights of the conterminous proprietors being very well established in law. The only question then is, whether the defender's operations were illegal and unwarrantable, or, in terms of the pursuer's plea, in excess of the rights of a mutual owner.

What is alleged against the defender is this, that he has begun to build to the west on his own ground, and has availed himself of the mutual gable; that in doing so he has had to raise the gable, as his own house has been built higher than that of the pursuer's; that he has inserted joists in the mutual gable, and has turned a certain recess which was left in it into a fireplace, and has carried up a flue from it through the wall.

Now, the question comes to be, whether these things were done in excess of the rights of a joint owner. In considering this question, it must be kept in view that the gable in question was built a considerable time ago,—at a time, in fact, when the defender or his predecessors had apparently no expectation of building on their ground to the west. It was built, however, so as to serve as

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necessary fireplaces, vents, and joist holes, or from raising the wall to a reasonable height. The defender has here done nothing more, and I can see no ground for holding that his operations are illegal, or for ordering the gable to be restored to its original condition. Whether the pursuer may or may not be entitled to claim from the defender any part of the value of the gable of which he has now made use is a question not *hujus loci*, and the claim is accordingly reserved in the interlocutor."

[1] Bell's Prin. 1075-1078, 1086.

[2] Begg v. Jack, Jan. 10, 1874, *ante*, vol. i. 366; Dow and Gordon v. Harvey, Nov. 9, 1869, 8 Macph. 118, 42 Scot. Jur. 60; Warren v. Marwick, June 13, 1835, 13 S. 944, 7 Scot. Jur. 418.

a mutual gable if and when required. But, viewed as a mutual gable, it was erected in rather a peculiar way by the pursuer's predecessor. While he made fireplaces on his own side of the wall he made none on the other. The only convenience he provided on his neighbour's side of the wall was the recess above mentioned, which has been now utilised as a fireplace, and he made no provision for flues at all. Now, if the proprietor who is last to build is entitled to have a fireplace, or, in fact, to have a use of the gable corresponding to that which is enjoyed by the proprietor who is first to build, then, by some means or other, it is necessary that he should have a fireplace and a vent also.

But the pursuer strongly contends that, according to a general principle of law a mutual gable, being common property, cannot be touched by one owner without the consent of the other. That proposition lies at the foundation of the pursuer's case. It appears to me to be stated much more broadly than the authorities warrant, and indeed, when so stated, to be repugnant both to common sense and everyday practice. When the second builder comes to erect his house, if he constructs it in the ordinary way he must insert joists and drive in dooks for the purpose of supporting the woodwork of the lathing. In that way he necessarily interferes with the substance, the stone and lime, of the gable wall. Therefore the rule contended for by the pursuer cannot be applied absolutely.

But the truth is that a gable is the subject of common property in a somewhat different way from any other thing, in this respect, that when it is originally built the party who builds has the only beneficial enjoyment. The party who comes after has a right *in futuro*, which is available to him only when he comes to build. That is a very curious position of matters. There may exist a right of common property in one sense even at that time; but it is a different description of right in the one party and in the other as regards the active title and possession. The one uses it as the wall of his house; the other views it in regard to the future as a wall which he will be entitled to use when he comes to build. The first builder is not bound to consult his neighbour when he builds. He is entitled, by the custom of all burghs, to build the wall half on his neighbour's ground. In the ordinary case he does so behind the back of the neighbour. The neighbour does not see how the thing is done, or exercise any control over its execution. He takes it for granted that it will be done in such a way as to afford him requisite accommodation. But if he finds, when he comes to build, that it does not, what is the result? Then, for the first time, the adjoining proprietor exercises any active title, or enters upon any possession or use of the common property; and then, for the first time, the rights of the two parties come to be adjusted. If the second party finds that the wall is so built that it cannot be used for a gable, there must be some remedy, because it has been built half on his ground. He is entitled to have the wall made available for a gable for his house, and if he requires a fireplace and vents, and does not find them, he is entitled to have them.

In what way that right is to be enforced in the ordinary case is a different question. I do not give any opinion as to whether the second builder is entitled to make the alterations at his own hand. Probably if he proceeded to make extensive alterations, however necessary, without communication with the other party, the latter might be entitled to stop such proceedings, because to such subjects the rule is undoubtedly applicable, *in re communi melior est conditio prohibentis*. But then he must take the attitude of a prohibitor by applying to judicial authority. Here there has been no effectual application for interdict.

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The party has waited till the thing was done, and now brings this declarator. Therefore the inquiry is not whether the defender would have been originally entitled to go on with his operations, if the pursuer had interdicted him, but whether the defender has acted in excess of his legal rights as joint owner. Now, it seems to me that the making of a fireplace and a vent in this gable, if it has inflicted no injury on the pursuer, is a matter of right to the defender. That results from the nature of the subject of the common property. There can be no common property in this gable unless there is an equality of rights. But the parties cannot have equality of rights if the one has vents and the other has none. When the second proprietor comes to build that is the time when the mutual rights of parties are adjusted, and it is settled what the second builder is to have.

Therefore I think the defender's right to insert joists, slap out a vent, and make a fireplace, provided no injury is done thereby to the pursuer, is beyond challenge. At the same time I have thought it right to explain the principles on which I have arrived at that result, because, so far as I am aware, there is no express authority on the point.

The same observation applies still more strongly to the only remaining question, whether the builder is entitled to increase the height of the gable. That is a practical question which must very often have arisen, and we see many obvious examples of its having arisen and been decided—gables which have been raised by the owner of the house on one side, while the house on the other side remains of its original height. In such cases the matter has been arranged, because the parties have been reasonable. But it is singular enough that the question has never been raised in a Court of law, and it arises in a very pure form in the present case.

The first builder builds a house of a certain height. After many years the adjoining proprietor comes and wants to build his house higher. It is contended that he cannot do so without giving up the use of the gable which is built half on his ground and building a new one inside. That would be a curious result. It would end in this, that the first builder in a line of street, where there was no restriction in the titles, would settle, for all time coming, the utmost height to which the houses could be built. He would settle it for his next neighbour, and so on to the end of the street the standard of height would transmit against all the builders. Or, suppose a two-storied house was built at one end, and a house of three storeys at the other, as the houses advanced towards each other, what a curious collision there would be. When they came to meet, the house in the middle would have one gable of one height and another of a different height. A rule of law which leads to such results is not to be maintained.

We must follow the undoubted maxim that the owner of the soil is owner *a cœlo ad centrum*, or rather, we may say in this case, *a centro ad cœlum*. He is not to be restricted in his ownership by the circumstance that his next neighbour has built a gable wall partly on his ground. Therefore the only mode of reconciling the two rules—the first, that the gable is common property and cannot be interfered with by one party without the consent of the other, the second, that the owner is entitled to raise a building on his property to any height—is to hold, as the Lord Ordinary has done, that the second proprietor may raise the wall to any height to which he wishes to build his own house, always provided that he does not injure the gable or his neighbour's property. There is no ground for saying that injury has been done in this case, and therefore I have come to the same conclusion as the Lord Ordinary.

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LORD DEAS.—I have no doubt that this is a mutual gable, but the debateable question is, whether the one party can heighten it without consent of the other. Reference has been made, in the course of the discussion, to a remark of mine in the case of Begg against Jack, to the effect that the extent of the right of each joint proprietor to make operations upon a mutual gable without consent of the other did not appear to have been made the subject of express decision. That remark has received confirmation in the course of the present argument. It is remarkable, certainly, that so many houses should have been built and afterwards heightened in most of the burghs in Scotland without that question having been raised for decision. But I think the inference to be drawn from that fact is, that the right of each proprietor, within burgh, to make all reasonable uses of the mutual gable has never been seriously doubted. Your Lordship has alluded to the heightening of the houses in the New Town of Edinburgh, and I see that in the case of Alexander v. Stobo (March 3, 1871, 9 Macph. 599). I went pretty fully into the history of some of the principal streets in the New Town of Edinburgh, particularly Princes Street and George Street, in both of which a great proportion of the houses have been heightened since they were originally built. Double gables in these streets are, I am persuaded, all but unknown. The heightening has been far from simultaneous, and if it was understood that each joint proprietor might, if he chose, prevent the other from heightening the mutual gable, there must have been a wonderful universality of neighbourly feeling to account for the objection never having been taken and judicially enforced.

There has been immemorially recognised in the royal burghs of Scotland what is called the law of neighbourhood, or good neighbourhood, with reference to buildings, particularly as to their height, safety, and boundaries, under the jurisdiction of the Dean of Guild, and, where there is no Dean of Guild, under the jurisdiction of the Magistrates, who, in that case, are vested with all the functions of the Dean of Guild. It is upwards of half a century since I first became personally familiar with instances of this jurisdiction being exercised by the Magistrates where there was no Dean of Guild, and we have both ancient and authoritative confirmation in our institutional writers of this being the law and practice. Thus Bankton, speaking of the Dean of Guild Court, says (iv. 20, 2)—"This Court has likewise the sole jurisdiction in regulating buildings within borrows, whether in repairing or taking down and rebuilding old buildings or erecting new ones." "Without their warrant, obtained upon citation of all parties having interest, no houses within borrow can be built or demolished in whole or in part." And in sec. 7, he adds,—"In some borrows there is no Dean of Guild. In such cases those matters that belong to the Dean of Guild Court are within the cognisance of the Magistrates with advice of the Council, to whose jurisdiction that of the Dean of Guild is understood to be annexed, when by the constitution of the borrow no separate Guild Court is established." *Vide* also Ersk. i. 4, 24, and ii. 9, 9.

Agreeably to this doctrine it was expressly decided in the case of the Magistrates of Stirling v. the Sheriff, Nov. 1752 (M. 7584), that the jurisdiction of the Dean of Guild, in all questions of neighbourhood within burgh, is exclusive of that of the Sheriff, and subject only to review of the Supreme Court. Whether it would now be imperative to follow that judgment it is not necessary here to inquire. One reason in favour of it probably was that the Magistrates being entitled, as Bankton observes, to advise with the members of Council, and

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the Dean of Guild, in the larger burghs, having, as we know, a council of his own, any deficiency of practical skill in the judicial officers might thus be supplemented from the larger body, in which practical men were always likely to be found. The modern practice, however, in the Sheriff-court and this Court, of obtaining reports from men of skill, would pretty well supply that desideratum, with the advantage of greater judicial experience than can now be found in Burgh Courts, which, within my recollection and that of your Lordships, habitually decided civil suits without limitation of amount, but have now virtually ceased to do so, although the jurisdiction itself has not been abolished.

A mutual gable, it is to be observed, is a very peculiar kind of mutual wall,—very different, for instance, from division walls, so common in this city between back greens; and it will not do to reason from the one to the other. The purpose of these division walls is enclosure merely, without excluding light and air; and for one party to heighten them without consent of the other might very well be deemed, in many circumstances, a violation of the implied contract under which the walls were built, although that matter, no doubt, is seldom left to implication. A mutual gable must be presumed to be intended to serve the purposes of a gable for each of the properties, to bind into it the front and back walls of the houses, to receive the chimneys and flues of each in fair proportion, and to afford supports essential to the interior construction and utility of each of the buildings. In making these particular uses of the gable I can see no principle of restriction except that the one proprietor must not injure the property and rights of the other, nor endanger the mutual property of both. If any other view were adopted the one proprietor could not, without consent of the other, change the position of an interior wall running into the gable, alter or enlarge a fireplace, insert the end of a joist even in the thickest part of the gable, or interfere with it in any way, however beneficial to himself and innocuous to his neighbour.

But the sole reason why I think these uses may be made of the gable is because they are the very purposes for which a mutual gable is intended. It does not follow that either of the joint proprietors can operate upon it for purposes not inherent in its nature,—for instance, to make wall presses, which certainly could not be struck out without mutual consent. Nor do I by any means say that the gable may be raised to whatever height the strength of it will bear, however unusual and invidious that height may be. On the contrary, I think there must always be judicial control in this respect, as well as in other respects, so that nothing may be done but what is fair and reasonable. The discretionary power vested in the Dean of Guild, and consequently in the Magistrates when they come in his place, was very strongly affirmed in the case of Buchanan v. Bell, 15th Nov. 1774, M. 13,178, where a water barge in Glasgow, which was said to have existed for more than forty years, and to be according to a practice common in the city, was nevertheless ordered to be taken down; and the report bears that the Court were of opinion "that although the Dean of Guild can make no arbitrary regulations tending to deprive a person of his property yet he has certainly discretionary powers in the matter of police, and particularly *ne opere manufacto aut aliquo immisso urbs deformetur*; and the regulation in question fell within these powers in the exercise of which that useful magistrate ought to be supported."

The discretion to limit as well as to permit operations on a mutual gable is an important element in the exercise of jurisdiction in that matter. It has been

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immemorially held that wherever the Dean of Guild has jurisdiction he has also a considerable discretion, subject to the control of the Supreme Court, to prevent any one from acting *in æmulationem vicini*.

The Sheriff has not been in use to exercise over rural tenements the same control which has been immemorially exercised by the burghal Courts over burghal tenements. So that, although many of the considerations suggested as to mutual gables may be common to such gables, whether within or beyond the burghal territory, it does not necessarily follow that either the rights of the parties or the powers of the local Judge are in both cases the same. I wish to be distinctly understood, therefore, as confining my opinion, in the meantime, to such cases as that before us, which is the case of a mutual gable in a royal burgh. There may be much to hear and consider before carrying the doctrine farther.

I have only to add, that if, as the pursuer alleges, the defender proceeded in the present case without judicial authority, I do not doubt that the pursuer, if he had timeously interfered, might have interdicted him till such authority was obtained. But as far as appears the pursuer allowed the defender's operations to be substantially completed before he made any complaint. Even that, however, might not have been conclusive had it been alleged that the operations were either unsafe or injurious. But we have no such allegation in this record, and no such allegation was made at the bar. The question has been argued to us not as one of injury of any kind but as one of abstract right. Taking it so, I am of opinion that the pursuer's contention cannot be given effect to.

LORD ARDMILLAN.—I have no doubt on the first point raised,—the title to the property. I am satisfied, in concurring with your Lordship and the Lord Ordinary, that the pursuer is not the sole and exclusive proprietor of the west gable of the house in question, and to that extent the defender is entitled to absolvitor from the conclusions of the action.

But, assuming the gable to be a mutual gable, a question of importance arises, which has been well argued, and which the Court has carefully considered.

On this point, I am of opinion that the use of a mutual gable by operations which, without injury or danger promote its mutuality, is not illegal or unwarrantable, or in excess of rights. In so far as regards the arrangements for vents and fireplaces in the gable, it is, I think, necessary to the mutuality of the wall as between two occupied houses.

The gable would not be mutual in any reasonable meaning of the word unless both parties have the right of laying joists and making adjustments for vents.

A man who builds partly on his neighbour's property a mutual wall builds subject to the eventual mutual enjoyment, the prospect of which alone entitles him to build partly on the property of another. On this part of the case I have no doubt.

The raising of the mutual gable to a greater height is a question rather different.

I think that, if there is injury or danger, or reasonable dread of injury or danger, the party complaining may interpose by craving interdict But there was no interdict here, and no averment of injury or danger. The pursuer claims his right of controlling the height of the next house, and thus of all the other houses.

The judicial authority of the Sheriff or Dean of Guild relates rather to the

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mode than the act. The Judge or Magistrate takes care that a right is exercised without injury or peril, and not exercised if there is injury or peril.

LORD MURE.—I concur with your Lordship in the chair. It rather appears to me that a good deal of the argument for the pursuer has proceeded on a misapprehension of the precise terms of the rule laid down by Mr Bell in the passage in his Principles on which the pursuer mainly relied. It was assumed that Mr Bell had laid it down that where property was common no one party could do anything in the way of alteration unless the other owners consented; but as I read the passage, that is not the true meaning of it. What Mr Bell says is, that "operations on a common wall, which are not necessary, are to be done only by common consent." The words "not necessary" are important, and the inference from them, I think, is that if the operations are alleged to be necessary, and that is disputed, the Courts of law must decide whether they are so or not.

The authorities cited by the pursuer had reference to mutual walls and common passages, but in these cases it does not appear that there was any necessity for heightening the walls or opening doors into the passages. One main object of a mutual gable, however, on the other hand, is to afford means for carrying up the chimneys which may be necessary for the use of the mutual owners, and if one of these owners will not concur in alterations such as those here in question when proposed to be made upon a gable the Courts of law must settle the dispute. And if, as here, no injury can be alleged, then the formation of a chimney in a mutual gable, or altering the height of that gable in so far as necessary for the ordinary uses of a chimney for the joint proprietor's house, will not be put a stop to merely because the other party withholds his consent to it. Nor ought they, in my opinion, to be ordered to be removed, even where there may be grounds for apprehending some injury, where the objecting party has allowed the operations to proceed, and has not had recourse to the proper legal measures for stopping the alteration, till the authority of the Court was interposed. It was upon this latter ground that I proceeded in deciding the case of Cruikshanks,[1] which was affirmed in this Division of the Court, holding that in such circumstances the remedy was that of an action of damages for the injury sustained.

On the question of interdict, I am of opinion that if the pursuer had here applied for one, and could have alleged a relevant case of injury, an interdict might have been granted, at all events until the matters in dispute were settled by the Court. But the pursuer lost that remedy by going to the Sheriff and raising a question of heritable right before him as to the absolute property of the wall, which led to that action being dismissed.

THIS interlocutor was pronounced:—"Recall the said interlocutor in so far as it reserves to the pursuer any claim competent to him against the defender for payment of a part of the value of the said mutual gable, and in place thereof reserve to the pursuer any pecuniary claim competent to him against the defender in respect of his making use of the said mutual gable: *Quoad ultra* adhere to the said interlocutor, and refuse the reclaiming note: Find the defender entitled to additional expenses," &c.

J. & R. A. ROBERTSON, S.S.C.—A. KIRK MACKIE, S.S.C.—Agents.

[1] Not reported.

THOMAS R. BUCHANAN, Pursuer.—*D.-F. Clark—Low.*
THE SCHOOL BOARD OF TULLIALLAN, Defenders.—*Sol.-Gen. Watson—Guthrie Smith—Innes.*

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School—Schoolmaster—School Fees—Education (Scotland) Act, 1872 (34 *and* 35 *Vict., c.* 62), *secs.* 48, 53, 55.—The school board of a parish having passed a resolution requiring the schoolmaster, who had been appointed prior to the Education Act, 1872, to collect monthly the school fees, which formed part of his emoluments, and to return a statement of the fees collected quarterly to the treasurer, the schoolmaster raised an action concluding for reduction of the resolution and for declarator that he was not bound to collect the fees, on the ground that by the 53d and 55th sections of the Act it was the duty of the board to collect the fees and pay them to the schoolmaster. *Held* (by a majority of seven Judges, *diss.* Lord Deas, *aff.* judgment of Lord Curriehill), that in accordance with the usage prior to the Act the duty of collecting the fees remained with the schoolmaster,—and the defenders *assoilzied*.

THIS was an action by T. R. Buchanan, teacher of the parish school of Tulliallan, against the school board of that parish, concluding (1) for reduction of certain minutes of the board, (2) for declarator that the pursuer was not bound to collect the school fees of the parish school, and (3) for payment of £34, 3s. 8d.

1ST DIVISION, with three consulted Judges. Ld. Curriehill. M.

The pursuer averred that he had been teacher of the parish school of Tulliallan for twenty-eight years prior to the passing of the Education Act, 1872. When the school board was appointed they allowed the fees to remain at the former rates, and the teacher received in addition a salary of £55. In July 1873 the school board intimated to the pursuer that the fees, which had formerly been collected by him, would in future be collected by the clerk. That system, however, was not long continued, and, on 8th January 1874, the board passed the following resolution, which they communicated to the pursuer:—"That on and after 1st February next, Mr Buchanan be required himself to collect the fees every four weeks in advance, commencing on 2d February 1874, rendering quarterly to the treasurer a statement of the fees collected, and of those in arrear." * On 20th February, and again on 20th March, they passed resolutions adhering to the resolution of 8th January. On 31st January they adopted, and communicated to the pursuer, the following resolution:—"That the clerk be instructed to send Mr Buchanan copy of the Board of Education's letter, of date 23d March, and to intimate that the board require him to conform to the resolutions as to the collecting of the fees and keeping of the accounts and registers passed on 8th January last. The clerk is requested to explain to Mr Buchanan that it is not, and never was, the intention of the board that he should prosecute for fees in arrear, but that the board will prosecute those parties whom they think fit." The above four minutes were those of which reduction was sought. The pursuer further averred that he refused to collect the fees unconditionally (which was explained to mean without remuneration), that the defenders had not collected them, and that the fees payable between February and July 1874 amounted to £34, 3s. 8d., and were still due to him.

He pleaded;—(1) Having regard to the provisions of "The Education

* The minute of this date, besides the passage above quoted by the pursuer on record, contained the following paragraph concerning him:—"(2) That Mr Buchanan be required to keep registers and accounts of fees. (3) That Mr Buchanan add to the usual monthly fees 3d per month during January, February, and March, for heating the school, and one halfpenny per month throughout the year for cleaning purposes, and that he pay the sums thus collected to the treasurer, along with the other fees."

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(Scotland) Act, 1872," the pursuer is not bound to collect the school fees of the parish school of Tulliallan, and it is incompetent and illegal for the defenders to require him to do so. He is therefore entitled to decree of reduction and declarator as libelled. (2) The defenders being justly owing and indebted to the pursuer in the foresaid sum of £34, 3s. 8d., are bound to make payment of the same, with interest.

The defenders substantially admitted the facts as averred by the pursuer, and quoted a letter from the Board of Education approving of the course which they had pursued.

They pleaded;—(2) By statute 43 George III., c. 54, and the usage following thereon, the fees paid by the pupils in a parish school fell to be collected by the teacher, and no contrary provision being contained in the Education Act, the old law in this particular is still unrepealed. (3) In virtue of the powers vested in them by the Education Act, the school board, with the sanction of the Board of Education, was entitled to require the pursuer to collect the fees, and to account to their treasurer. (4) The defenders not having received the fees for the periods in question, and their non-recovery being in no way due to the fault of the defenders, they are not liable.

The Lord Ordinary, on 23d December 1874, pronounced this interlocutor:—"Repels the reasons of reduction, assoilzies the defenders from the whole conclusions of the action, and decerns: Finds the defenders entitled to expenses." *

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* "NOTE.—The present action arises out of a dispute (of a class which is becoming unfortunately numerous) between the school board of Tulliallan and the parochial schoolmaster of that parish who was in office at the passing of the Education (Scotland) Act, 1872. I cannot help thinking that the dispute would never have arisen, or at all events might have been easily adjusted out of Court, if the parties had exercised a little mutual forbearance while the new system of national education introduced by the recent statute was being established in the parish. As the parties, however, still keep each other at arms-length, the matter in dispute must be judicially decided. The pursuer was for upwards of a quarter of a century before 1872 the parochial schoolmaster of Tulliallan. The defenders are the school board of that parish, elected in 1873 under the provisions of the Act of 1872. Prior to 1872 the pursuer, as parochial schoolmaster, had a fixed salary, and received for his own use the whole school fees paid by the pupils attending the school. These fees were collected by himself in conformity with the invariable practice in all parish schools. He was, however, under section 18 of the Act 43 George III., cap. 54, obliged to teach gratuitously, or for smaller fees than he was entitled to demand from ordinary pupils, such poor children as should be recommended by the heritors and minister at any parochial meeting. The Act of 1872 transferred from the heritors and the minister to the school board the whole management of the parochial schools; and by repealing the Act 43 George III., freed the schoolmaster from the obligation to teach gratuitously any poor children. And the Act has further made it the duty of the parochial board of the parish to pay out of the poor fund the ordinary and reasonable fees for the elementary education of every child in the parish whose parent is unable from poverty to provide such education. The school board, when appointed, assigned to the pursuer a fixed salary of £55 per annum, and in addition, allowed the fees in his school to remain at their former rates, and to be levied by himself as part of his emoluments. Matters remained on this footing until July 1873, when the school board resolved that the school fees should be collected by their clerk quarterly, and in advance. It does not appear, and indeed it is not alleged, that the board intended by this resolution to take away the fees from the pursuer. On the contrary, the fees were collected by the clerk from 1st July 1873 to 31st January 1874, and were handed over to the pursuer. The school board, however, seem to have found it difficult, if not impracticable, to

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The pursuer reclaimed, and argued;—The 55th section of the Act provides that teachers appointed previously to the passing of the Act shall collect the fees satisfactorily by the hands of their officer, and on 8th January 1874 they resolved,—'That on and after 1st February next Mr Buchanan be required himself to collect the fees every four weeks in advance, commencing 2d February 1874, rendering quarterly to the treasurer a statement of the fees collected, and of those in arrear.' The pursuer, founding on the terms of the 53d section of the Act of 1872, which provides that the school fees 'shall be paid to the treasurer of the board,' declined to collect the fees. Some communings took place between the pursuer and a committee of the board, which led to no satisfactory result, and the board, by minutes dated respectively 20th and 31st March 1874, adhered to their resolution of 8th January, that the pursuer should be required to collect the fees. The last of these minutes directs the clerk of the board to explain to the pursuer 'that it is not, and never was, the intention of the board that he should prosecute for fees in arrear, but that the board will prosecute those parties whom they think fit.' All of these resolutions were communicated to the pursuer, who, however, refused and still refuses to collect the fees. The result is, that no fees were collected by anyone for the two quarters beginning respectively on 1st February and 1st May 1874; and the present action has been brought by the pursuer to have the minutes and resolutions of the board reduced and set aside, and whether these are reduced or not, to have the board ordained to pay to him the school fees payable during the two quarters mentioned, with interest thereon. The pursuer maintains that, having regard to the provisions of the Act of 1872, he is not bound to collect the school fees; that it is incompetent and illegal for the defenders to require him to do so; and that the defenders are bound to pay to him a sum equal to the amount of the fees which were payable, and which should have been levied during the period referred to. The contention of the pursuer appears to me to be based upon an erroneous construction of the statute, and to be untenable. It is rested mainly, if not altogether, upon the isolated expression in section 53 of the statute quoted by him in condescendence, article 3, viz., that the 'fees shall be paid to the treasurer.' These words are read by the pursuer as meaning that the school fees must be actually collected by the treasurer of the board from the pupils or their parents directly, and that no other person can grant a valid receipt for the fees. These words, however, do not necessarily bear that meaning, and they cannot, as I think, be rightly construed without reading in connection with them not only the whole context of the section in which they occur, but also sections 43, 48, and 55. Section 43, which deals with 'the school fund,' provides that 'there shall be carried to the school fund all moneys received out of moneys provided by Parliament, or raised by way of loan, or otherwise received by the school board for the purposes of that fund, and not by this Act specially appropriated; and any deficiency shall be raised by the school board as provided by this Act.' In section 48, which prescribes the duties of the treasurer, it is not said that this officer is to collect the fees from the scholars, but it is declared to be his duty, *inter alia*, 'to keep and preserve in a proper book or books an accurate account of the school fund, and of all other property and funds under the administration of the school board, and of the expenditure thereof; and the account of the school fund shall be kept separate from the account of all other property and funds.' By section 53, which deals with the 'school fees,' it is provided that the school board shall, subject to the provisions of section 62 with respect to higher class public schools, 'fix the school fees to be paid for attendance at each school under their management, and such fees shall be paid to the treasurer of the board, and a separate account shall be kept of the amount of the fees derived from each school; and it shall be lawful for the school board, if they see fit, to pay to the teachers of a school the fees derived from such school, and to divide the same among them as the school board shall determine.' And by section 55 it is provided that teachers in office before the passing of the Act 'shall not, with respect to tenure of office, emoluments, or retiring allowance as by law, contract, or usage secured to or enjoyed by them

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not be prejudiced by the provisions of the Act.[1] But the minute of 8th January imposed duties upon him which he was not previously bound to perform—for example, to keep an account of the fees. That was a duty laid on the treasurer by the 48th section, and the 53d section provided that the fees should be paid to the treasurer. Though the position of the teacher was not to be worse than before, it is not to be assumed

at the passing of this Act, be prejudiced by any of the provisions herein contained, and such emoluments and retiring allowances shall be paid and provided by the school board having the management of such schools respectively.' By the same section (section 55) it is provided that teachers appointed after the passing of the Act are to hold office during the pleasure of the board, and are to receive such salaries and emoluments as the school board shall think fit. These sections, when rightly construed, appear to me to shew that the intention of the Legislature was—(1) That although the school fees were to form part of the school fund, and to pass through the treasurer's account as a separate item of the fund, they were not necessarily to be collected by the treasurer, and that the requirements of section 53 would be satisfied by the fees being collected by any schoolmaster, old or new, with the sanction and authority of the board, and retained by him as part of his emoluments—he always giving an account to the treasurer of the amount so collected and retained and of the arrear outstanding; and (2) that in the case of teachers in office at the passing of the Act, the school board would fully comply with the provisions of section 55, if they authorised and empowered the teacher to continue to levy that part of his emoluments which consisted of the school fees, in the same way as he was in use to do under the old system. In no better way could the board 'provide' to the teacher that part of his emoluments without prejudicing him with respect thereto. In the present case the teacher is not only not prejudiced in the matter of emolument by being required to collect the fees as formerly, and being allowed to retain the whole for his own use, but he is rather benefited—(1) because he is no longer obliged to teach any pupil gratuitously, fees being now paid for every pupil who attends the school, and attendance being now compulsory; and (2) because, in the event of fees being in arrear, the board, and not the teacher, are to bear the expense of prosecuting defaulting parents. It might perhaps have been more courteous in the board to have explained their views to the pursuer before returning to the old system of collecting the fees, and the resolutions might have been expressed in less imperative terms; but I do not think that the proceedings of the board have been such as to justify the pursuer in the course which he has adopted. I construe the minutes of the board as meaning this,—'We wish you, the teacher, to continue to have the fees as part of your emoluments as heretofore. We have not the facilities for collecting them which you have; but you will collect them and appropriate them in the same way as you used to do before 1872, and we will assist you in case of difficulty with our statutory powers of prosecution; and all that you have to do is to inform our treasurer how much you collect in name of fees, and how much remains in arrear.' This appears to me, not only to be not at variance with the provisions of the Act, but to be in itself a most reasonable proposal; and I cannot see any ground on which the reductive conclusions of the action can be sustained. Nor are the petitory conclusions better founded. The pursuer has chosen to sacrifice his emoluments from the fees to a mistaken feeling of offended dignity, and he must submit to the consequences if he has failed to collect the fees when they were placed by the board within his reach. In conclusion, I have merely to observe that, even if it were to be held that under section 53 of the statute the treasurer of the board, and he alone, can grant a valid receipt to parents for the school fees, the pursuer's case would not thereby be benefited; both because such a difficulty was never suggested in the course of the dispute, and because there is no reason to believe that the defenders, if asked by the pursuer, would have declined to furnish him with receipts signed by the treasurer."

[1] The sections of the Act are quoted *infra*, p. 798, note.

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that the Legislature did not intend to improve it by relieving him of the collection of the fees. The propriety of laying that duty upon him is not the same as before, because the fees were formerly his property, now they are not, but are carried to the school fund under the 43d section.[1] They must reach the school fund by the theory of the Act, even though they may afterwards come to the teacher. If it had been his statutory duty to collect the fees, the board could not have displaced him as they did for a time. The intention of the Act was to relieve the teacher from an unsuitable and invidious duty; and the 55th section, while providing that the emoluments of teachers in office prior to the Act should not be prejudiced, expressly enacted that such emoluments should be paid to them by the board.

The defenders argued;—The 55th section gave the teacher all the right he had. Under it his position was left as it had been before. It was the immemorial custom in parish schools that the teacher should collect the fees. The 53d section could not aid the pursuer, unless it was made illegal that the fees should be paid to any other person than the treasurer. But that was not even maintained.

The Court appointed the case to be heard before seven Judges.

At advising,—

LORD PRESIDENT.—The pursuer is the schoolmaster of the parish school of Tulliallan. The first conclusion of the summons seeks to reduce certain minutes whereby the school board "resolve that on and after 1st February next the pursuer be required himself to collect the school fees every four weeks in advance, commencing on 2d February 1874, rendering quarterly to the treasurer a statement of the fees collected and of those in arrears."

Then the summons proceeds, that whether the said minutes are reduced or not it ought to be found and declared "that the pursuer is not bound to collect the school fees of the parish school of Tulliallan," and, further, that the defenders should be decerned to make payment to the pursuer of £34, 3s. 8d. That sum represents the school fees which ought to have been collected, and which the pursuer says it was the duty of the defenders to have collected. Therefore the question, and the only question intended to be raised by this summons is, whether the pursuer is bound to collect the school fees. That view of the summons is further supported by the pleas in law. A good deal of reference was made in argument to the terms of some of the minutes, particularly to that of 8th January 1874, according to which a resolution was passed to the effect not only that the pursuer should regularly collect the school fees, but also keep a register and account of the fees, and add to the usual monthly fees certain payments for heating and cleaning the school. It is said that whether he was bound to collect the fees or not, he was not bound to submit to these terms. But I throw aside these specialties, because I do not think that they form any part of the substance of the pursuer's case. The only question raised by the summons, and therefore the only question which we are called on to determine, is the obligation to collect the fees.

Beyond all dispute, prior to the Act of 1872 parish schoolmasters were in use to collect the fees, and that for a plain reason. The fees belonged to themselves. They had the greatest, indeed the only direct interest in collecting them, and, therefore, they were the proper parties to be entrusted with that duty. They had also opportunities and facilities for performing it which no

[1] *Infra*, p. 798, note.

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other person could possibly possess. Under the provisions of the Act of 1872 it appears to me that schoolmasters then in office in parish schools were left in the full enjoyment of the school fees as part of their emoluments, and if so, it would seem to follow that they were the proper persons to collect them. No change was made as regards these old schoolmasters and their right to the fees, and as they retained the exclusive right to them the same reasons which operated previously to make them the proper collectors remained undisturbed.

Still, the question before us must be solved with reference to the particular clauses of the Act. Several of these have a bearing on this question. The school board have the entire management of the affairs of the school; among other things they are entitled to manage the whole funds, and for the due administration of these they are authorised to appoint a treasurer. The 43d section, which relates to the school fund and the expenses of the board, is the first which requires attention.* The assessment and borrowing clauses immediately follow. Then we come to the 48th section.† The treasurer is thus the keeper of the school fund. And taking these two clauses together we have it provided that the school fund is in his hands, and that everything goes into it which is received by the board for the purposes of the fund, "and not by this Act or otherwise specially appropriated." Then we come to the 53d clause,‡ which relates to fees. Now, a very important question here arises whether the 53d clause can affect the case of a master in office at the time of the passing of the Act. That question cannot be solved without taking into consideration not only the other clauses which I have read, but also the 55th.§ Now, this 55th clause must be construed with

* Sec. 43.—"The expenses of the school board, including those incident to the election thereof (but not including the expenses of any member or candidate), in any parish or burgh under this Act, shall be paid out of the school fund. There shall be carried to the school fund all moneys received out of moneys provided by Parliament or raised by way of loan, or otherwise received by the school board for the purposes of that fund, and not by this Act or otherwise specially appropriated, and any deficiency shall be raised by the school board as provided by this Act."

† Sec. 48.—"Each school board shall, at the first meeting thereof, or as soon thereafter as conveniently may be, appoint, during the pleasure of the school board, a fit and proper person, or fit and proper persons, to be treasurer to the school board, with such remuneration as the school board shall see fit, and it shall be the duty of the treasurer to keep and preserve, in a proper book or books, an accurate account of the school fund, and of all other property and funds under the administration of the school board, and of the expenditure thereof."

‡ Sec. 53.—"The school board shall, subject to the provisions hereinafter contained with respect to higher class public schools, fix the school fees to be paid for attendance at each school under their management, and such fees shall be paid to the treasurer of the board, and a separate account shall be kept of the amount of the fees derived from each school; and it shall be lawful for the school board, if they see fit, to pay to the teachers of a school the fees derived from such school, and to divide the same among them as the school board may determine."

§ Sec. 55.—"Subject to the provisions hereinafter contained regarding the removal of teachers of public schools appointed previously to the passing of this Act, such teachers shall not, with respect to tenure of office, emoluments, or retiring allowance, as by law, contract, or usage, secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions herein contained, and such emoluments and retiring allowances shall be paid and provided by the school board having the management of such school respectively."

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reference to the condition of schoolmasters in office in respect of school fees. As I have already said, the fees belonged to them. They were entitled to collect them, and that, certainly, was a privilege, because they could collect them better than anybody else. And if anybody else had done it the master must in some shape have paid commission. He thus both saved money, and had the advantage of being in a position in which he could use means to obtain payment which were not available to anybody else. Therefore the product of the fees would be larger in his hands than if collected in any other way; and in that shape they formed an important part of his emoluments. The 55th section provides that his position as to emoluments is not to be "prejudiced." That is a very strong expression. And the school board is bound to secure, either by payment or provision, that is to say, arrangement or regulations, that he be kept in as favourable a position as he was in before. Now, that is very difficult to reconcile with the view which the pursuer here takes up of the effect of clause 53. He says that clause requires that the fees should be paid to the treasurer; and though it was quite fairly admitted that that did not necessarily mean that the treasurer was to collect them, it was said that it shewed that the money when collected was to be paid over to him, and form part of the school fund, and that the right of the master as regards the fees could only be to obtain payment of them from the treasurer when collected, which it was represented was inconsistent with his being the collector himself.

But it appears to me that according to the true construction of the 53d clause, when taken in connection with the other clauses which I have read, it does not apply to schoolmasters in office at the passing of the Act, and cannot affect their position. It provides that the fees are to be fixed by the board. No doubt it may affect the schoolmaster in that way. But when it goes on to provide that the fees are to be paid to the treasurer, and that a separate account is to be kept of them, and that it shall be lawful for the board, if they see fit, to pay to the teachers the fees directly, or divide them as the board shall determine, it seems to me that we are out of the case of the old schoolmasters. In their case the board have no discretion. The fees are secured to them by section 55, which, being the later enactment, is, at all events, sufficient to overrule section 53. The 53d section says the fees are to be dealt with by the board as they please; they may divide them as they see fit. Can anything be more clearly prejudicial to the emoluments of old schoolmasters than acting on that section? Therefore it is plain that this is just one of those parts of the receipts of the school which for the time is in terms of the 43d section "by this Act otherwise appropriated," and not available for the school fund, while the old schoolmaster is in office.

Now, if the old schoolmaster is thus secured in his fees, as he had them before the Act, and in his right to collect them, is it not almost a necessary consequence that the board are entitled to say,—"During your tenure of office we have nothing to do with the fees. You must collect them as you did before."

On that ground I agree with the interlocutor of the Lord Ordinary. But I have endeavoured to explain the particular ground upon which my opinion proceeds, because I desire it to be understood that it is in respect of the 55th section in its application to schoolmasters in office at the date of the Act. If this was a question of a new schoolmaster, the 55th section could have no application, and it is needless to discuss what questions would then arise. It is maintained, on the one hand, that the master's duty should be confined to teach-

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ing. On the other hand, it is said that it does not matter much what the theory on that point is, because if the new master is ordered to collect the fees, and refuses, the board will dismiss him. I doubt whether the question can be so easily solved. The question may arise, not between the board and the master, but between a majority and a minority of the board. But on that question I give no opinion. I only state my opinion that an old schoolmaster is bound to collect his own fees, as secured to him under section 55.

LORD JUSTICE-CLERK.—It is impossible not to regret the state of the relations between the school board and the schoolmaster which this action discloses. With the exception of the particulars contained in the third requisition in the minute of the school board, to which, inconsiderable as they are, objections may perhaps lie, and which were surrendered by the counsel for the board at the bar, the board have only required the schoolmaster to do what from time immemorial the schoolmasters of Scotland have done, and what the pursuer himself, during his long tenure of office, has been in the habit of doing. I can find little or nothing in the conduct of the board which lays them open to observation. They tried the experiment of collecting the fees themselves, but finding as has been found in other parishes, that this was a cumbrous and inconvenient operation, they have simply reverted to the former practice, and required the schoolmaster to act as he had previously done. I have looked in vain in these proceedings for any reasonable explanation of his refusal, or for any statement of any material interest which he wishes to protect. When pressed in argument he could only suggest two. One was that his time ought to be given solely to the teaching of his school, and that the collection of the fees would interfere with these duties. Considering that during the whole period of his tenure of office he has found no inconvenience arise from the same cause, it is difficult to put much faith in the sincerity of this objection. It appears, however, that he was quite prepared to undertake the duty if what he calls a reasonable arrangement had been come to on that subject, so that it is impossible to regard this ground of complaint as having any substance in it.

The other interest which the pursuer alleges to have been infringed is much of the same character. He suggested at the bar some supposed difficulties in carrying out the wishes of the board, and represented their not unreasonable wish that he should resume a duty so long performed, as if it implied a domiciliary circuit of the whole parish, and an amount of labour which he had never undertaken before. These anticipations seem to me to be entirely imaginary. The fees which the board desire him to collect are the fees which the children bring to the school. As explained by their counsel, the defenders do not expect the schoolmaster to go round the parish, which has never been the practice in Scotland, and still less do they expect him to prosecute for the fees, a proceeding of which I have never heard of even a single example. The board have undertaken any prosecutions which may be required; but these will be against the parents under the compulsory clauses, with which the schoolmaster has nothing to do.

I regard, therefore, the schoolmaster's position in this litigation as entirely unsupported by any substantial interest, and I think he has failed entirely to allege any reasonable ground, as far as his own interest is concerned, for the difficulties which he has raised.

It seems, however, that there is a legal argument, founded on a construction

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of the clauses of the Education Act, from which it is maintained that it is not lawful for the school boards to require the schoolmaster to collect these fees, and it is on the merits of that legal argument that our present advising takes place.

I must premise the few observations which I intend to make on the construction of the clauses of the statute referred to by one general observation. In a very able address the junior counsel for the pursuer contended that under this statute the schoolmaster had in some sense a position independent of the board—that his function was solely to teach—and that the board had no duty to discharge in regard to his teaching—but were concerned alone in the financial concerns of the school. I heard the argument with surprise; for if there be one thing clear in this important Act of Parliament it is that the school boards are entrusted with a general right and duty of administration over the whole of the educational machinery provided by the statute. They are to ascertain the amount of school accommodation—they are bound to maintain a school in each parish, and keep it efficient—to provide what additional accommodation they may consider to be necessary—to clear out incompetent and inefficient schoolmasters,—and they have all the general powers necessary for the performance of these duties,—and for the greater part their power and discretion is without control. The Government inspector is concerned solely with the Government grant and the terms on which it is given. The board in Edinburgh has no general power of control; and although schoolmasters in office at the date of the Act have certain rights reserved to them in regard to tenure and emoluments, the schoolmasters generally are simply the servants of the ratepayers, represented by the school board, and are necessarily subject to the administration of those for whom they act, and by whom they are appointed and paid. While, therefore, we might interfere in cases which were fraudulent or oppressive, I listened, without assent, to criticisms on the statute founded on misconceptions such as these.

But however critically the statute may be read I am of opinion that the contention of the pursuer derives no support from it.

The clauses on which this contention is founded are the 48th, the 53d, and the 55th sections of the Act. The 48th section authorises the school board to appoint a treasurer, who is to take charge of the funds of the board. The 53d section authorises the school board to fix the school fees, and provides "that such fees shall be paid to the treasurer of the board, and a separate account shall be kept of the amount of the fees derived from each school; and it shall be lawful for the school board, if they see fit, to pay to the teachers of a school the fees derived from such school, and to divide the same among them as the school board shall determine." And the 55th section provides that, subject to the provisions in regard to removals, the teachers appointed previous to the Act "shall not, with respect to tenure of office, emoluments, or retiring allowance, as by law, contract, or usage secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions herein contained, and such emoluments and retiring allowances shall be paid and provided by the school board having the management of such schools respectively." It is contended that by virtue of the provisions in the 53d section, which provides that the fees shall be paid to the treasurer of the board, it is not lawful for the board to direct that they shall be paid to any one else.

The simple view which I take of this argument entirely coincides with that

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presented by your Lordship. Whatever its value might be in the case of a new schoolmaster—a question little likely to occur—it has no relation at all to the case of a schoolmaster in office at the passing of the Act. I have no doubt that the statute did contemplate that the board should relieve the schoolmaster to be afterwards appointed of such secular duties as might interfere with his proper functions; and that it gave the boards power to maintain a staff of officials sufficient to enable them to do so. Whether it gave the schoolmaster any right to question such arrangements as the present is a very different matter. But the reservation in the 55th section clearly qualifies the provisions of the 53d section in any view which can be taken of it. Under that 55th section the schoolmaster's interest in the school fees is reserved entire—he is entitled to their amount, and perhaps, if he chooses, is entitled to collect them as he has been wont to do. The school board are certainly not bound to collect them for him free of charge, his right being to the amount of these fees minus the trouble or cost of collection; and if the schoolmaster can collect them more cheaply himself, or more conveniently, there seems no reason why the school board should not leave them in his hands. In short, as far as an old schoolmaster is concerned, the fund belongs to the schoolmaster, and not to the board, although the board and the schoolmaster may by arrangement agree on a sum to be accepted in lieu of the fees. I therefore think that the 55th section takes the case of an old schoolmaster out of the procedure anticipated in the 53d, a conclusion much strengthened by the last provision of that section, which empowers the school board if they see fit to pay to the teachers of the school the fees derived from such school, and to divide the same among them as the school board shall determine. This provision cannot possibly apply to the case of an old schoolmaster, who might certainly object to any portion of the school fees, or their estimated amount, being paid to any one but himself.

Lord Deas.—This is an action of reduction at the instance of the pursuer in his capacity of parish schoolmaster of Tulliallan, the object of which is to reduce and set aside certain resolutions embodied in various minutes of meetings of the school board of the parish, which are said to be unauthorised by the Education (Scotland) Act, 1872, and prejudicial to the pursuer's rights and interests under that Act. The summons contains also certain petitory conclusions, but these are not essential to the action of reduction, the conclusions of which fall, in the first instance, to be decided, whatever may become of the petitory conclusions, which might have formed the subject of a separate action, and fall to be separately considered. The pursuer has quite a sufficient interest to insist in the reduction whether the board be held liable to him for past due fees or not.

The resolutions which the pursuer seeks to reduce are embodied in the minute of meeting of 8th January 1874 under three heads, but in substance they are four,—

1. That the pursuer shall collect the school fees (that is, the fees payable by scholars) every four weeks, in advance, and pay them over quarterly to the treasurer of the board.

2. That he shall keep registers and accounts of fees, or (as expressed in the minute of 20th February 1874) "registers and log-book."

3. That he shall render quarterly to the treasurer a statement of the fees collected, and of those in arrear.

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4. That, along with the usual monthly fees, he shall collect 3d. per month during January, February, and March for heating the school, and one halfpenny per month, throughout the year, for cleaning purposes, and pay the sums so collected to the treasurer along with the other fees. These last words obviously imply that, under the first resolution, the fees themselves are to be so paid over.

The minutes of meeting subsequent to 8th January, so far as sought to be reduced, are merely confirmatory and explanatory of the resolutions embodied in that minute. The minute of 31st March explains "that it is not, and never was, the intention of the board that he (the pursuer) should prosecute for fees in arrear, but that the board will prosecute those parties whom they think fit."

It is avowedly intended that the duties thus imposed upon the pursuer shall be performed by him gratuitously. That being so, the only debateable question appears to me to arise under the first resolution. There has been neither law nor paction referred to for holding the pursuer bound to collect money for heating and cleaning the school. The board might as well have ordered him to pay for the coals, or himself to sweep the school personally or by deputy, as to make collections for these purposes. I think he is entitled to have the resolution as to these items *de plano* reduced and set aside. A finding to the effect that he is not bound to comply with the resolution is not the remedy appropriate to an action of reduction, and, if the resolution be clearly *ultra vires*, I know no reason why his remedy should not be given, to this extent, in the usual form, under the reductive conclusions of the summons.

I am disposed to make very much the same observations as to the resolutions requiring the pursuer gratuitously to keep registers and accounts, or "registers and log-book," and to render quarterly accounts to the treasurer of the fees collected and of those in arrear. These duties infer labour not incumbent on, nor performed by, him anterior to the Education Act—not laid upon him by that Act—and for the exaction of which, without remuneration, neither law nor paction can be pleaded.

The debateable question, however, remains—Is the pursuer bound gratuitously to collect the school fees and hand them over quarterly to the treasurer? I am disposed to think that he is not. The defenders themselves did not think he was till recently, for they appointed the clerk to the board to collect the fees, and he did so for the half year ending 31st January 1874. But I do not rest upon this, but on the terms of the statute, the policy of which, I think, was that, beyond receiving his emoluments from the board, the schoolmaster should, in future, have nothing to do with money matters at all—that he should devote his time and attention exclusively to teaching, and that all financial matters should be in the hands of the board. There may have been many good reasons for this connected with the new system of compulsory education, and compulsory exaction of payment for that education from all classes alike without fear or favour; but into these reasons I do not inquire, because the statute, I think, has said that this is to be so, and that is enough.

There may possibly be a distinction, as regards the present question, between old and new schoolmasters—that is, schoolmasters who held, and still hold, their offices *ad vitam aut culpam*, and those appointed since the passing of the Act. But if there be so, the position of the old schoolmasters must be in that respect exceptional, and I do not see how we can, judicially and satisfactorily, deal with the exception without first considering,—although, it may be, not

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absolutely deciding,—the construction of the Act as to parish schoolmasters generally.

The interpretation clause bears:—"'Parish school' shall include any school established under the recited Acts, or any of them, and any school established under this Act by the school board of a parish, or which is by this Act vested in and placed under the management of the school board of a parish." The subsequent sections of the Act place the property and management of all parish schools in the school board of the parish, and the property and management of all burgh schools in the school board of the burgh.

The schoolmasters of all schools under the management of the school board are throughout designated by the common term "the teachers," and wherever nothing is said to the contrary it is clear enough that the words "the teachers" include the schoolmasters of the parish schools, old and new.

The 43d section of the Act bears that the expenses of the school board shall be paid out of the school fund. "There shall be carried to the school fund all moneys received out of moneys provided by Parliament, or raised by way of loan, or otherwise received by the school board for the purposes of that fund, and not by this Act otherwise specially appropriated, and any deficiency shall be raised by the school board as provided by the Act."

The 44th section provides for assessing and laying on a "school rate" to meet any deficiency of the school fund.

The 48th section provides for the appointment of a treasurer, "with such remuneration as the school board shall see fit," who is to keep an accurate account of the school fund, and of the expenditure thereof, separate from his account of the other property and funds, and once a year to transmit an account, shewing all receipts and payments, to the accountant of the Board of Education for audit.

By section 52 the school board "may appoint a clerk or clerks, and other necessary officers," "and may assign them such salaries or remuneration as they think fit." There is no restriction as to the duties which such clerk or clerks may be directed to perform.

Then section 53 provides that the school board shall fix the fees "to be paid for attendance at each school under their management, and such fees shall be paid to the treasurer of the board, and a separate account shall be kept of the amount of the fees derived from each school; and it shall be lawful for the school board, if they see fit, to pay to the teachers of a school the fees derived from such school, and to divide the same among them as the school board shall determine."

A subsequent clause may possibly, as I have already suggested, make an exception from this enactment. But the enactment itself is quite general. It applies to the fees paid for attendance at all schools under the management of the board, and it is absolute that all such fees shall be paid to the treasurer of the board, who is to keep a separate account of the fees derived from each school. The power of the board to pay or not to pay over the fees derived from each school to the teacher of that school, as they see fit, is also absolute, as well as the power to divide the fees equally or unequally (so I read the clause) among the different teachers where there are more than one. Similar provisions occur in section 62 (sub-section 3) as to burgh schools. The enforcement of the payment of the school fees under section 70 is also committed to the board, and nothing is said anywhere of enforcement of payment by the schoolmaster, either by refusing to teach the children of defaulters or otherwise.

These enactments seem to me to be inconsistent with the supposition that it is either the right or the duty of the teacher of any of the schools under the management of the school board to collect the school fees and pay them over to the board, otherwise than by the authority of the board on the one hand, and the consent of the teacher on the other. For any of the teachers collecting the fees and putting them into their own pockets I can find no authority whatever. The board may or may not pay over the fees to the particular teacher as they think fit, or they may pay him by salary without reference to the fees, provided the salary fully covers the amount. But, unless by mutual arrangement, the teachers generally seem to me neither entitled nor bound to interfere with the collection.

Is there then an exception introduced by section 55 in the case of old schoolmasters? I am unable so to construe the clause. It provides that teachers appointed previously to the passing of the Act "shall not, with respect to tenure of office, emoluments, or retiring allowance, as by law, contract, or usage secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions herein contained, and such emoluments and retiring allowances shall be paid and provided by the school board having the management of such schools respectively."

Now, I cannot see how the pursuer is to be prejudiced in his emoluments by having the school fees collected for him in place of collecting them himself. He may be so far better by being saved that trouble, but he cannot be worse. I do not think the fact that under the old system he collected the fees, and put them in his own pocket, subject to no further trouble and to no accounting, affects the present question. The statutes then in force, viz., the Acts 1696, 43 Geo. III. c. 54, 1 and 2 Vict. c. 87, and 24 and 25 Vict. c. 107, are out and out repealed. The old system is swept away, and a new system, altogether different, introduced into its place. The rights and duties of parties under the new system are to be looked for in the Education Statute, and I do not find in that statute any duty laid on the pursuer to collect those fees, which admittedly must go into the school fund, and to keep books, registers, and accounts without any remuneration for his time, trouble, and responsibility, simply because the statute says he is not to be prejudiced in his emoluments. The "other duties not relating to teaching," referred to in section 76, are obviously certain duties imposed on schoolmasters by the Militia Acts and certain Railway Acts, &c., and that section has no bearing on this case.

My conclusion, therefore, is in favour of decree of reduction of the resolutions complained of, and that parties should then be heard upon the petitory conclusions, which have not yet been entered upon.

LORD NEAVES concurred with the Lord President and the Lord Justice-Clerk.

LORD ARDMILLAN.—I regret that yet another litigation has arisen in the administration of the Education Act. I regret still more the spirit in which this dispute has originated, a spirit obvious enough on the face of the proceedings before us; and I agree with the Lord Ordinary in thinking that mutual forbearance might have prevented this dispute. It is a bad public example, and a bad omen to the cause of education, that such a difference could not be settled without a lawsuit. But it is now here. The pursuer has forced the question into Court, and we must dispose of it. We have had the advantage of hearing very able arguments.

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Mr Buchanan is the parochial schoolmaster of Tulliallan. He was appointed many years before the passing of the Act of 1872; he was well aware of the use and wont of Scotland in regard to the collecting of school fees, and, as the Lord Ordinary truly says, "the fees were collected by himself in conformity with the invariable practice in all parish schools." The question raised here is, whether he shall, as formerly, collect the fees for himself, or whether, on his being directed by the school board to collect them, he is entitled to refuse to do so, and to demand that the school board shall collect the fees for him?

His claim as pursuer in this action is in the character and in respect of the alleged rights of a pre-appointed teacher—a teacher appointed before the Act of 1872. It is with this claim of his, as an old teacher, that we alone have to deal. We have no other case before us. The case of a teacher appointed after the passing of the Act may be or may not be quite the same. I give no opinion on that case. On the one hand, the provisions of the statute in regard to fees and emoluments are not in all respects quite the same. On the other hand, these newly appointed teachers hold their appointments during the pleasure of the school board; and in that case it is not likely that any question such as the present could be raised, since the school board have a compulsitor by which they could enforce obedience to any lawful direction.

I agree with the Lord President in his construction of the 55th section of the statute, and I agree with the Lord Justice-Clerk in his remarks on the relation of the 55th to the 53d section. By that 55th section the teachers who had been previously appointed are protected from prejudice caused by provisions of the Act with respect to "tenure of office, emoluments, or retiring allowance, as by law, contract, or usage secured to or enjoyed by them at the passing of this Act." Three grounds or sources of security are here mentioned, viz., "law, contract, or usage," prior to the Act. It is not pleaded that there is any law, as distinguished from usage, ruling this question, and conferring a right of enjoying fees without collecting them. Nor is it pleaded that there was any contract in respect of which this teacher was before the passing of the Act entitled to have these school fees collected for him and not by him. Nothing of the kind is suggested. On the contrary, collection by himself had been according to his own experience and practice. Therefore there remains only, as the source of his security for fees, "usage,"—the use and wont of Scotland, and it may be also the local usage in the particular parish. Now, it is beyond question, that the collecting of school fees by the teacher was, for a very long time before the passing of this Act, according to the use and wont of Scotland, and in this parish the pursuer, as parochial teacher, did himself collect the fees for more than a quarter of a century prior to 1872.

His own statement on the record is that when he was appointed under the new Act the board allowed the fees to remain as formerly, and awarded to him a fixed salary of £55 per annum in addition to the fees. It thus appears that when the pursuer entered on his tenure of office under the new Act he did so on the footing of retaining his right to emoluments, apart from the fixed salary awarded, as they stood upon the use and wont of Scotland, and on the usage in the parish of Tulliallan. That usage, general and local, was his security for his emoluments, and the measure of his claim under the 55th section, if by the provisions of the Act he should be prejudiced therein.

It is very plain, and it was so specially represented by the pursuer, that the cost or the trouble of collecting fees is of the nature of a deduction from the

fees which he receives—a burden on the benefit of receiving them. To get the fees which the pursuer must take the trouble of collecting is less advantageous, and was stated by him to be less advantageous, than to receive the fees collected by another. But if I am correct in holding that the ground and measure of the pursuer's right to the fees rests on usage, and if his own collecting of the fees for himself is according to the usage, and part of the usage, then the 55th section and 53d section read together can give him no right to insist that the fees which he has hitherto collected for himself shall now be collected by the board for him, or, in other words, can give him no right to insist that the cost or trouble of collection, great or small, shall be borne, not by himself, but by another, that is, shall be added to the emolument sanctioned by usage.

I may here explain (as I think there has been some misunderstanding on the subject) that the collecting, which the board has required, means only the receiving the fees from the children or their parents in the old manner, according to use and wont, viz., at the school. Nothing more was ever done by any teacher. Nothing more was desired, or directed, or meant to be desired or directed by the school board. Nothing more was suggested by the counsel on either side as within the meaning of the resolution complained of. The board state on record that they "resolved to revert to the old way." They were not introducing a new plan, but returning to the old way; and beyond all doubt the old way was for the teacher to collect the fees in or at the school from the pupils or others who came to pay them.

As I read the 55th section, the school board are bound to give the teacher such emoluments as shall secure him from prejudice according to his right by usage at the date of the Act. But the collection is left to rest on the prior usage. If the fees are collected by the board or by another than the teacher that would be to that extent a departure from the previous usage, and these fees, or their amount, must be handed to the teacher. If withheld or diminished he is prejudiced. If the fees are collected by the teacher, the amount thereof, as matter of book-keeping, enters the account of the school fund. Practically, if he paid that amount when collected to the school board the board would hand it back to him, according to their agreement that he should enjoy the fees. A memorandum of the sum collected satisfies the requirement as to book-keeping. The circuitous procedure of first handing the fees to the board and then receiving them back is avoided, or may be avoided, by allowing the teacher to collect and retain them.

This arrangement for the collection, surely not unreasonable or inequitable, or unfavourable to the interests of the teacher, is, in my opinion, within the province, and the power, and the ordinary management or administration, of the school board. I think they were entitled so to arrange it.

An application for advice was made very naturally and properly by the school board to the Board of Education for Scotland at Edinburgh, and the pursuer having directed the attention of the school board to the provisions of the 53d section of the Education Act, that subject was brought under the notice of the Board of Education. The letter of the Rev. Dr Taylor, secretary to the Board of Education, is printed in this record. Of course the opinion of the Board of Education does not authoritatively dispose of a legal question between the school board and the teacher; and accordingly the Board of Education explain that they do not attempt to do so. But the views of the Board of Education—a body competent to judge of a matter within administrative

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working, and a body free from the local prejudice which may be supposed to actuate one or both of the sections of the local board,—are not without importance. The opinion of the Edinburgh board is thus stated :—"The words in section 53, 'such fees shall be paid to the treasurer of the school board,' do not refer to the process of collecting fees, but to the carrying of them into the school fund, in order that a complete and accurate account may be kept of all the cash transactions of each school. The board do not consider that there is anything in the Act to interfere with the 'use and wont,' according to which the fees in the public schools of Scotland have been collected by the schoolmasters." I think the view taken by the Edinburgh Board of Education of the 53d section is judicious and appropriate. There are no express provisions in the statute in regard to the mode of collecting, or to the fixing of the person bound to collect, school fees; and the mere use in the 53d section of the words "paid to the treasurer of the board" cannot be read as a statutory direction that the treasurer shall collect. If the person who collects pays the fees to the treasurer, that meets and satisfies the clause. Reading the 53d section in connection with the 43d, 48th, and especially the 55th sections, I have arrived at the same conclusion as that expressed in this letter,—the same as that explained by the Lord Ordinary. In my opinion the purpose of these sections is not to direct the mode of collection, or to fetter the discretion of the school board, but to secure the formation and administration of a "school fund." Now, the administration of that fund, and the collection of that fund, is part of the management of the school, and is in the hands of the school board for the purposes of the Act. Whether it may be a better arrangement that the collection shall be by the teacher, or shall be by the treasurer of the board, is a question which cannot be disposed of by inflexible rule, for it may depend on circumstances. In this case I see no reason to doubt the decision arrived at. But it is a question for the discretion of the board. With that discretion we cannot interfere. We are not required, I think we are not entitled, to exercise our own discretion on a matter within the province and the administration and the discretion of the school board. I think it is our duty to decline to interfere, and our duty to leave the school board to exercise their own discretion, for the parish schools are by the statute "vested in" and placed "under the management of the school board."

Accordingly, on the leading question now before us, I am of opinion that the matter embraced and disposed of in the resolutions complained of by the pursuer is within the sphere of ordinary management and administration by the school board, and that this Court should not interfere unless the resolution of the school board is clearly *ultra vires* and contrary to law. I am further of opinion that this resolution of 8th January 1874, with the subsequent resolutions adhering thereto, is not *ultra vires*, and not contrary to law, and that the pursuer is not entitled to decree of reduction as concluded for. There is no real importance in the question raised in this action. But very grave and important interests are involved in the interference of this Court with the administration of the school board in such a matter. If, in a matter where the management and the discretion is by statute given to the school board, every offended teacher in whom irritation is kindled, or to whom irritation is supplied, were encouraged to rush into Court with an action of reduction, the consequences would be very serious.

There are some trifling sums for heating and cleaning the school in regard to which I do not think that we have sufficient materials for judging whether they

were exigible according to usage, and whether they were collected by the teacher according to usage prior to the date of the Act. I understood the Solicitor-General to say that on the part of the board he did not press this point, and I was glad to hear that statement, as I think that this part of the resolution is wisely departed from.

I have therefore only to add that, subject to some slight modification in regard to the matter last mentioned, I concur in the opinion of the Lord President, and the interlocutor of the Lord Ordinary.

LORD ORMIDALE.—Were it not for the difference of opinion in the Court I could not have entertained any doubt that the interlocutor of the Lord Ordinary in this case is well founded. And, with all due deference, I cannot help thinking that it is only by giving way to an unnecessarily narrow and literal construction of a single expression in the Education Act that any other conclusion can be arrived at.

The question is, whether the school board of Tulliallan are entitled to insist in the pursuer, the schoolmaster of that parish, receiving the fees tendered to him by the scholars attending his school, and accounting for them to the treasurer of the board. I have used the expression "receiving" the fees paid by the scholars in place of the word "collecting," as the latter might be liable to misconstruction, although the true meaning of the board has been, I have no doubt, all along perfectly well understood by the pursuer to be, not that he should go about the parish insisting on payment of the fees from the scholars or their parents or others, and still less that he should be at any trouble or expense in enforcing payment of the fees, but merely that he should receive and account for such of the fees as may have been received by him at the school. I have also used the word "accounting" for the fees in place of saying "paying" them over with one hand to the treasurer of the board, and then with the other taking them back from that functionary, as I cannot imagine that any such circuitous proceeding was ever contemplated.

Having regard to these explanations, and the concession which I understand the board to be quite ready to make in any form the Court may desire, that they will not require the pursuer to receive the dues for cleaning, or to take any trouble in reference to securing the services of a person to attend to the cleaning and heating of the school, as mentioned in their minute of 8th January 1874, I must own my inability to see how the proceedings of the board are in any respect objectionable, or can be fairly complained of or resisted by the schoolmaster.

It is true that the pursuer was schoolmaster of the parish of Tulliallan for many years prior to the passing of the Education Act, and that consequently he is entitled to the benefit of the 55th section thereof, which provides that "with respect to tenure of office, emoluments, or retiring allowance, as by law, contract, or usage secured or enjoyed by him at the passing of this Act," he is not to be prejudiced. But by the minutes of the school board complained of I am unable to see how the pursuer can be prejudiced to any extent or in any way whatever. That he will be prejudiced with respect to his tenure of office, or retiring allowance, has not been and could not possibly be said, as the minutes referred to have no relation to his tenure of or removal from office. Neither do I understand that the pursuer complains that his emoluments have been or will be to any extent or in any way prejudiced by these minutes, and he makes no such

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complaint in the record. On the contrary, he expressly says at the conclusion of the first article of his statement of facts that the school board have "allowed the fees in his school to remain at their former rates," and that in addition to these he has a fixed salary of £55 a-year.

It being clear, therefore, that the pursuer can derive no support in this action from the 55th section of the Act, the question is narrowed to the 53d section, which is that on which the pursuer mainly if not exclusively relies. It is no doubt enacted by the latter section that the school board shall fix the school fees; and that the same "shall be paid to the treasurer of the board," and this is the statutory expression to which I referred at the outset as creating the only possible difficulty in the case. Founding on the 53d section of the Act, the pursuer has argued that school boards are not entitled to require him to collect or receive the school fees of his scholars, and that it would be illegal for him to do so, seeing that the statute expressly provides that the fees shall be paid to the treasurer. But this, as I have already said, is, in my apprehension, a very narrow and far too literal a construction of the statutory words, and one which cannot, I think, be supported by any show of reason. On this point I entirely concur with the Lord Ordinary. The statute does not, even in words, provide that the fees are to be paid to the treasurer by the scholars themselves. It does not, indeed, specify by whom the payments are to be made to the treasurer,—that, as well as other *minutiæ*, being, as might be expected, left for the regulation of the school board, so far as any regulation might be necessary. This being so, what else, consistently with good sense and reason, could the school board have done than to require the pursuer, as schoolmaster, to take from the children attending his school their fees, and keep a note or record of his receipts? In requiring him to do this the board did not impose any new duty or trouble on the schoolmaster to which he had not all along been previously subjected. On the contrary, it may well be suggested that his trouble in regard to his scholars' fees has been considerably lightened, for until the passing of the Education Act he undoubtedly was himself obliged to collect, and enforce if necessary, payment of the fees, or submit to their loss and go without them, while now he has only to receive what the scholars are ready to pay, leaving the board to compel attendance of defaulting scholars, and in that way to enforce payment under and in terms of the compulsory powers of the statute. So far, therefore, from the complainer being prejudiced by the proceedings of the board complained of, it is manifest that he must be considerably benefited, for he will be entirely relieved from the disagreeable, troublesome, and expensive duty of enforcing at his own instance payment of the school fees. Nor can it avail the pursuer anything to say that the trouble he formerly had in collecting and enforcing payment of his fees was taken on his own account, so far as taken at all, while now the comparatively trifling portion of the trouble to which he will still be subjected will be taken by him on behalf of the board, for any such reasoning as this proceeds on an obvious fallacy. The school fees formerly collected and received by the pursuer were no doubt appropriated by him as his own, but so also will still be all the school fees that may be paid. Neither can it with truth be said by the pursuer that he will be subjected to any new hardship by being obliged to enter in a book or register, to be furnished to him, the payments that may be made by the scholars, in order that the school board may always know who have, and who have not paid, for such a note in some form must always have been kept by him.

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The only other question that remains for consideration is, whether it was within the competency or power of the school board to regulate, so far as regulation was necessary, the very small matters of detail about which the pursuer has raised the present dispute. Of this I am unable to entertain any doubt. By the 23d section of the Education Act it is provided that all the schools in the parish "shall be vested in and be under the management of the school board of such parish," which shall, with respect to the school management, "and generally with respect to all powers, obligations, and duties, in regard to such schools now vested in or incumbent on the heritors qualified according to the existing law, and the minister of the parish, supersede and come in place of such heritors and minister." And, again, by the 76th section of the Act the duties imposed upon the schoolmaster of a parish by previous statutes, "and any other duties not relating to teaching, which according to any law or statute in force at the date of the passing of this Act are imposed upon the schoolmaster of a parish, shall be performed by the schoolmaster of the parish in office at the date of the passing of this Act, so long as he continues to be teacher of a public school in the parish." Keeping these statutory enactments in view, and also bearing in mind that prior to the passing of the Act it was, beyond all question, the duty, according to the invariable practice of the parish schoolmaster, to collect his fees, I must repeat that I am unable to see how it can be reasonably maintained that the school board have exceeded their powers by the proceedings complained of. That they have not done so appears to be clear, as well on a consideration of the statutory provisions as on the broad, and, as I think, indisputable ground, that the pursuer has not been required to do anything more than what is naturally and fairly incidental, on the one hand, to his position of schoolmaster, and, on the other hand, to the position of the school board, as having the management and control both of him and the school. It does not, indeed, seem to be disputed on the part of the pursuer that it was within the competency and power of the school board to do all they did. All he says is that they were not entitled to do what they did "unconditionally," but what he means by that he has not stated in the record.

On the grounds, and for the reasons I have now adverted to, I am of opinion that the interlocutor of the Lord Ordinary is well founded and ought to be adhered to, with the explanation, or a finding, if thought the preferable mode, to be inserted in the interlocutor of adherence, that the pursuer is only to receive the school fees that may be paid to him by the scholars attending his school, at the same time entering in the appropriate book or books to be furnished to him for the purpose by the school board the payments so received by him, and the names of the scholars by or for whom such payments have been made. And, if thought in the least necessary, the interlocutor of the Court adhering to the Lord Ordinary's interlocutor may also contain an explanation or finding to the effect that the pursuer is not to be at any trouble in regard to the heating or cleaning of the school, and that the receipts, if any, which he may require to give his scholars for the fees paid by them shall be furnished by the school board or their treasurer. With some such explanations or findings as these the pursuer will be saved from all risks of any undue burden being laid upon him.

LORD MURE.—I have felt this case, as I understand all your Lordships have done, to be one of considerable difficulty and importance, and my opinion has fluctuated during the consideration of it. When the case came before us in the

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First Division of the Court the minute of 8th January was defended to its full extent. It contains three distinct resolutions for regulating the duties to be imposed on the schoolmaster, first, as to collecting the ordinary school fees; second, as to keeping a register; and thirdly, as to his charging and drawing from the scholars small sums for cleaning and heating the school. In the view I took of the position of schoolmasters appointed before the passing of the Education Act of 1872, it appeared to me that the third at least of these resolutions went beyond what the board were entitled to impose upon the pursuer. And if the minute of the 8th of January had still been defended in its entirety I should not have been able to concur in holding that the defence to this action ought to be sustained.

But I understand that all that your Lordship proposes is to negative the declaratory conclusions of the summons, that the pursuer is not bound to collect the fees, and that we are not by our judgment to express any opinion on the other matters contained in the minute of 8th January. The effect of the proposed judgment, therefore, as I understand it, will be to decide that schoolmasters who were in office at the date of the Act of 1872 are to collect the school fees as they had been in the habit of doing, and it appears to me that, in the absence of any express provision to the contrary, that is fair and reasonable, because the policy of the Act as pointed out, more particularly in the 55th section, seems to be that these schoolmasters should be maintained in substantially the same position in the matter of emoluments as they were before it was passed. And as the collecting of the school fees is a duty which parish schoolmasters have discharged from time immemorial, I think it was fairly within the power of the board to say to the pursuer that he should continue to discharge that duty, drawing the fees as heretofore, with such additional salary as might be assigned to him by the board, but not of less amount than that which he had been in use to receive. In the argument before the Court of seven Judges I understood from what fell from the Solicitor-General that the defence of the resolutions of the 8th of January was not insisted in to any further extent, and that all that was to be required of the pursuer was that he should take payment of the fees when brought to the school, monthly, in advance, according to his previous custom. I am prepared to concur in a judgment to that extent.

There was some difference of opinion as to whether the Lord Ordinary's interlocutor ought not to be altered to the effect of limiting the judgment to decree of absolvitor from the declaratory conclusion. Lord Ormidale and Lord Mure were in favour of such a modification. But ultimately

THE COURT adhered.

J. & J. TURNBULL, W.S.—KEEGAN & WELSH, S.S.C.—Agents.

No. 139.
June 12, 1875.
Graham v. Borthwick.

W. GRAHAM (Inspector of Poor of Hoddam), Pursuer.—*Lancaster.*
C. BORTHWICK (Inspector of Poor of Middlebie), Defender.—*R. Johnstone.*
D. CLAPPERTON (Inspector of Poor of Annan), Defender.—*Crichton.*

1ST DIVISION.
Sheriff of Dumfriesshire.
M.

Expenses—Proof—Deposition to lie in retentis.—In an action in the Sheriff-court of Dumfriesshire by the inspector of poor of Hoddam against the inspectors of Middlebie and Annan for advances made to a pauper, on the motion of the second defender the evidence of a witness, Mrs Wheeler, aged 74, was allowed to be taken on com-

mission to lie *in retentis*. She resided at Plymouth and was brought to Dumfries, accompanied by her husband (as she was unable to travel alone), and there her deposition was taken. The case afterwards proceeded to proof before the Sheriff, and Mrs Wheeler was examined as a witness, and gave very material evidence for the parish of Annan. The case came before the Court of Session on appeal, and the parish of Annan was ultimately successful.

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The Auditor disallowed the expense of her first examination, which amounted to upwards of £50. The inspector of Annan objected to his report.[1]

Held that the expense ought to be allowed to the amount which would have been incurred if the deposition to lie *in retentis* had been taken at Plymouth without sending agents there, and remit to the Auditor accordingly.

Observed that there is no absolute rule on the subject.

MACKENZIE & KERMACK, W.S.—JOHN GALLETLY, S.S.C.—WM. STEELE, S.S.C.—Agents.

WILLIAM DONALD, Pursuer.—*Scott—M'Kechnie.*
THE TRUSTEES OF THE CLYDE NAVIGATION, Defenders.—*D.-F. Clark.*

No. 140.
June 12, 1875.
Donald v. Clyde Navigation Trustees.

Process—Issue—Counter Issue.—In an action of damages for personal injury against the proprietors of a ferry the defenders were allowed to take a counter issue of contributory negligence, in respect that the pursuer did not object, but *observed* that the defence might have been proved without a counter issue, and that a counter issue in such cases was not usual in practice.

THIS was an action of damages for personal injury raised in the Sheriff-court of Lanarkshire by William Donald, Govan, against the trustees of the Clyde navigation. The Sheriff-substitute (Clark) having appointed a diet of proof the pursuer appealed to the Court of Session with a view to jury trial. He proposed this issue,—"Whether, in consequence of the insufficiency of a chain or chains used by the defenders in connection with their ferry between Partick and Govan, or of the improper or insecure fastening thereof, the pursuer, while travelling as a passenger by said ferry on or about 28th May 1872, was seriously injured in his person, through the fault of the defenders, to the loss, injury, and damage of the pursuer?" The defenders proposed to take the following counter issue,—"Whether the said injuries were caused, or materially contributed to, by the fault of the pursuer?"

1ST DIVISION. Sheriff of Lanarkshire. M.

The pursuer did not oppose.

The defence as stated on record was mainly (1) that the chain was broken in consequence of a steamer, the "Vivid," passing too rapidly; (2) that the pursuer was standing in an improper place.

LORD PRESIDENT.—In practice we have not found a counter issue necessary in cases of this kind. The only question is, whether we shall allow the defenders to take one on their motion. There being no objection on the part of the pursuer, and no chance of prejudice to him, I am inclined to allow the defenders to take the issue. But I must not be understood to say that the former practice has been erroneous, or that such an issue is necessary.

[1] The following authorities were quoted by the parties:—Colquhoun v. Mackay, May 28, 1829, 1 D. and A. 100; Napier v. Campbell, March 7, 1843, 5 D. 858, 15 Scot. Jur. 357; Maclaine v. Cooper, Feb. 4, 1846, 8 D. 429; Couper v. Cullen, June 27, 1874, *ante*, vol. i. 1101.

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LORD DEAS.—The practice since the Judicature Act has been not to have a counter issue in cases of this kind. I think that ought to be continued. The settlement of the issues is the act of the Court, and not of the parties. I see no reason for departing from the usual practice in this case. If, however, the issue is given, it ought distinctly to appear that it is so in respect of no objection.

LORD ARDMILLAN.—I think the defence might have been proved without a counter issue. Still, that is not, in my opinion, conclusive against allowing it. The fact alleged is relevant, and important. If the defenders desire to have a counter issue with the object of bringing their plea on the fact more distinctly before the jury, I think they are entitled to have it. I throw no doubt on the correctness of the former practice. There is no decision against the competency of a counter issue such as this, and here it is proposed by the defenders and not objected to by the pursuer.

LORD MURE.—This is rather a nice question. I cannot concur in the opinion which has been indicated by one of your Lordships, to the effect that wherever there is a special point raised in defence, which a defender wishes to bring prominently before the jury, he is entitled to a counter issue. In this case there is another special defence founded upon,—the conduct of the "Vivid" steamer in approaching the ferry at too rapid a pace. But I think it would be a dangerous rule to act upon, that because the jury might not deliberately apply their minds to that point there should be a counter issue regarding it. The defence of contributory negligence, however, is perhaps a more special matter; and as it is stated that it has sometimes been found difficult to get juries to consider that question, and the pursuer in this case does not object to the issue proposed by the defenders, I think the issue may be allowed, but only in respect of the consent of the pursuer.

THE COURT allowed the counter issue.

JOHN WRIGHT & JOHNSTON, L.A.—WEBSTER & WILL, S.S.C.—Agents.

No. 141. June 15, 1875. M'Dougall v. M'Dougall.

ALLAN M'DOUGALL, Pursuer.—*D.-F. Clark—Guthrie Smith.*
HUGH M'DOUGALL AND OTHERS, Defenders.—*Sol.-Gen. Watson—Trayner.*

Writ—Attested Deeds—Statutes 1593, *c.* 179, *and* 1681, *c.* 5.—*Held* that the Act 1681, c. 5, did not require the insertion in the testing-clause of probative deeds of the names of the subscribing witnesses, but only of such a designation as, along with their subscriptions, was sufficient for identification.

A deed contained the following testing-clause:—"In witness whereof, . . . before these witnesses, John M'Corquodale, schoolmaster in the island of Seil, and Allexr. *Dow*, Residenter in Carbane, tutor or guardian to the children of John M'Dougall, tacksman of Carbane. (Signed) JOHN M'DOUGALL. John M'Corquodale, witness; Alexr. Dow, witness."

The letters printed in italics were written on erased portions of the deed. *Held*, in an action raised before 1st October 1874, the date when the Conveyancing Act, 1874, came into operation, that what was written on erasure must be regarded *pro non scripto*, but that the person whose Christian name was given as "Allex." and who was designed as "residenter in Carbane, tutor or guardian to the children of John M'Dougall, tacksman of Carbane," was shewn without going beyond the deed to be the subscribing witness, Alexr. Dow, and therefore, that the deed was duly tested.

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June 15, 1875.
M'Dougall v. M'Dougall.
2D DIVISION.
Lord Shand.

THIS action was raised on 29th June 1874 by Allan M'Dougall of Ardincaple, concluding, *inter alia*, for declarator that a bond of tailzie, bearing to be granted by John M'Dougall of Arncaple, dated 23d June 1758, was null and void, and that the pursuer as heir-male of line and at law of the said John M'Dougall, had right in fee-simple to the lands of Ardincaple.

The defenders called were persons alleging themselves to be substitute heirs of entail under the destination contained in the bond of tailzie.

The testing-clause of the bond of tailzie was as follows:—"In witness whereof, these presents are wrote on this and the seven preceding pages of stampt paper, by Charles Mackenzie, clerk to William Budge, Writer to the Signet, and subscribed by me at Carbane, the twenty-third day of June one thousand seven hundred and fifty-eight years, before these witnesses, John M'Corquodale, schoolmaster in the island of Seil, and Allexr. *Dow*, *R*esidenter in Carbane, tutor or guardian to the children of John M'Dougall, tacksman of Carbane. JOHN M'DOUGALL. John M'Corquodale, witness; Alexr. Dow, witness."

The pursuer averred that the letter "r" of the word "Allexr.," the whole of the word "Dow," and a portion of the letter "R" of the word "Residenter" in the testing-clause, were written on an erasure, or superinduced over other words. He therefore maintained that the said word and letters must be held *pro non scriptis*, and that the deed was, consequently, not duly attested according to law, and was void and null.

The Lord Ordinary, on 28th January 1875, pronounced the following interlocutor:—"Finds that the letter 'r' of the word 'Allexr.,' the surname 'Dow,' and the letter 'R' at the beginning of the word 'Residenter' in the testing-clause of the bond of tailzie bearing to be granted by the now deceased John M'Dougall of Arncaple, dated the 23d day of June, and recorded in the Register of Tailzies the 10th, and in the books of Council and Session the 16th days of August, all in the year 1758, mentioned in the conclusions of the summons, have been superinduced on an erasure: Finds that the said letter and words so superinduced must be presumed to have been written after the said deed had been signed and completed, and must be taken *pro non scripto*: Finds, therefore, that the said deed contains in the body thereof the designation of one witness only, and was at its date, and now is, null, by virtue of the statute 1681, chapter 5," &c.*

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* "NOTE.—The question raised in the present action must be decided without reference to the provisions of section 39 of the recent Conveyancing (Scotland) Act, 1874, the action having been raised in June 1874, while the statute, which did not come into operation till 1st October, contains (section 68) a saving clause as to all depending actions.

"From an inspection of the bond of tailzie of 1758, which forms the subject of the action, I am satisfied that the word 'Dow' and the letter 'r' of the word 'Allexr.' which precedes it, and the letter 'R' at the beginning of the word 'Residenter' following, have been written on the deed after erasure; and, accordingly, I have not thought it necessary to order a proof of the pursuer's averments on this subject. A careful inspection of the deed in good light must, I think, lead to this conclusion. Enough of the original writing on the surface of the paper on which the superinduced word and letters are now found remains to lead to the inference that, in place of the superinduced word and letters, the word 'Alexander' had originally been written. The clause in this way seems, as originally written, to have omitted any surname of the second witness. To supply this defect the last part of the word 'Alexander,' consisting of the letters 'ander,' has been erased, as appears from the surface of the paper by looking along it, and on the erased surface there has been superinduced—(1) the letter

No. 141. The defenders reclaimed.

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'r' to complete the word 'Allexr.'; (2) the surname 'Dow'; and (3) the small letter 'r' beginning the word residenter has been converted into a capital letter. If there were any doubt as to the erasure, there certainly can be none I think as to the superinduction, and the legal effect of vitiation in either way is the same. The part of the deed vitiated, whether the vitiations have arisen from the erasure and superinduction, or superinduction on writing below, must be read *pro non scripto*.—Gollan, July 23, 1863, 1 Macph., H. L. 66, 35 Scot. Jur. 641; Munro v. Johnstone, 18th December 1868, 7 Macph. 250, 41 Scot. Jur. 153; and Hamilton v. Menteath, 1st December 1824, 3 S. (N. E.) 245.

"Assuming that the word and letters above mentioned are to be held *pro non scripto*, it follows that the testing-clause contains only the name and designation of one witness. It must be assumed that the superinduced word and letters were added after the deed was completed; and in the absence of the word and letters which have been superinduced the name of the alleged witness has not been mentioned in the deed.

"The Act 1681, chapter 5, provides, *inter alia*,—'That only subscribing witnesses in writs to be subscribed by any partie hereafter shall be probative, and not the witnesses insert not subscribing; and that all such writs to be subscribed hereafter, wherein the writter and witnesses are not designed, shall be null, and are not suppliable by condescending upon the writter or the designation of the writter and witnesses;' and after certain other provisions the statute concludes, 'and that in all the said cases the witnesses be designed in the body of the writ, instrument, or execution respective, otherwise the same shall be null, and make no faith in judgment or outwith.'

"The effect of this provision was to render it necessary, under pain of nullity of the deed, that not only should the witnesses subscribe, but that they should be designed in the body of the deed or testing-clause. In the present case only one witness is named and designed, omitting the erased words and letters. The designation of another person is also given, but no name, or at least no surname. It appears to me in these circumstances that the deed does not fulfil the requirements of the statute, and that it is therefore a nullity.

"It is maintained by the defenders that under the statute it is not necessary that the subscribing witnesses should be named in the body of the deed, but that it is sufficient if they be there designed, as the names may be properly ascertained by a reference to the signatures of the witnesses appended to the deed. The first answer made to this contention is that the statute, in requiring the designations of the witnesses to be given in the testing-clause by necessary implication requires the names to be also there stated, because the names are truly necessary to the designation. The statute places the writer and witnesses in the same position. Both must be designed, and it is evident that in the case of the writer the name must be given; and it rather appears to me that it is essential that, in like manner, the names of the witnesses should be recorded. This view is supported by the decisions in the case of Douglas, Heron, and Co. v. Clerk, 1787, Mor. 16,908, and Abercromby v. Innes, 15th July 1707, Mor. 17,022, in both of which deeds were found to be null because of errors in the Christian name of the witness as given in the testing-clause, although the designation was in terms which correctly applied to the person who signed as witness. It is farther against the defenders' view that it should be left to the accident of the form in which a witness may sign whether his Christian name should appear in the deed or not. In many cases the witnesses sign their Christian names, and even a second name, by initials merely, and it is only in the testing-clause that the proper name and designation of the witness is to be found. But apart from this view, and even supposing it could be held under the statute that the designation of a witness, without his name, given in the testing-clause, would be sufficient, at least it must be apparent from the clause that the designation applies to the subscribing witness. Thus the testing-clause

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LORD JUSTICE-CLERK.—This is an action of reduction brought for the purpose of setting aside a bond of tailzie, dated in 1758, on the ground that it was not

might bear that the deed had been signed 'before the two subscribing witnesses, both clerks to A B, solicitor in Edinburgh.' In such a case it might be maintained that the deed contained the designations of the two witnesses who were identified as subscribing it, and that their names could be ascertained from their subscriptions. In the present case there is nothing to identify the designation of the second witness with Alexander Dow who subscribed the deed as a witness. The testing-clause does not profess to design any one who subscribes, and may refer to one who had seen the deed signed but had not himself subscribed it as a witness. There is nothing to identify the designation with a subscribing witness, and so the subscribing witnesses are not designed.

"I am not aware that any case substantially the same as the present has occurred; but the unvarying practice, in conformity with the statute, has been to give the names and designations of the witnesses in the testing-clause, a practice with which the deed in question professes but fails to comply, and this practice strongly shews that the specification in the testing-clause has been always deemed essential. In two cases deeds have been sustained in which the testing-clause did not expressly bear that the parties mentioned were witnesses, but in both cases the witnesses who subscribed were named and fully designed in the testing-clause, and it was evident that the only purpose for which their names there occurred was to designate them as witnesses.—Doig v. Kerr, 1741, Mor. 16,900, and Wemyss v. Hay, 5th June 1821, 1 S. (N. E.), 51. In these cases there was a compliance with the provisions of the statute in giving what is here wanting, the names and designations of the witnesses. In the case of Gibson v. Walker, 16th June 1809, F. C., affirmed 2 Dow's Appeals, 270, the deed was held to be null because the signature of the witness was written on an erasure, although his name and designation were given in the testing-clause.

"Holding the effect of the statute to be clear, the only difficulty I have felt in the case has arisen from the case of Morton v. Hunters, 10th December 1828, 7 S. 172. From the report of that case it appears that one of the several objections to the instrument of sasine was that the name of one of the witnesses was written on an erasure in the body of the instrument, but it is added, 'it was subscribed by him, and it was not alleged that he had not been present.'

"The report bears that the Court 'disregarded the objection as to the witness,' and no more notice of the subject occurs in the discussion of the case. What was the particular ground on which the Court proceeded, or whether this particular objection was strongly pressed, does not appear. It may be that from an inspection of the deed the Court was satisfied that no erasure had occurred, or the view may have been adopted that in the case of instruments of sasine, which depended for their validity on their being recorded immediately after their date, and where the record supplied a check against alterations, the same strict rules in regard to vitiations were not held to apply. There is an obvious distinction between such instruments and ordinary deeds, in this respect, that the witnesses, at least down to the statute of 1845, did not, as in the ordinary case, attest the execution of the instrument, but subscribed as witnesses, testifying that the acts referred to in the instrument had been done. Various writers have referred to the indulgence shewn by the Court to irregularities occurring in these instruments. Professor Menzies states (last edition, p. 578), 'the Court will not interfere with an instrument of sasine on account of obvious blunders, inaccuracies, or ungrammatical expressions in the body or in the notary's docquet, provided it contain effectual attestation that the essential things were done, and this may be assumed as a principle under the new form as well as the old. We shall not occupy time in citing numerous cases.' In the case of Douglas v. Chalmers, being one of a series of cases reported by Tait, 5 Brown's Sup. 588, the reporter adds the following note,—'In all the above cases the Lords proceeded upon this principle that when it appeared *ex facie* of the instrument

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duly executed and authenticated in terms of law. It is alleged by the pursuer that in the testing-clause of the deed what purports to be the surname of one of the instrumentary witnesses, and one letter of the abbreviation of his Christian name, is written on an erasure, whence he deduces the conclusion, to which the Lord Ordinary has given effect, that the bond is vitiated *in essentialibus*, and is devoid of the solemnities required by the Act 1681, c. 5.

Of the existence of the alleged erasure, and the extent of it, there is substantially no dispute. The full text of the testing-clause is as follows:—"In witness whereof these presents are wrote on this and the seven preceding pages of stampt paper by Charles Mackenzie, clerk to William Budge, writer to the signet, and subscribed by me at Carbane the 23d day of June 1758 years, before these witnesses, John M'Corquodale, schoolmaster in the island of Seil, and Allexr.

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that the thing was done, and that sasine was in reality given, blunders or mistakes in extending the instrument ought not to annul the sasine, and accordingly in many cases sasines labouring under defects have been sustained both by the Court of Session and House of Peers, which at a more early period of our law, especially before the introducing the Register of Sasines, would not have been sustained.' There is a similar note by the editor at page 227 of the second edition of Bell's Treatise on Completing the Title.

"This favour to instruments of sasine is probably the explanation of the decision in the case of Hunter, and a reference to the session papers shews that much reliance was placed on the fact that the deed as recorded in the Register of Sasines corresponded with the deed challenged. In the answer on this point reliance was placed on the fact that it was not alleged 'that any alteration had been made upon the instrument since it was completed and sent to the record.' I do not think that the decision in the case of Hunter can be held as nullifying the words of the statute with reference to a deed which witnesses have signed in order to attest its execution by the granter. The subscribing witnesses must be designed in the testing-clause.

"Assuming that the statute applies, and that the deed must be held to have been null after it was completed, in consequence of the want of mention in the deed of the name and designation of one of the witnesses, it was not maintained by the defenders that anything that has since occurred could make the deed valid now.

"Apart from the provisions of the recent Conveyancing Act, it seems to follow from the decision in the case of Sheppard v. Cheyne's Trustees, 6 D., 464, and 6 Bell's Appeals, 153, that neither the lapse of time nor the completion of titles and possession which has followed on the bond of tailzie can prevent effect being given to the challenge now made. In that case Lord Chancellor Cottenham, after stating the reasons for holding the deed of entail to be null on account of the erasures it contained, proceeds,—'But if there was in truth no disposition, no conveyance (for this is the effect of the vitiation of the deed), it is not easy to understand how there could be a ratification. To give effect to this supposed ratification would in fact be not to ratify, but to make a disposition for the granter—a disposition which he himself had not made.'

"These words apply expressly to the present case. Assuming the bond of tailzie to have been null under the statute, no ratification of it by making up titles or possession could make it valid or effectual. It wants the requisites of a deed, and being null, such actings as have followed on it cannot rear it up into an effectual instrument. It is admitted that the pursuer is heir of line of the granter of the alleged deed, who was proprietor of the estate in question. This being so, he seems to be entitled now to take up the estates, on the footing that they were not well disponed by the bond of tailzie, and are still *in hæreditate jacente* of the alleged granter of that deed. Looking to the nature of the question, and the necessity, for the sake of the pursuer's title, to have the present question tried in a litigated cause, I do not think the case one in which expenses should be given."

Dow, residenter in Carbane, tutor or guardian to the children of John M'Dougall, tacksman of Carbane." The name "Dow," the final "r" of the abbreviation "Allexr.," and the initial "r" of the following word "residenter," are unquestionably written on the erased portion of the instrument.

Thus three questions arise.

1. What is the import of the words used in the testing-clause, as affected by the erasure?

As to this matter, I agree with the Lord Ordinary. We must read the clause as if the word and letters in question were left blank. We are not to supply anything to fill the vacant place, but to read the part of the clause which is not vitiated as if the clause itself contained nothing else. That part of the testing-clause, therefore, must be read as follows,—" before these witnesses, John M'Corquodale, schoolmaster in the island of Seil, and Allex residenter in Carbane, tutor or guardian to the children of John M'Dougall, tacksman of Carbane." The partial erasure of the initial letter of "residenter" does not affect the sense, and is of no importance. The second instrumentary witness is therefore not named—at least not fully or effectually named—in the testing-clause.

2. The second question is, Is this clause vitiated and erased *in essentialibus;* is it an essential requisite to render the deed effectual that the instrumentary witnesses should be named, as well as designed, in the testing-clause?

I am of opinion that the insertion of the names of the instrumentary witnesses in the testing-clause is not a solemnity required by law, and that there is no Act of the Legislature, and no judicial decision, on the authority of which we can affix the penalty of nullity to the omission. It is true, that the usual style of such clauses sets forth the names as well as the designations of the instrumentary witnesses, that it has been the custom of conveyancers to insert them, and that their teaching has prescribed this form as the safest, most distinct, and simplest mode of pointing out the person whose designation follows. But we must look to the statutes to find what matters are essential in this respect. The question is not now mooted for the first time, and although it has never been decided, I have formed a clear opinion that neither the letter nor the policy of the Act 1681, c. 5, made the naming of the instrumentary witnesses in the testing-clause essential to the validity of a deed, but that it is sufficient if they be designed therein.

The course of Scottish legislation in the execution and authentication of deeds was very simple. I have no intention of going over the statutes, which were fully commented on from the bar, and are familiar. As writing became more common, attestation by sealing was disused. The Act 1540, c. 117, seems by its words to make the subscription of attesting witnesses essential; but neither this statute, nor that of 1579, c. 80, although they from time to time were so construed, enacted in express words that this should be so. Neither was it customary to design the witnesses named, but not subscribing, in the body of the deed. The first statute which contained any peremptory provision in regard to the execution of deeds was that of 1593, in regard to the writer of the instrument, as to whom it was enacted that "all original charters, contracts, and all other writs and evidents to be made hereafter, sall make special mention in the hinder end thereof, before the inserting of the witnesses therein, of the name, surname, and particular remaining place, diocese, and other denomination of the writer of the bodies of the foresaid original writs and evidents, otherways the same to make no faith in judgment nor outwith the same in time coming."

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So stood the law in 1681; and the statute passed in that year had in regard to witnesses two objects, and two only,—the first, to make their subscription essential; and the second, to make it necessary to design them in the body of the writ, at the hinder end, as the Act 1579 expresses it. The contrast in the language employed in the Act 1593, in regard to the writer of the deed, and that used respecting witnesses in that of 1681, is very significant. The Act of 1681 enacts that only subscribing witnesses shall in future be probative, and that "writs to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null, and are not suppliable by a condescendence." The naming of the writer was essential, because otherwise he could not be known. The name of the witnesses appeared from their subscription, and therefore all that was necessary was so to design them as that they might be known and discovered. Mr Robert Bell, in his treatise on the Testing of Deeds (p. 39) has pointed out with considerable acuteness that these provisions were not intended so much to regulate the authentication of deeds as to provide, by the subscription of witnesses, for a practical aid to their memory, in case the deed should be challenged, and by their designation to afford a ready means by which they might be identified and traced.

On the words, therefore, of the Act 1681, I should have little hesitation in coming to the conclusion that the statutory nullity applied only to the absence of the designations of the witnesses. I am confirmed in that view by the opinion expressed by the writer I have already referred to, who is the only commentator who has discussed this question. His remarks are full and interesting, and although as a lecturer on conveyancing he directs the practitioner to name as well as to design the witnesses in the testing-clause, he indicates a very clear opinion that the omission of their names is not a statutory nullity. Lord Stair, with his usual accuracy, says,—"By a late statute, Parl. 1681, c. 5, writs, after that statute, prove not, unless the witnesses subscribe and be designed," (iv. 42-3). One or two of our writers have assumed that the witnesses should be named in the testing-clause, but none of them have discussed the question.

There are only two cases which throw light on this question, but both are instructive. They are the cases of Doig, 9th January 1741, M. 16,900, and that of Wemyss v. Hay, 5th June 1821, F. C. They were both of the same character. The persons whose names appeared as subscribing witnesses were named and designed in the testing-clause, but the clause did not bear that the deed was subscribed before them, or mention that they were witnesses in any way. I have looked at the session papers in Wemyss' case, in which these questions, and in particular the case of Doig, are largely discussed. The deed was ultimately sustained in both these cases, although as far as usage or practice was concerned the omission was as flagrant as that of the names of the witnesses.

Thirdly, assuming that it is not essential to mention the names of the subscribing witnesses in the testing-clause, it is beyond all doubt necessary that they be designed. Now, although here some one, whose name was intended to occupy the blank in the deed, is sufficiently designed as residenter in Carbane, and tutor or guardian to John M'Dougall's children, the question arises, whether it clearly appears that the person so designed is the instrumentary witness. It is here that the difficulty of the case rests.

Now, had there been any substantial variance between what appears of the witness's name in the testing-clause, and the signature to the deed, the case

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would have been ruled by a long series of authorities, which settle that an error in the name of the witness designed, or a variance between the name in the testing-clause and the name subscribed, is fatal, for then the designation is made to apply to some one other than the subscribing witness; and here it may be contended that the subscribing witness is not "Allex." but "Alexr." Dow, who may be a different person. The view is plausible, and not without aid from some of the decided cases. But, on the whole, I think it is too strained and technical. Holding the erased part of the deed to be left blank, I think it clear that the word "Allex." is, and was intended to be, the Christian name of the second instrumentary witness, whose surname is omitted; that it accurately corresponds in sound with the actual signature; that there is thus identity between the person designed and the person subscribing, and that, without having recourse to conjecture or inference, it sufficiently appears that Alexr. Dow, the instrumentary witness, is designed as residenter in Carbane, and tutor or guardian to John M'Dougall's children. The case, in this respect, differs by contrast from that of Callander.[1]

LORD NEAVES concurred.

LORD ORMIDALE.—This case is one of nicety and difficulty, and all the more that notwithstanding the numerous decisions which have been given in regard to the execution and testing of deeds none of them appear to be exactly in point.

The Lord Ordinary has correctly stated the circumstances in which the disputed question has occurred, and both parties were agreed as to them. The deed of entail, called a bond of tailzie, is dated the 23d of June, and recorded in the Register of Tailzies the 16th of August 1758. It is not said, and there is no reason for supposing, that there has been any tampering with the deed after it was recorded; and since then, down to the raising of the present action in June of last year, it appears to have been held and acted upon as in all respects valid and unobjectionable. It has not, however, been maintained by the defenders that the objection now taken to the regularity of the testing-clause of the deed, if good in itself, is barred by lapse of time or for any other reason. The question, therefore, to be determined is, whether the objection relied on by the pursuer is so formidable and unanswerable in itself as to be fatal to the deed.

The testing-clause is set out in the 12th article of the pursuer's condescendence. It will be seen that there is inserted in it the name and designation of the writer of the deed, the place where it was executed, the number of pages on which it is written, and that it was subscribed before and in presence of witnesses. The clause also bears, as it now stands, that the deed was subscribed by the granter before and in presence of two witnesses, whose names and designations are stated in the ordinary way. But it is alleged by the pursuer that the name of the witness Alexr. Dow is vitiated, excepting the first part of the first name, by being either erased or superinduced in such a way as to destroy its authenticity; and accordingly that the name of one of the two witnesses requisite to the due execution of the deed must, in respect of the decisions in the case of Gollan and the other cases referred to in the note of the Lord Ordinary, be held *pro non scripto*, and, if so, that this is a fatal objection to the

[1] Callander v. Callander's Trustees, Dec. 17, 1863, 2 Macph. 291, 36 Scot. Jur. 140.

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validity of the deed. On the other hand, however, it must be kept in view that the deed bears not only the subscription, in due and ordinary form, of the granter, but also the subscriptions of "John M'Corquodale, witness," and "Alexr. Dow, witness." As regards John M'Corquodale, no objection has been taken to the way in which his name and designation are inserted in the testing-clause, which is, so far, therefore, free from any irregularity. And as regards the other witness, Alexander Dow, although his name, except Alexr., being vitiated by erasure or superinduction, must be held not to be in the testing-clause, the designation as there inserted,—"residenter in Carbane, tutor or guardian to the children of John M'Dougall, tacksman of Carbane,"—is not vitiated in any way; and that this designation must be held to apply to the subscribing witness Alexr. Dow, is, I think, abundantly clear. It cannot possibly be held to apply to the other witness M'Corquodale, for his designation is otherwise given in the testing-clause, and neither can it, I think, be fairly or reasonably held to apply to any one else but Alexr. Dow, seeing that he subscribes the deed, and adds to his subscription "witness." It might be different if the effect of the vitiated words in the testing-clause was to entitle the pursuer to read anything he pleased in their place, even to the destruction of the deed, but in reference to any contention like that, the Lord Chancellor observed, in the case of Gollan, cited by the Lord Ordinary, that "such a proposition is, in my judgment, unsupported either by principle or authority." The only, and utmost effect, therefore, of the vitiation which here occurs, is to cause the vitiated words to be held *pro non scriptis*.

Assuming, then, that the bond of tailzie in question bears in the testing-clause, taken in connection with the subscriptions, all the requisites of a deed regularly executed and authenticated, the pursuer's objection to its validity cannot be entertained, but, on the contrary, must, in my opinion, fall to be repelled.

But it was argued, and this was in reality the sole point attempted to be made by the pursuer, that it is a statutory injunction, under the sanction of nullity, that the names and designations of the witnesses, as well as of the writer of the deed, must be inserted in the testing-clause. I am not satisfied that this is so. Without going over all the old Scots Acts relating to the execution and authentication of deeds, I believe I am correct in saying that those having any material bearing on the present question, and which were chiefly, if not exclusively relied on, by the pursuer, were the Acts 1593, cap. 179, and 1681, cap. 5. The former decerns and declares that deeds "sall make special mention in the hinder end thereof, before the inserting of the witnesses therein, of the name, surname, and particular remaining place, diocese, and other denomination of the writer of the body of the foresaid original writs and evidents; otherwise the same to make na faith in judgment or outwith in time cuming." There is here, it will be observed, a clear distinction drawn between the writer of a deed and the witnesses to it. As to the former, special mention must be made of his name, surname, and designation, under the sanction of nullity. But as to the witnesses it is merely assumed that they are also to appear, in some form or other, in the hinder end of the deed, after the names and designations of the writer. But how this is to be done, or whether the designations merely, or the names as well as the designation of the witnesses are to be inserted, is not stated; nor has the sanction of nullity of the deed, declared in reference to the want of the name, surname, and particular designation of the writer, any application to the witnesses. It was argued, however, that any obscurity or defect in this respect

in the Act 1593 is cleared up and supplied by the subsequent Act of 1681, which declares that "all writs to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending upon the writer, or the designation of the writer and witnesses." But here, as in the Act of 1593, a distinction necessarily arises between the writer of the deed and the witnesses, for although both are apparently put on the same footing it neither is nor can be so in reality, for while no designation of the writer can be given without mentioning also his name, seeing that his name could not be otherwise discovered, and therefore a designation without application to any individual would be obviously worthless, the matter is quite different as regards the witnesses, seeing that a testing-clause, although it makes no mention of their names, would be perfectly good and unobjectionable. If, for example, it bears that the deed was executed before "the witnesses subscribing, both advocates in Edinburgh," the testing-clause would in this way, although it did not contain the names but merely the designations of the witnesses, leaving their names to be seen in their subscriptions, be perfectly unobjectionable. Accordingly, the Act 1681 cannot be held to refer, so far as the witnesses are concerned, to anything more than their designation.

It may be said, no doubt, that in the present instance there is no express allusion in the testing-clause to the witnesses subscribing, and therefore that as regards the subscribing witness Alexr. Dow, the connection between him and the designation, "residenter in Carbane, tutor or guardian of the children of John M'Dougall, tacksman of Carbane," does not exist. But it appears to me that this is a view of the matter which cannot be entertained, and that on a fair and reasonable construction of the Act 1681 it must be held that the designation which has just been quoted, seeing that it could not apply to the witness John M'Corquodale, who is otherwise well designed, must be held to apply to the other witness who subscribes himself "Alexr. Dow, witness," and to no one else.

If the view I have now explained be correct it follows that the objection taken by the pursuer to the bond of tailzie in question is ill-founded. And this is a result which I think is sufficiently supported by the authority of Mr Bell in his well known lectures on the Testing of Deeds, published in 1795. He says (p. 77 of his work), in reference to the Act 1681, and what it requires to be inserted in the testing-clause, "that it is not the name of the witness which is required and the want of it which is declared to be a nullity; the Act understands that the witness is to subscribe, and it therefore requires no more than his designation, and you will observe that the Act speaks in a way very different of the writer and of the witnesses. It says the defect 'shall not be suppliable by condescending on the writer, or on the designation of the writer and witnesses.' The reason is obvious; without the name of the writer, his designation could give no information; whereas the designations of the witnesses, joined to their subscriptions, prove fully what the Act meant to establish. We should therefore be apt to infer that in these cases where the designation may be given without naming the witnesses, the want of the names in the testing-clause will be no nullity; and that where the true designation is given, and the witnesses have actually subscribed, an error in the name of the witness as inserted in the testing-clause ought not to prove fatal to the deed." That it is only the designations of the witnesses which the Act 1681 requires to be inserted in the testing-clause, and that there is a distinction in this respect between

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them and the writer of a deed, appears to me also to be illustrated by the cases of Doig v. Kerr, 9th January 1741 (Mor. 16,900), and Wemyss v. Hay, 5th June 1821 (1 Sh. 47), the judgment of this Court in the latter of which was affirmed by the House of Lords, 26th April 1825 (1 Wilson and Shaw, p. 141). In these two cases an objection to the authentication of a deed to the effect that the testing-clause, although it contained in the end of it the names and designations of two persons, did not state that these two persons were witnesses to the execution of the deed, or what they had to do with it, was repelled, in respect that this defect was sufficiently cleared up by a reference to the signatures of the persons who signed the deed as witnesses, and who appeared to be the same persons as those named in the testing-clause. The cases of Douglas, Heron, and Company v. Clerk, and Abercromby v. Innes, referred to in the note of the Lord Ordinary, do not appear to me to be in point at all, for in both of these cases the testing-clause and the subscriptions of the witnesses were not only not reconcileable, but positively contradictory. The case, again, of Gibson v. Walker, also referred to by the Lord Ordinary, not only materially differs in its circumstances from the present, but was decided very much on the ground that the deed there in question had been fraudulently tampered with after its execution. I agree, however, with the Lord Ordinary in thinking that little aid is to be derived from the case of Morton v. Hunters, although its tendency appears to me to be rather in favour than otherwise of the defender's contention.

With these explanations, and on the ground that the designation in the testing-clause, "residenter in Carbane," &c., is sufficiently connected with Alexr. Dow, who signs the deed as a subscribing witness, and as in this way the deed in question contains all that the Act 1681, cap. 5, requires for its authentication, I am for altering the Lord Ordinary's interlocutor in this case, and in place thereof for repelling the reasons of reduction and assoilzieing the defenders.

Lord Gifford.—I have come, though not without difficulty, to be of opinion that the view taken by the Lord Ordinary is too strict, and I think that neither the words of the statute of 1681, and the other statutes which prescribe the requisites necessary for the authentication of deeds, nor the principles fixed by decided cases, compel us to hold that the deed before us is vitiated *in substantialibus*, and therefore null.

It is observed by the Lord Ordinary, and I think the observation well founded, that no case has yet occurred substantially the same as the present. No case has been cited, and I am not aware of any case in which the question now for decision was really raised, so that, numerous as the decisions have been upon these old statutes, we are now to decide, apparently for the first time, whether it is necessary, under pain of nullity, to insert in the testing-clause of a probative deed the full names as well as the designations of the instrumentary witnesses.

The question arises in the present case from the circumstance about which there is no dispute, that the surname and part of the Christian name of the second instrumentary witness are written upon an erasure. The fact of erasure and of superinduction upon the erased portion of paper is admitted, and, indeed, is evident from inspection of the deed itself, and the question is, What is the legal effect of this erasure?

Now, in the first place, I think the rule is sufficiently established by the

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authorities, some of which are cited by the Lord Ordinary, that words or parts of words written on an erasure are simply to be held *pro non scriptis*. At least this is the general rule, for there may be exceptions, as in the case of very extensive erasures, which might alter the whole nature of the deed; but the general rule, I think, applies here. It was suggested that the Court are entitled or bound to fill up the erased portion with any possible words, or to imagine and insert words which, had they stood where the erasure is, would have vitiated the deed,—for example, in the present case, to suppose that where the name "Dow" now stands on the erasure some other name such as Tod or Smith were inserted; and this of course would vitiate the deed. I am of opinion, however, that this is far too malignant a proceeding to be adopted as a rule of law. Of course, if fraudulent vitiation is alleged and proved, the deed may always be cut down as in a reduction, but it is quite a strict enough rule in cases like the present to hold all words on erasures *pro non scriptis*.

Applying this rule, the testing-clause runs thus:—"Before these witnesses, John M'Corquodale, schoolmaster in the island of Seil, and Allex esidenter in Carbane, tutor or guardian to the children of John M'Dougall, tacksman of Carbane." The signature of the second witness is "Alexr. Dow, witness." The question is, Is the statement in the testing-clause enough in reference to the second instrumentary witness? I think it is.

The leading statute is 1681, cap. 5, which contains the enactment cited. It provides that "writs to be subscribed hereafter, wherein the writer and the witnesses are not designed, shall be null, and are not suppliable by condescending upon the writer, or the designation of the writer and witnesses." The previous statute (1593, cap. 179), had required the insertion of the "name, surname, and particular remaining place, diocese, and other denomination of the writer of the body of the foresaid original writs and evidents." Now, I think it clear, even taking the Act 1681 alone, still more taking it in connection with the previous Act of 1593, that the writer of the deed, and the witnesses thereto, are dealt with in a very different manner. In the case of the writer, he must be named by name and surname as well as designed, but the witnesses, who, under the statute, must always be subscribing witnesses, only require to be designed. And the reason is clear, for the mere designation of the writer, whose name nowhere appears, would do little or nothing towards pointing him out, but if the designations of the subscribing witnesses are given, then both their names and designations are disclosed upon the very face of the deed. The statute seems very carefully expressed, so as to make nothing a statutory requisite but what is absolutely necessary, and we are not to multiply statutory requisites the want of which is to infer nullity by mere implication. On this point I entirely adopt the reasoning of Mr Robert Bell in his lectures on the Testing of Deeds, a book of the very highest authority in conveyancing, even if the writer had merely given his opinion, but I think his reasons are really unanswerable. Mr Bell's opinion seems to be confirmed by the passage in Stair (iv. 42, 19), where he says, speaking of the Acts in question, that the name of the writer, and the designations of the witnesses, are *de substantialibus*. Other and later conveyancing authorities were referred to, who seem to place writer and witnesses in the same category, so that the names as well as the designations of both should be inserted in the testing-clause. But besides the observation that these conveyancers were pointing out the safe and proper course to be adopted, and were not considering what would be the barest possible compliance with the statutes, I think it quite

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clear that none of them had the present question in view. None of them take up the question as Mr Robert Bell does, and none of them in the slightest indicate that either his reasoning or his opinion were unsound.

The Lord Ordinary seems to concede that the mere insertion of the names is not *inter essentialia* as a solemnity as in the case he puts, where the testing-clause bore that the deed was signed "before the two subscribing witnesses, both clerks to A B, solicitor in Edinburgh." I do not doubt that such a testing-clause would be quite sufficient, although the names of the witnesses could only be learned by looking at their subscriptions, and if this be true, it really is enough for the decision of the present case; for although we had a very ingenious argument to the contrary, it seems to me to be quite plain that the witness who is insert in the testing-clause as "Allex esidenter in Carbane, tutor or guardian to the children of John M'Dougall, tacksman of Carbane," can be no other than the witness who subscribes Alexr. Dow. The other witness is quite clear, because he is both named and designed, and I think it a most forced and violent reading—indeed, as I said before, a malignant reading—to hold that the "Alexr." who signs as a witness is a different person from the Allex. who is designed in the testing-clause. Indeed, in one view, he is both named and designed in the testing-clause. His Christian name is given, though not his surname, and I do not think it matters that his Christian name is given in a contracted form, especially when it happens that this is the very same contracted form in which he signs.

I need hardly add that in the present question, which relates to mere formalities of authentication, we are noway bound by any analogy drawn from the strict rules of interpreting an entail. The deed happens to be an entail, but in the present question we deal with it as if it had been an ordinary disposition, or an ordinary agreement. It is plain also that all questions as to challenging or impugning the deed as false are left entire. We only deal here with its *ex facie* regularity. I am, therefore, for sustaining the deed in point of law, and this leads to absolvitor from the present action.

THIS interlocutor was pronounced:—"Alter the said interlocutor, repel the reasons of reduction, assoilzie the defenders from the action, and find them entitled to expenses."

MITCHELL & BAXTER, W.S.—PATRICK S. BEVERIDGE, S.S.C.—Agents.

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Earl of Breadalbane v. Jamieson.

GAVIN, EARL OF BREADALBANE AND HOLLAND, Pursuer.—*Sol.-Gen. Watson—Kinnear.*

GEORGE AULDJO JAMIESON (Judicial Factor on the Trust-Estate of John, second Marquis of Breadalbane), Defender.—*D.-F. Clark—Balfour.*

Minerals—Precious metals—Act 1592, *c.* 31.—A proprietor of lands obtained from the Crown, in terms of the Act 1592, c. 31, a separate charter of the mines of gold, silver, and other metals and minerals in the lands. He subsequently executed an entail of the lands, without mention of the mines and minerals. *Held* that the mines and minerals were brought under the entail as parts and pertinents of the lands.

2D DIVISION.
Ld. Curriehill.
R.

THE Earl of Breadalbane (the pursuer) succeeded to the estates of Breadalbane on the death of his father, the sixth Earl, in 1871, and made up titles thereto as heir of taillie and provision to his father, under an entail executed by the third Earl in 1775. He subsequently disentailed the estates under the authority of the Court of Session.

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The heir of entail in possession of the estates immediately before the pursuer's father was John fifth Earl and second Marquis of Breadalbane, who died in 1862, leaving a trust-disposition and settlement, dated 26th November 1847, by which he conveyed to trustees all and sundry lands, estates, mines, leases, and heritable subjects then belonging, or which should belong to him, in fee-simple, at the time of his decease. These trustees having all failed, the defender, Mr G. A. Jamieson, was appointed judicial factor on the trust-estate of the Marquis. The lands and estates forming the earldom having been held by the Marquis under the fetters of a strict entail, passed to the pursuer's father as the next heir of entail, and now belonged to the pursuer, but Mr Jamieson maintained that the mines and minerals within the said estates were not entailed, and that they formed part of the fee-simple estates of the Marquis, now vested in him as factor, and he accordingly intimated to the pursuer that he intended forthwith to enter upon the lands forming the original earldom of Breadalbane, and to open up and work the mines and minerals therein.

The pursuer, on 23d March 1874, raised the present action against Mr Jamieson, as judicial factor, for reduction of the titles under which the defender claimed the mines and minerals, and for declarator of his own right to these subjects.

The following facts appeared from the titles produced, and the admissions of parties:—In 1704 John first Earl of Breadalbane executed an entail of the lands and earldom of Breadalbane, comprehending the lands, baronies, &c. as therein described, in favour of his son and grandson, and the heirs-male of their bodies *successivé*, whom failing, to the other heirs of entail therein specified, whom failing, to persons to be nominated by him.

In 1742 John Lord Glenorchy, grandson of the entailer, who stood infeft in the fee of the lands and earldom embraced in the entail of 1704 (his father, the liferenter, being still alive) obtained from the Crown a charter of the mines and minerals within the estate. The previous titles contained no express grant of mines and minerals.

The charter proceeded on the Act 1592, c. 31,—"For furthering of the Kingis cōmoditie be the mynes and metallis,"* and by it the Crown granted in feu-farm to John Lord Glenorchy and the heirs-male of his body, whom failing, to the other heirs-male of taillie and provision under the titles and infeftments of the estate, and their assignees whomsoever, heritably and irredeemably, All and Whole the mines of gold, silver, lead, copper, tin, and other metals and minerals whatsoever which were or might be found within the said estate, for a reddendo of one-tenth of the produce thereof. Upon this charter Lord Glenorchy was infeft.

Upon the death of his father in 1752 Lord Glenorchy succeeded to the title as third Earl.

In 1775 the third Earl, in order more fully to carry out his grandfather's intentions, and to secure that the lands might always go along with the peerage, executed a new entail of the lands embraced in the entail of 1704, and of certain lands which he held in fee-simple.

The deed contained a very full enumeration of the various subjects conveyed, and their parts and pertinents, "together with all right, title, interest, claim of right, property and possession, petitor and possessor, which I, my predecessors and authors, or heirs and successors, had, have, or anywise may have claim or pretend to the lands, earldom, baronies, and other heritages before disponed, or to any part or portion thereof;" but mines and minerals were neither expressly conveyed nor expressly reserved.

* See the Lord Ordinary's note, *infra*, pp. 829, 830.

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Since 1775 the successive heirs made up titles under the entail of 1775.

In 1845 the second Marquis, who succeeded in 1834, procured himself served heir of taillie and provision to the third Earl in the metals and minerals granted by the crown-charter of 1742, and was in 1849 infeft therein upon a precept from Chancery.

In 1851, in order to make his title *ex facie* a fee-simple one, he resigned the said metals and minerals in the hands of the Crown, and obtained a charter of resignation in favour of himself and his own nearest heirs and disponees whomsoever, upon which he was infeft.

After the death of the second Marquis his trustees, and subsequently the judicial factor, completed titles to the said metals and minerals.

The pursuer pleaded;—(1) The pursuer being proprietor of the mines and minerals within his lands contained in the foresaid entail of 1704, the writs and titles whereby the defender pretends to have right thereto ought to be reduced and set aside. (2) John Lord Glenorchy acquired no right to the said mines and others by the crown-charter thereof in his favour in 1742, in respect that the said mines and others were not at the date thereof the property of the Crown, but were held by him as parts of the lands and earldom of Breadalbane under the foresaid entail of 1704. (3) Assuming that the charter of 1742 operated as a valid conveyance to John Lord Glenorchy of the mines and minerals within his estate in Scotland, the lands forming the said estate having been disponed and conveyed by him by the entail of 1775 to the pursuer and his predecessors, without reservation of the said mines and minerals, the said mines and minerals are now held by the pursuer as parts of the said lands in virtue of that entail, and writs following thereon. (4) The title to the said mines and others professed to have been made up in virtue of the said crown-charter, and writs following thereon, is null and void, in respect that none of the said writs contain a sufficient specification or description of the subjects of which infeftment is alleged to be given.

The defender pleaded;—(1) No title to sue. (2) The action cannot be maintained, in respect that the pursuer has not by virtue of his titles any right to the mines and minerals in question. (3) The defender ought to be assoilzied, in respect that by virtue of the said crown-charter of 1742, and writs following thereupon, he has right to the said mines and minerals. (4) At all events the defender has, by virtue of the said crown-charter and subsequent writs, right to the whole mines within the said lands, of gold, silver, and lead of such fineness that three halfpennies of silver may be fined out of the pound of lead, and he is entitled to decree of absolvitor as regards such mines.

The Lord Ordinary, on 13th February 1875, pronounced the following interlocutor:—"Finds and declares that the pursuer has the sole and exclusive right to the mines of gold, silver, lead, copper, and tin, and of other metals and minerals, within the lands and earldom of Breadalbane, and the other lands and estates formerly belonging to John Lord Glenorchy, afterwards third Earl of Breadalbane, and to possess and enjoy the same under and in virtue of his rights and titles to the said lands and earldom of Breadalbane and others, and decerns: Reduces, decerns, and declares in terms of the reductive conclusions of the summons, except in so far as the same are directed against the crown-charter in favour of the said John Lord Glenorchy, and his heirs therein mentioned, dated on or about 1st March 1742, and the sasine following thereon, being the writs first and second sought to be reduced, and, as regards these writs, dismisses the action, and decerns: Finds the defender, George Auldjo Jamieson, as judicial factor on the trust-estate of the late Most Honour-

able John second Marquis of Breadalbane liable in expenses to the pursuer," &c.* No. 142.

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* "NOTE.— . . . . I. The first question to be considered is, whether and how far a proprietor of lands has right to the mines and metals within the same, apart from any express grant thereof from the Crown? The general rule of law is, that a grant of land confers upon the proprietor right to everything in and upon and connected with the lands *a centro usque ad cœlum*. The rule, however, is subject to exceptions, and in all crown-grants of land certain royal rights, termed *regalia*, are presumed to be reserved by the Crown, unless expressly conveyed. And among these royal rights, or *regalia minora*, mines of gold and silver are enumerated by all the institutional writers as being excepted. It is apparently owing to feudal custom that in other countries any right in the Crown to such subjects was ever recognised. But in Scotland the right seems to rest entirely upon statute. The Act. 1424, c. 12, provides, 'gif any mine of gold or silver be founden in ony lordis landes of the realme, and it may be prooved that three halfe pennies of silver may be fined out of the pound of lead, the Lordis of Parliament consentis that sik mine be the kingis, as is usual of other realmes.' This statute, which is apparently the original Act of Annexation of mines, does not expressly confer upon the Crown a right to any mines and metals, except gold mines, and mines of lead producing a certain quantity of silver; and it farther seems to confine the royal right within those limits which custom had assigned to the sovereigns of other kingdoms.

In 1592, however, another Act of the Scottish Parliament was passed with reference to mines and metals, which it is necessary to examine with some care, because, in consequence of it not having been printed, its existence appears to have been unknown to Craig, Lord Stair, and Sir George Mackenzie, all of whom comment upon the earlier statute.

The Act 1592, c. 31, is of considerable length, and appears to have been passed mainly for the purpose of promoting the search for and working of the precious metals in Scotland, and of securing to the Crown the regular payment of the royal duty therefor. From the preamble of the Act it appears to have been the practice of the Crown to let to adventurers,—for the most part foreigners,—the whole mines and metals in the country for payment to the treasury of a tenth of the proceeds by way of rent. This was apparently found to be an unsatisfactory method of proceeding, and to tend rather to the discouragement than the promotion of mining in the country, and accordingly the Act of 1592 proceeds upon the subsumption that on the one hand an officer should be appointed, to be termed the Master of the Metals, part of whose duty should be to look after the working of the mines throughout the country, and to attend to His Majesty's interest, while, on the other hand, the mines and metals which had been previously part of the annexed property of the Crown, and therefore inalienable without the consent of Parliament, should be dissolved from the Crown and made alienable by way of feu-disposition to be granted by the Crown in favour of the heritors of the lands for payment of every tenth penny of the proceeds.

"The words of dissolution are as follows:—'And als oure souerane uilling that all his Maiesties liegis quha will tak on hand to discouer and work the saidis mynis may have reasonable proffite and recompence of thair panis [and] a sufficient securitie maid to thame of thair awin mynis within thair awin landis: And als vnderstanding that the dewtie of the said mynis qlk baith of the common law and conseutude obseruit be vther foreñ princes properlie pertenis to the prince extendis onlie to the tent part fre thairfor o' said souerane lord with auise of his estaittis in parliament hes dissoluit the saidis mynis and mettallis in sa far as thay war part of his propertie anext or ony wyis to the effect the same may be sett in feu for augmentation of oure said soueraine lordis rentall: And statutis and ordanis that it sal be lesum to his heines and his successouris w' auise of the thesaurare and of the said Mr. of the Mettallis coniunctlie and for reasonable compositioun to sett in feu ferme to every Erle, Lord, Barroun, and vther frehalder w'in this realme all and quhatsumeuir mynis of

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LORD NEAVES.—This case relates to a part of the law which does not often come before us. The question is whether those minerals, which at one period

gould, siluer, copper, leid, tin, and vther quhatsumeuir mettallis or mineralis qlk is or may be found within thair awin landis and heritages, with power to thame to seik and discouer, lauboure and work, the saidis mettallis and minerallis, and to sell, dispone, or sett the mynis thairof in takkis or feu w' consent alwyis of the said thesaurare and maister of the mettallis coniunctlie in maner foirsaid to vthers thair subtenants at thair pleasure as thair proper gudis and heretage: . . . . Payand thairfore zeirlie, the saidis Erlis, Lordis, Barounis, and vtheris quha sall accept the saidis feuis as said is, to oure souerane Lord and his thesaurare, thair factouris and suitors in thair name, the just tent part of all and haill the said gould, silver, copper, leid, tin, and vtheris minerallis qlk salbe found and gottin zeirlie w'in thair saidis landis and heritageis vpoun the ground quhair the same salbe found in sic vre and qualitie as the sam sal be gottin out of the erth frelie but ony deductioun.'

"There is a farther provision in the Act that in case of any mines being sufficiently discovered to be within any of the lands pertaining to any subject of the realm, and the lord of the ground sufficiently advertised thereof, and lawfully required to work the same himself before a notary and four witnesses as effeirs, if he refuses or delays the space of three months thereafter, 'then and in that cace it salbe lesum to o' said souerane lord to set the same in few or tak or utherwyis caus work the same or to mak right thairof to any uther persone at his grace pleasure, that be the wilfull refuiss or delay of the awnar of the ground his grace and his cuntrie be not defraudit of the comoditie of the said myne, and oure souerane lord, wt. auise foirsaid of the Parliament, declaris that this Act of dissolution salbe perpetuall to last for all tyme cuming.'

"The right and interest of the Scottish Crown in mines and metals thus depends entirely upon and is regulated by the Acts of 1424 and 1592. But as only the former of these statutes appears to have been known to the earlier institutional writers, this circumstance must not be lost sight of in considering the dicta of these writers upon this matter. Craig says (l. 1, dieg. 16, sec. 36),—'Argentariæ potestas publica est, et a solo principe concedi potest; in qua publicam fidem necesse est aliquando sequi. . . . Ego tamen per argentariam argenti fodinas potius intelligo, et idem maxima pars feudistarum sentit, quos legerim.' 'Nam metallorum fodinas omnes ad principem pertinere certum est. Sunt tamen qui putant metallorum aliorum ab auro & argento fodinas non ad Regem pertinere, sed ad dominos fundi, præstando canonem pro eis; & nisi vox hæc de argenti fodinis intelligatur, nulla earum inter hæc Regalia erit mentio, quæ tamen omissa præsumi non potest. Nam omnium gentium omniumque ætatum consensu fodinas omnes auri, argenti, æris, stanni, plumbi & similium publici juris esse & in patrimonio principis numerari comprobatur: neque vocis a prima significatione declinatio quempiam movere debet, cum sciamus neque semper eandem significationem neque etymologiam aut formationem Latinis vocibus post corruptionem Latinæ linguæ mansisse. Quod si *argentaria* argenti fodinam significet idem & in reliquis metallicis fodinis intelligi debet, frequens enim est in jure sub majoribus minora comprehendi.' And in a later part of his treatise he says (l. ii. d. 8, sec. 21), 'Auri, argenti, æris, plumbi fodinæ ad feudatarium non pertinent, sed ad Regem et inter Regalia numerantur. Ferrifodinas privatorum esse censeo, quod rari ex iis sint fructus, neque sine maximo impendio colligantur.'

"Lord Stair, in treating of those things which the law reserves as *regalia*, says (2, 3, sec. 60), 'the superior may have them from the king either expressly in a tenement holden of the king, or tacitly where lands are erected by the king to him in a barony or any higher dignity, whereby many of these *regalia* are comprehended, *baronia* being *nomen universitatis*; yet that will not comprehend all, as first mines and minerals of gold and silver, or lead of that fineness that three half-pennies of silver may be fined out of the pound of lead, which mines are

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of our history were annexed to the Crown, and which as between the Crown and the subject are still dealt with in a peculiar manner, can be carried by a general conveyance of the lands when they have been once vested in the owner of the soil.

declared to belong to the king wherever they can be found.—(Parl. 1424, c. 12.) But mines of iron, copper, and lead of less fineness belong to the proprietor, and are not accounted with us *regalia*, though in some other countries they be.'

"And Sir George Mackenzie observes, upon the Act 1424, c. 12, that 'it has been doubted whether lead, copper, or tin belong to the king or the heritor; but the king is in possession of disponing upon these also, and when he dispones them in a novodamus even to the heritor he reserves a tenth part to be paid into his exchequer, and his Majesty has granted general gifts of all copper mines.' He then refers to the passage from Craig already quoted (l. 1, d. 2, sec. 36), and in commenting upon that he expresses his own opinion to be that a grant of gold and silver mines alone would not include copper and tin, all of which he seems inclined to regard as *regalia*.

"It appears to me that the definition given by Lord Stair of the right of the Crown to mines and metals under the Act 1424 is that which ought to be preferred. It does not extend the right beyond the limits expressed in the Act, and it has been substantially adopted by the more recent institutional writers, viz., Erskine and Bankton. Before these later authors wrote, however, the unprinted Act, 1592, had become known, and both of them refer to it in treating of this matter.

"Mr Erskine, after referring to the Act 1424, says (2, 6, sec. 16),—'It appears by an unprinted Act in 1592, mentioned in the list of unprinted Acts of that year, No. 12, that not only mines of gold and silver, but of tin, copper, and lead, had been formerly annexed to the Crown, and so not alienable without consent of Parliament, but they are by that statute dissolved from the Crown, and it is made lawful to the king to set in feu-farm, not to any of his subjects indiscriminately, but to the baron or other freeholder of the ground, all metals or minerals that may be found within his own lands on payment of a tenth part to the king, without any deduction of charges, and in case the freeholder should refuse to work them the king may then, and then only, either cause work them for his own use or feu them to others.'

"Bankton, in treating of the same matter, says (2, 3, sec. 107), 'Regalia that may be communicated to subjects, whether of old included in baronies or regalities or not, require a special grant from the sovereign to transmit them;' and he then says (*ib.* sec. 109),—'Mines of gold and silver are *inter regalia*, and were not comprehended in the erection of lands into a barony or regality. These are esteemed silver mines where three half-pennies of silver can be fined out of the pound of lead.—(Parl. 1424, c. 12.) For the improvement of such mines the privilege is granted to the heritor of the ground to work them and take the profits to himself, paying a certain consideration to the king; and if he does not lay hold on the privilege the same encouragement may be granted to others, by feus or long leases from the Crown. The statute (dated 5th June 1592) in this behalf is not contained among our Acts of Parliament, and was unprinted and little known till of late. The benefit is not only given to the vassals of the Crown but to all other heritors; so that the subject superior can claim no interest in it, but only the proprietor of the lands; and on his default any other to whom the king shall please to confer it.'

"Now, it appears to me, that if Stair's definition of the interest of the Crown in mines and metals is, as I think it is, the soundest and most in accordance with the Act 1424, considerable aid may be thence derived in interpreting the Act of 1592. The object of the latter Act certainly was not to confer upon the Crown any new or higher right than it previously possessed; and if under the Act 1424, which has been shewn to be the only title of the Crown to mines and metals in Scotland, the right was restricted to gold and silver mines, or, what is the same thing, to gold mines and lead mines capable of producing three half-

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By the Act of 1592 the Crown has the power of feuing such minerals to the owner of the soil, or, if he fails to work them, of making them a separate estate, so as to secure the working of the minerals for the public benefit and for the patrimonial interest of the Crown in the lordship or reddendo exigible for them.

pennies of silver out of the pound of lead, it seems to follow that although mines of copper, tin, and other metals are all mentioned in the Act 1592 as if they were in the same position as gold and silver mines, the right of the Crown was not thereby extended beyond the right given by the Act 1424. In short, I think that the Act 1592 should be read as simply dissolving from the Crown such mines and metals as had previously been validly annexed, and were therefore inalienable without the consent of Parliament. The result is that mines and metals other than gold and silver mines and lead mines containing the quantity of silver already mentioned, are not reserved to the Crown as *regalia*, but pass to the vassal with the grant of the lands as *partes soli*. In so far therefore as the estates of the pursuer, the Earl of Breadalbane, contain mines and metals other than gold and silver and fine lead, it is clear that the pursuer must prevail in this action, and that if the pursuer is not himself in right of the crown-charter of 1742, that charter, and in any view the subsequent titles, founded on by the defender, must be set aside if, and in so far as, the same may be held to embrace anything not strictly falling under the head of *regalia*.

"II. This, however, is not sufficient to decide the whole questions raised in the present action, one of which relates to the extent to which a right to gold and silver mines is conferred upon the Crown by the Act 1424. The pursuer maintains that the King of Scotland was by that Act to have right to the mines and metals in the lands of the subject, to the same extent as, but to no further extent than, the sovereigns of other countries had right to the mines and metals in the lands of their subjects. And he maintains that the extent of that right is clearly defined in the Act 1592, where it is said that the 'dewties of the said mynis qlk baith of the cōmoun law and consuetude obseruit be uther forēn princes properlie pertenis to the prince extendis onlie to the tent part fre.'

"The pursuer contends that the only right which foreign sovereigns, and therefore the King of Scotland, had to mines and metals was a right to a tenth part of the produce, and that the mines and metals, under burden of that tenth, belonged to the proprietor of the lands at common law as *partes soli*. I think, however, that this is not the sound construction of the statute. The passage just recited occurs as introductory to that part of the statute in which the mines and metals are dissolved from the property of the Crown and are allowed to be feued out; and the reference to the duty as being 'the tent part fre' was simply made for the purpose of fixing that as the fair and usual return which the king and other monarchs should receive from mines which instead of being wrought by themselves are granted in feu to their subjects. In short, gold and silver mines until so feued out are the property of the Crown, and when feued out the reddendo is to be a tenth part of the free produce.

"III. But another and much more important question remains behind, and that is, Whether, and how far the king, by granting to his subject the mines and metals within that subject's lands by a grant in feu-farm for payment of a feu-duty, reunited the mines and metals with the lands themselves so completely as to render it unnecessary for a separate title thereto being afterwards completed by the vassal to these subjects?

"This is a question of very great difficulty; and after the best consideration which I have been able to give to it I have come to be of opinion that such a grant does not necessarily or *ipso jure* effect the consolidation of the mines and metals with the lands themselves. On the contrary, they may remain *separata tenementa*, and held on separate titles, and for payment of a separate reddendo, and they may, therefore, be the subject of separate conveyance or transmission. It appears to me, however, that the question is to be solved mainly by ascertaining the intention of the vassal in taking the crown-grant. Such intention, if not expressed, may be gathered by implication. And if it shall appear in any

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In this case the minerals were granted in 1742 to a member of the noble family of Breadalbane, and came thus to be held along with the lands. I am case that the granter, by taking the charter, really intended to consolidate the mines and metals with his lands, and if he has not afterwards done anything to indicate any change of intention I am inclined to think that his successors, in taking the lands, will be held as taking and as entitled to take the mines and metals also. I arrive at this result by considering (1) that but for the express provisions of the Act 1424 mines of gold and silver, and of fine lead, would all have passed in a grant of land from the Crown to the vassal as *partes soli*, although not expressed; and (2) that the Act 1592, besides declaring the dissolution to be perpetual, makes it lawful for the king to feu to every lord, baron, and other landholder, and to none other, all mines and metals, &c., within their own lands. This statute has been the subject of judicial decision, and it has been held (1) that the Crown is not merely entitled, but is bound, when required, to give to each subject a grant of the minerals within his own lands—(Earl of Hopetoun v. Officers of State, 4th May 1750, M. 13,527); (2) that the right to demand such a grant is not restricted to freeholders who are immediate vassals of the Crown, but extends and belongs to all proprietors of land, freeholders, though holding of subject superiors—(Duke of Argyll v. Murray, Dec. 7, 1739, M. 13,526—see also Elchies, *voce* Regalia, No. 3); and (3) that, where such a grant has once been made, a subsequent adjudication of the lands, without mention of mines and metals, is held to carry the mines, &c., in preference to a subsequent adjudication of the lands with express mention of the mines and metals—(Ochterlony v. Earl of Selkirk, Nov. 28, 1755, M. 164.) This is an instructive case. Sir Alexander Murray of Stanhope appears to have obtained from the Crown, in terms of the Act of 1592, grants of the mines and metals in his lands of Ardnamurchan and in Peeblesshire. The case of the Duke of Argyll, above mentioned, had reference to the mines in Ardnamurchan. The case of Ochterlony dealt with the mines in Peeblesshire. Several creditors of Sir Alexander adjudged his Peeblesshire estates. The first adjudger, the Earl of Selkirk, simply adjudged the lands. Ochterlony, another creditor, subsequently adjudged both lands and mines. In a competition the question occurred whether the mines were carried by the adjudication which mentioned the lands only. Ochterlony, who was the last adjudger, and who had adjudged both the lands and the mines, pleaded that, in respect of the separate charter of the mines, the lands and mines were held under separate titles, and must be separately adjudged. But the Earl of Selkirk, who was the first adjudger, and who had simply adjudged the lands, pleaded that, 'by the Act 1592, the proprietor of lands may demand a charter of mines, and he alone may work them; he cannot work them after the lands have been adjudged from him. Unless, therefore, the adjudication of lands carry the mines, the grant of the mines must become ineffectual, and the intention of the Act 1592 be frustrated.

"'The Lords found that the adjudication of the lands comprehended the mines.'

"The *rationale* of this judgment appears to me to be that, in the general case, a grant of mines from the Crown in favour of the proprietor of the lands in which the mines are situated has the effect of reuniting the mines and the lands, so that the whole will pass to the successor of the grantee by any conveyance, voluntary or judicial, in which the mines are not expressly excepted, unless perhaps where the grantee has himself made a previous separate conveyance of the mines to another. If I am right in this view it follows that if Lord Glenorchy, after obtaining the charter of the mines of the earldom in 1742, made a general conveyance of the earldom without excepting the mines, the whole estate, including the mines, must have been carried by that conveyance, no separate conveyance of the mines having ever been made by his Lordship. But, farther, the foregoing narrative of the titles shews that in 1775 Lord Glenorchy (who had then become third Earl of Breadalbane) executed a new deed of entail in favour of himself and the substitute heirs of entail, by which he conveyed to the heirs

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of opinion that when once vested in the proprietor of the soil they were carried by a general conveyance of the lands with pertinents, and without any express mention of the minerals. I see no good reason why they might not pass with the lands if such was the intention, or if a contrary intention did not appear. But we are not here left without guidance. The case of Ochterlony seems to me to be conclusive. That was a stronger case than the present. It was a competition of diligence. One creditor simply adjudged the lands, and afterwards another creditor adjudged the lands and minerals. If the minerals had constituted a separate estate the creditor who attached them as such would have been preferred to the other. The Court, however, preferred the first adjudger, on account of the priority in date of his adjudication, thereby holding that a general adjudication of the lands was sufficient to attach the minerals. A decree of adjudication is nothing more or less than a judicial disposition. It confers, no doubt, only a personal right, but that right can be feudalised by means of a charter of adjudication. I do not therefore see how the authority of that case can be got over.

The present is by no means a favourable case for applying a different rule. A person who gets a grant of the minerals in his capacity of proprietor of the lands is not in a favourable position for saying that he will separate them from the lands which he holds under an entail, and deal with them as he pleases, and as a fee-simple estate.

I am of opinion, on these grounds, that the interlocutor of the Lord Ordinary ought to be adhered to.

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of entail not only the original lands and earldom of Breadalbane, but all the estates then belonging to him, with all their parts and pertinents. Now, when the narrative of that deed of entail is carefully considered I think that the conclusion is inevitable, not only that the Earl did not mean to except the mines, but that he believed that in executing that deed he was settling upon himself and his heirs of entail the old lands and earldom, and all his subsequently acquired estates, and also all the accessory rights which he had acquired to any of these estates, including the mines and metals. The deed of entail was executed in 1775, after the date of the decision in the case of Ochterlony; and I think that the whole tenor of the deed shews (1) that it was with the view of carrying out his grandfather's intentions of enlarging and consolidating the family possessions that Lord Glenorchy had applied for and obtained from the Crown this grant of the mines and metals within his estate in 1742, and (2) that he believed he was entailing, in 1775, not only the lands of the whole earldom and the lands subsequently acquired by himself, but also every right, title, and interest of whatever kind which he then had in the estate, and amongst these I think he must be held to have had in view the mines and minerals. On the whole matter, therefore, I think that both by the law as laid down in the case of Ochterlony, and by the intention of the entailer as described by the entail of 1775, the mines and metals in the lands and earldom of Breadalbane must be dealt with as parts and pertinents of the lands and earldom, and as having been brought under the entail. And, if so, it follows that the title expede by the second Marquess to the mines and metals in 1845, not being a title as heir of entail under the tailzie of 1775, was inept, and must, with all the subsequent titles, including that expede by the defender, be now reduced and set aside. If this be the sound view of the title, it follows that the pursuer must prevail, not only in the declaratory conclusions of the summons, but also in the reductive conclusions, to the extent now indicated. I have therefore given decree in terms of that conclusion. It seems unnecessary, and indeed out of place, to reduce the original charter and sasine of 1742, because, if I am right, these deeds are the foundation of the pursuer's own title to the mines and metals." . . . .

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LORD ORMIDALE.—I am of the same opinion. I think it unnecessary to enter into many of the matters dealt with by the Lord Ordinary in his learned and elaborate note. It is unnecessary to determine whether gold and silver mines are carried from the Crown without an express grant, because the Lord Breadalbane of the day did obtain an express grant in 1742. And afterwards in 1775, when he stood, beyond all doubt, owner of the minerals referred to, he executed a new entail of his lands.

It is true that in this new entail he makes no express mention of minerals, but on the principles given effect to in the case of Ochterlony, cited by the Lord Ordinary, I think it clear that the minerals in dispute must be held to have passed with the lands. The only answer that seemed to be attempted for the defender to this view of the matter was that, looking to the terms of the entail of 1775, the minerals must be held to have been intentionally omitted. But as the lands are conveyed in the fullest terms, with parts and pertinents, and all right, title, interest, &c. which the granter had, I rather think that, on the principle of the case of Ochterlony, there would require to have been a positive exclusion of the minerals to prevent them being carried.

On these grounds, and without going into farther detail, I concur in thinking that the interlocutor of the Lord Ordinary ought to be adhered to.

LORD JUSTICE-CLERK.—The case is one of some difficulty, but I have come, without hesitation, to be of opinion that the decision in the case of Ochterlony is conclusive. In that case the proprietor stood precisely in the same position as Lord Breadalbane did in 1775. One of his creditors adjudged the lands without mentioning the minerals. Another afterwards specially adjudged the crown grant. The Court preferred the first adjudger, holding that the judicial conveyance of the lands implied in the adjudication was sufficient to carry the minerals. It has been suggested that the judgment might have proceeded on the ground that the decree of adjudication in general terms was a sufficient warrant for a charter containing a specific grant. But I cannot conceive that a judicial conveyance, where intention is of no effect, should be more liberally construed than a voluntary conveyance, in construing which intention is a main element.

I have also come to be of opinion that the judgment in the case of Ochterlony was well founded, and that on sufficiently obvious principles. This matter of the Crown's right in gold and silver mines is of considerable historical interest. Previous to the statute of 1592 such minerals were part of the annexed property of the Crown, and could not pass by charter of barony, or in any other way. It is proved by the preamble of the Act of 1592, and it is historically true, that the Crown made use of this right by giving tacks of the mines chiefly to foreigners. I find in the statistical account of the parish of Crawford, in which the Leadhills lie, that the mines there had been let to foreigners previous to 1592, and that a good deal of jealousy prevailed in consequence. I believe there are papers in the Advocates' Library upon the subject, and that the dissatisfaction occasioned by this mode of dealing with the mines led to the passing of the Act of 1592. That statute authorised the Crown to set the minerals in feu to the owner of the land, and only in the event of the owner refusing or delaying to work the minerals to feu them to others.

All this shews that this is a very peculiar right on the part of the Crown. Although it is a *jus regale*, it is difficult to see how the principle of a separate feudal estate could be applied. As the proprietor of the lands had the right to

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the ordinary minerals, and as the gold, silver, and fine lead could only be worked along with the ordinary minerals, the Crown's right really resolved itself into one of lordship. I am therefore of opinion that whenever the owner of the soil, who alone could receive the right in the first instance, obtained a grant under the Act of 1592, the property of the minerals became absorbed in his right to the land, burdened only with the real right of the Crown to the lordship.

On the whole matter, I am for adhering to the Lord Ordinary's interlocutor.

LORD GIFFORD was absent at the debate.

THE COURT adhered.

DAVIDSON & SYME, W.S.—GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—Agents.

No. 143. June 16, 1875. Johnston v. Dilke, &c.

THOMAS BRUMBY JOHNSTON, Pursuer.—*Fraser—Trayner.*
SIR CHARLES WENTWORTH DILKE, AND OTHERS, Defenders.—*D.-F. Clark—Lancaster—J. P. B. Robertson.*

Reparation—Slander—Literary Criticism—Innuendo—Excess of Damages.—An atlas was published, entitled "The Edinburgh Educational Atlas of Modern Geography, with complete index, by W. & A. K. Johnston" (being the firm under which the publisher carried on business). A review of the atlas appeared in a journal, which, after adverting to Dr Livingstone's high opinion of the geographical acumen of A. Keith Johnston, a deceased member of the firm, and of his son who bore the same name, proceeded,—"The atlas now before us, though bearing the name of A. Keith Johnston, is the work of neither the *primus* nor the *secundus* of that name, for the son is no longer connected with the house established by his late father, ... and not merely from the present work, but from others which have lately come to our notice, we regret to observe unmistakeable signs of the absence of that true geographical acumen which Livingstone so justly lauded." The review then went into a severe criticism of the atlas in detail.

The publisher of the atlas brought an action of damages against the proprietor of the journal for slander, and averred that the article represented that he (the pursuer) had falsely, and for the purpose of deceiving the public, issued, as the work of A. Keith Johnston, an atlas which was not the work of either the first or the second of that name, but of persons not skilled in making an atlas. An issue was adjusted and sent to a jury, who found for the pursuer, with £1275 of damages.

On a motion for a new trial, on the grounds (1) that the verdict was contrary to evidence, and (2) that the damages were excessive, the Court refused to disturb the verdict on the first ground, holding that the innuendo was sufficiently supported by evidence to make it not unreasonable for the jury to find for the pursuer, but intimated that, unless the pursuer accepted £100, they would grant a new trial on the ground of excess of damages. The pursuer having consented to take £100, a new trial was refused.

Observed (*per* the Lord Justice-Clerk), that if the critic, instead of stating as a matter of fact that the atlas was not the work of either the father or the son, and making that statement of fact the explanation of the inaccuracies which were found in it, had said that, looking to the abounding errors in the atlas, it could not be the work of these experienced men, the innuendo could not have been maintained.

2D DIVISION. Jury Cause. R.

THIS was an action by Thomas Brumby Johnston, geographer, publisher, and engraver, carrying on business in Edinburgh under the firm name of W. & A. K. Johnston, against Sir Charles W. Dilke and others, proprietors and publishers of the "Athenæum" newspaper, concluding for £5000 damages for slander.

The alleged slander was contained in a review which appeared in the

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"Athenæum" of 11th July 1874 of an atlas published by the pursuer, entitled "The Edinburgh Educational Atlas of Modern Geography, with complete index, by W. & A. K. Johnston."

The article complained of commenced,—"The number of the 'Proceedings' of the Royal Geographical Society just published contains a letter from Dr Livingstone to Sir Henry Rawlinson, in which the great traveller says:—'It was gratifying to find that, though my letters disappeared, Keith Johnston *secundus*, as he ought to be called, had, with the true geographical acumen of my lamented friend, Keith Johnston *primus*, conjectured that the drainage (from Lake Bangweolo) went to the north-west, as I found it, and not to the Congo, as I often feared.'

"The atlas now before us, though bearing the name of A. Keith Johnston, is the work of neither the *primus* nor the *secundus* of that name, for the son is no longer connected with the house established by his late father, the merited reputation of which he was so well qualified to maintain, but is gone to seek his fortune in Paraguay. And not merely from the present work, but from others which have lately come to our notice, we regret to observe unmistakeable signs of the absence of that 'true geographical acumen' which Livingstone so justly lauded.

"This 'Educational Atlas,' though nicely got up, and in this and in other respects following the traditions of the firm under whose name it appears, is scarcely a work likely to maintain the special character of that firm, it being one that might have been prepared at the work-table of any map-maker of ordinary ability. We are far from saying that in its maps of the known portions of the globe it contains any material errors or omissions, or that the general execution and finishing of the work are deficient; but the engraving, though artistically, or rather mechanically good, is so delicate and faint, and the maps are so overcrowded with names, as to render them indistinct and difficult of reference—the first essential, as it appears to us, in an 'educational' atlas." . . .

The reviewer then went into a detailed and severe criticism of the atlas, and concluded,—"On the whole, we miss in this atlas the presence of the master mind, which, in both father and son, gave to the house of W. *and A. K.* Johnston the character it has so long enjoyed, but we fear is now losing, in the world of science."

The pursuer averred;—"The said article was of and concerning the pursuer and his said firm of W. and A. K. Johnston, and was intended to represent, and does represent, that the pursuer and his said firm had falsely, and for the purpose of deceiving the public, issued, as the work of A. Keith Johnston, an atlas which was not the work either of A. Keith Johnston the first or A. Keith Johnston the second, but of persons not skilled in making an atlas; that the said atlas was a grossly unskilful work, and not useful as an educational work; and that the pursuer and his present firm of W. and A. K. Johnston were no longer capable of producing good and useful atlases or geographical works."

The case was tried before the Lord Justice-Clerk and a jury upon the following issues:—"It being admitted that in the number of the 'Athenæum' newspaper published by the defenders on 11th July 1874 the article printed in the schedule appended hereto appeared;—(1) Whether the said article was of and concerning the pursuer and his firm of W. and A. K. Johnston, and falsely and calumniously represents that the pursuer and his said firm had falsely, and for the purpose of deceiving the public, issued as the work of A. Keith Johnston an atlas which was not the work either of A. Keith Johnston the first or A. Keith Johnston the second, but of persons not skilled in making an atlas, to the loss, injury, and damage of the pursuer: (2) Whether the said article

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was of and concerning the pursuer and his said firm of W. and A. K. Johnston, and falsely and calumniously represents that the pursuer and his present firm of W. and A. K. Johnston were no longer capable of producing good and useful atlases or geographical works, to the loss, injury, and damage of the pursuer."

The defenders took no counter issue.

It was proved that the plates which were used for the "Educational Atlas" were revised by A. Keith Johnston the second before he went to Paraguay.

Only one witness stated that he had, in reading the article in the "Athenæum," put upon it the meaning innuendoed by the pursuer in the first issue.

The jury found for the pursuer on the first issue, with £1275 of damages, and for the defenders upon the second issue.

The defenders moved for a rule on the pursuer to shew cause why the verdict should not be set aside and a new trial granted, on the ground that the verdict was contrary to evidence, and that the damages were excessive.

The Court having granted the rule, parties were heard.

At advising,—

LORD JUSTICE-CLERK.—Having presided at the trial of this case I may as well, before your Lordships deliver your opinions upon the question before the Court, state the impression which the evidence made on my mind, on the first ground on which the motion is based for a new trial, viz., that the verdict is contrary to the evidence.

The issue relates to a long and elaborate article upon the subject of a geographical publication, and it contains a variety of matters which the pursuer felt to be injurious to him. The two issues which were granted by the Lord Ordinary—I assume after discussion—were those that are now before the Court. The whole sting of the issues is in the innuendo attributed to the article as a whole. That the article is of and concerning the pursuer is quite certain. That some of the statements contained in it are untrue is also certain; but the real question brought before the jury was, whether the article bore the innuendo which is appended to and forms part of the issues that were approved of and sent to trial. Now, my Lords, I do not think that, although an issue is adjusted containing an innuendo which the pursuer undertakes to prove, it is beyond the power of the presiding Judge, looking to the evidence and to the import of the language said to have been used, to say to the jury that no case has been presented to them which would justify that innuendo, and that the words will not bear it. But, on the other hand, when an issue is sent to a jury, and there are no collateral circumstances founded on to modify the natural meaning of the words, it appears to me that, *prima facie* at all events, it is a matter for the consideration of the jury. In this case I find that these two issues had been carefully adjusted by the Lord Ordinary, and that he had expressed his views in a note which he added to his judgment.

In regard to the second issue, which puts to the jury whether the article represented that the pursuer and his present firm of W. and A. K. Johnston "were no longer capable of producing good and useful atlases or geographical works," my impression was that that was altogether a forced and fanciful construction to be put upon the article. It would require very strong words indeed to deduce that result from anything that could be said upon such a work. But

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I did not think it necessary to withdraw that from the jury. I told the jury that was my impression on the evidence, and they accordingly adopted or coincided in the view that I expressed.

In regard to the first issue, the matter was considerably more perplexing, because it contains a very complex innuendo containing various elements, all of which it was necessary that the pursuer should maintain and establish,—"That the pursuer and his said firm had falsely, and for the purpose of deceiving the public, issued as the work of A. Keith Johnston an atlas which was not the work either of A. Keith Johnston the first or A. Keith Johnston the second, but of persons not skilled in making an atlas."

The question that arose for the jury was, whether the article meant all those things. Now, my Lords, if the article had simply said that, looking to the nature of this atlas and its abounding errors, the critic came to the conclusion that it could not be the work of the experienced geographers who had been in use to make the maps of A. K. Johnston, I do not know that there would have been much of a case to send to the jury. At all events, it would have been impossible to maintain it on the footing of this innuendo. Probably a critic is entitled to say, if he gives the grounds on which he says it, "I assume from the excessive carelessness of the work which we are criticising that it cannot be the production of the experienced men whose works we have been accustomed to receive." That, at all events, would have been a very different case. But that is not the statement contained in the article in any view of it; for the statement is that as a matter of fact, although the work bears the name of A. Keith Johnston, it is not the work of either the first or the second of that name. And the reason why the critic says it is not the work of either the first or the second A. Keith Johnston is not the inaccuracy which he finds in the work itself, but the fact that the son is no longer connected with the house established by his late father, "the merited reputation of which he was so well qualified to maintain, but has gone to seek his fortune in Paraguay." And, therefore, the kind of case which was suggested of a mere inference from the nature of the work itself is entirely out of this question. And it is very important in this discussion to keep that in mind. Whether the allegation be true or false, injurious or not injurious, the allegation is, that in point of fact it is not the work of either the father or the son, and the reason is that the son has ceased to be connected with the firm. In regard to the inaccuracy, so far is that from being the ground on which that statement of fact is made, the statement of fact is made to be the explanation of the inaccuracies which are found in it. That the statement was false was clearly proved, and that is not in dispute. It was a statement which the proprietors or publishers of the "Athenæum" could not fail to know to be at least derogatory to the reputation of the firm, because they say so in so many words, and that is the whole gist of the article. It turned out to be false, and I regretted at the time, and I regret still, that having made a statement in point of fact which they knew to be injurious, and which turned out to be false, the editors of this very distinguished publication should not at once have said,—"We are very sorry that we were misled in that matter." Probably if they had done so we should have heard no more of this case.

But then came the question, assuming the statement that it was not the work of A. Keith Johnston the first or the second, as represented in the article, whether the article represented that the pursuer and his said firm had falsely, and for the purpose of deceiving the public, issued as the work of A. Keith

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Johnston the first or the second an atlas which was not the work of these parties, but of persons not skilled in making an atlas? Now, to pass for a moment from the purpose of deceiving the public, it appeared to me that there was evidence to go to the jury that the article meant to represent the maps as the work of persons not skilled in making an atlas,—that is to say, not eminently skilled. That they could make a map is of course assumed in the article itself, for it is assumed that this map might be made by a map-maker of ordinary ability. But the reference to the "true geographical acumen" which occurred two or three times in this article—in the second paragraph, in the last, and especially in the fourth paragraph, where they say that "the present cartographer has not the geographical acumen to follow out his own conclusion by erasing the words 'Sources of the Nile'"—I think entitled the jury to judge for themselves, and to affirm that part of the issue, if they were satisfied on the subject.

But the last point, and by far the most difficult point in the inquiry, was, whether the article meant to say that the pursuer, by putting the name of the firm upon the book, intended to deceive the public. I think the critic did mean to say that the public were deceived, or would be so but for his caution, for he says that the work before us, though bearing the name of A. Keith Johnston, is the work of neither the *primus* nor the *secundus*—that is to say, that the public would naturally have expected that it was the work of one or other of them, but that in point of fact it was not. Now, whether that was said with the intention of representing that by putting that name upon the book the firm intended to lead the public to believe what was contrary to the fact,—that it was the work of the old hands, and not of new,—was the question which the jury had to consider. I think that a strong inference to draw from the words, and so I told the jury. But I am not in a position to say that it is not an inference which they were entitled to draw. I cannot say that it is contrary to the evidence. I might not myself have drawn the inference, but my opinion is that the jury having had the whole case before them, and having heard the whole evidence such as it was—into which I do not think it necessary to go—it was not very strong of its class, but there was a certain amount of it—I am not prepared to say that the jury, having found that, went contrary to the evidence in so finding. And therefore I was satisfied with this part of the verdict as it was returned, and I would not be disposed to have this investigation over again before a fresh jury.

In regard to the matter of damages, I must fairly say that I think there was no justification and no foundation for the amount of damages which the jury gave. I may perhaps take some blame myself that I did not make any observations to the jury upon that subject, led mainly by the fact which was stated by Mr Fraser yesterday, that he appealed to the jury mainly for a vindication of the character of this work, and very much on the ground that the defenders had made no expression of regret for the mistake in point of fact which had been made. The jury have fixed the damages at £1275. As I have said, I think that is entirely without evidence, and accordingly it appears to me that if that verdict is to be taken as it is, it would be impossible for us to avoid giving a new trial on that ground, which is quite a sufficient ground. But I think we are quite entitled to take the course of putting it to the pursuer to accept a reasonable sum—what we consider reasonable—in name of damages; and if he is willing to do that, and to allow the verdict to be modified to that extent, then I think there will be no necessity for any new trial.

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LORD NEAVES.—I do not go into the question whether the innuendo was made out, for this reason, that it does not appear that your Lordship was asked to say that the language used in the article was not capable of the meaning which the jury put upon it.

But I think the jury have strained matters very much, and have been carried away by the severity of the criticism, which was quite allowable, whether right or wrong. In a question between "English Bards and Scotch Reviewers," or Scotch geographers and English critics, I do not see why a harsh and keen article should not be considered within the province of the critics. It has been so considered, and I presume will continue to be so, and not without good reason. The jury were no doubt carried away by thinking the pursuer assailed unjustly. I consider the amount of damages grossly excessive, and utterly unsupported by the evidence—I would almost use the word "outrageous"—but at all events they are quite unjustifiable in any view.

LORD ORMIDALE concurred.

LORD GIFFORD.—The only question of difficulty which I have found in this case is, whether there was or was not evidence to go to the jury to support the innuendo in the first issue. I do not remember any case where an innuendo so complicated and difficult as this was supported by evidence so slender; and very little more would have induced me to say that the verdict was against evidence, and that a new trial must be granted on that ground alone.

But I feel that I am not in a very favourable position to come to that conclusion, and I concur mainly in consequence of the impression which the evidence has made upon your Lordship, who tried the case,—a matter to which I give the greatest possible effect. Therefore, upon the first ground on which a rule is moved for, I think we cannot grant a new trial.

As to the amount of damages, I quite concur in the observations of your Lordships. This is a verdict which, to use the expression of an old Judge, would make people hold up their hands in astonishment. There is not a particle of evidence which could possibly justify such an award of damages, and I am driven to ask on what grounds can the jury have proceeded. I think we have the means of getting at the grounds which may have misled the jury, for the sting of the article complained of is not so much in the innuendo which is put in the first issue as in the sharpness and severity of the criticism which the article contains. I can quite understand that the jury would find great difficulty in discriminating between the damage which was done by an allegation against the Johnstons, that they had put on the title-page something calculated to mislead the public as to the authorship of the atlas, and the injury which was inflicted by the very severe criticism indulged in against the maps themselves. The jury must have failed to distinguish between damages for the criticism, which they were not entitled to give the pursuer, and any very moderate damages which they might be entitled to give upon the footing that the article accused the pursuer of having misled the public as to the authorship of the maps. And therefore I consider, with your Lordships, that unless a very different amount is accepted we must grant a new trial on the second ground.

Fraser, for the pursuer;—In regard to the amount of damages I am authorised by the pursuer to state that he leaves himself entirely in the hands of the Court.

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LORD JUSTICE-CLERK.—Then we are of opinion that £100 would have been a reasonable amount of damages, and that nothing beyond that ought to have been given. And, therefore, if the pursuer is willing to accept £100, we shall refuse the rule.

THIS interlocutor was pronounced:—"Having heard counsel, in respect that the pursuer consents that the amount of damages found by the verdict of the jury shall be reduced to £100, discharge the rule, and find the defenders entitled to expenses in connection with the application for a rule, which modify to one-half of the taxed amount," &c.

UPON a motion by the pursuer to apply the verdict, this interlocutor was pronounced on 25th June 1875:—"On the motion of the pursuer, apply the verdict of the jury in this cause, and decern against the defender for the sum of £100 of damages, and find the pursuer entitled to expenses, including the expenses of the trial, with the exception of the expenses in connection with the application for a rule, already disposed of."

KEEGAN & WELSH, S.S.C.—TODS, MURRAY & JAMIESON, W.S.—Agents.

No. 144.
June 18, 1875. Trustees of the Clyde Navigation v. Barclay, Curle, and Co.

THE TRUSTEES OF THE CLYDE NAVIGATION, Pursuers.—*D.-F. Clark—Asher.*
BARCLAY, CURLE, AND COMPANY, Defenders.—*Sol.-Gen. Watson—Alison.*

Ship—Collision—Reparation—Compulsory Pilotage—Merchant Shipping Act, 1854, *sec.* 388.—To entitle the owners of a ship, under the charge of a licensed pilot, where such pilotage is compulsory, to the benefit of the provision of the statute which exempts them from liability when a collision has occurred by the fault of the pilot, it lies on them to prove that it was occasioned solely by the pilot, and that there was no contributory fault on the part of the ship or master or crew.

Circumstances in which *held* (*diss.* Lord Ormidale) that the owners had discharged this *onus*.

2D DIVISION. Ld. Mackenzie. R.

ON 17th February 1873 the new steamer "Colina," built by Barclay, Curle, and Company, which was about 320 feet long, and 2000 tons registered burden, sailed down the Clyde from Glasgow on her trial trip, and was returning up the river on 19th February, when about a quarter to five in the afternoon, the light being good and the weather clear, she ran into a dredger belonging to the trustees of the Clyde Navigation, moored on the south side of the river near Dalmuir, struck the dredger in the stern, and sank her.

At the date of the collision the "Colina" had not been taken over by the purchasers, and was still in the custody of the builders.

The present action was raised by the trustees of the Clyde Navigation against Barclay, Curle, and Company for £6000, as the damage sustained by them in consequence of the sinking of the dredger by the "Colina," through the fault, as the pursuers alleged, of the defenders and their servants.

The defenders, besides maintaining that the collision was not caused by their fault, pleaded;—(3) *Separatim*, the collision having been occasioned by the fault or incapacity of a duly licensed or qualified pilot acting in charge of the steamer within a district where pilotage was compulsory by law the defenders are entitled to absolvitor, with expenses.

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Section 388 of the Merchant Shipping Act, 1854, enacts,—"No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law."

It was not disputed that Luke Skelly, a pilot duly licensed by the Clyde Pilot Board, was, at the time of the collision, in charge of the "Colina," and that the collision occurred within a district where the employment of a pilot licensed by the board was compulsory.

The facts disclosed in the proof were shortly as follows:—The dredger had been moored in the same place for about a week before the collision, and was seen by the pilot when the steamer went down the river two days before. Close on each side of the dredger a barge was moored. The distance from the outside barge to the north bank was about 260 feet, and the distance from the inside barge to the south bank was about 70 feet, the breadth of the river being about 410 feet. It was proved that it was impossible for the "Colina" to pass up the river between the inside barge and the south bank, the only fairway for navigation being to the north of the outside barge. About 700 yards or more below where the dredger was moored the river takes a bend, but for that distance the river runs in a straight line.

The pilot saw the dredger as soon as he came round the bend. When about 400 or 500 yards from the dredger, and when the head of the "Colina" was pointing straight up the fairway, which lay to the north of the outside barge, Skelly gave the order to port the helm, to clear a small boat which was in the way on the north side. The helm was kept at port until the steamer got within about 100 yards of the dredger, at which time her bow was in a line with the dredger, or a little to the south of it. When the pilot's attention was called to the fact that the telegraph indicator shewed that the helm was at port, he got into a state of great agitation, and telegraphed to have the helm put to starboard, and immediately after hard-a-starboard, with the view of avoiding the south bank and getting the vessel's head into the fairway to the north of the dredger and barges, so as to avoid a collision with them, but that was impossible at the speed the "Colina" was going. Mr Ferguson, a partner of the defenders' firm, who was on board, said to the pilot, "You had better let her take the bank." The pilot did not hear Mr Ferguson's suggestion, or at all events did not adopt it. The witnesses—except Skelly—were all of opinion that the only way in which a collision could have been avoided when the pilot discovered the position of the "Colina," and that her helm was at port, was by continuing that course, and running the "Colina" into the south bank, which was soft and would not have injured the vessel.

After giving the order "hard-a-starboard," Skelly, finding that the vessel did not answer the helm sufficiently soon, gave the order to stop, and reverse the engines, which was done. The "Colina" had two tugs, one attached to the bow and the other to the stern. The hawser of the bow tug had the effect of assisting the starboard helm. Immediately after the engines were reversed Skelly cried out to the bow tug to slip the hawser. This order was not heard by the men on board the tug in consequence of the noise of the steam. Skelly then ran forward and repeated the order, and the tug threw off the hawser. Skelly stated in his evidence,—"Had the tug been cast loose when I first gave the order I think the vessel would have gone clear of the dredger and run on the south bank." But the other witnesses who were examined on this point considered that even when the order to throw off the hawser was first given it was too late to avoid

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a collision, seeing that the action of the helm was neutralised by the reversing of the engines. Skelly further stated in his evidence,—"I had no officer beside me to help me in signalling to the tug. On the first occasion I whistled and cried out to the tug, but in addition I waved my hand on the second occasion. There would be about half a minute between the time I called out and the time the rope was sprung. I did not ask assistance from any of the ship's officers. I did not require any assistance in signalling to the tug."

The bye-laws for the regulation of vessels on the Firth of Clyde provide,—"Section 1. All steam-vessels must be supplied with a captain or sailing-master, who shall be an experienced seaman; and must also be manned with a sufficient number of able-bodied and experienced seamen, for the safe navigation of the vessel, under a penalty not exceeding £5 for each offence: And no passenger-steamboat shall be manned with less than a master, two deckmen, and a steersman (who may be a pilot), exclusive of the engineer, firemen, and steward, under the like penalty."

The officers and crew on board the "Colina," on her trial trip, had been provisionally engaged by the purchasers. The officers were not in the employment of the defenders, to whom the vessel still belonged, and had no regular commissions, but were there to see that the pilot's orders were obeyed, according to the custom in trial trips. The master was not taking an active charge, but the first and second officers were discharging their duties as such, although Durie, the first officer, in his evidence disclaimed any responsibility. The bye-law above quoted was not strictly complied with, but the result of the evidence on the whole was that there were plenty of men to do the work, and the pilot himself stated that all his orders, except the order to throw off the hawser, were promptly obeyed.

The pursuers maintained that it was not sufficient for the defenders to shew that there was fault on the part of the pilot, but they must exclude the possibility of contributory fault on the part of the master and crew, and they founded on two points in particular as fixing liability on the defenders,—first, that the vessel was not manned in terms of the bye-law; and, second, that if the order to throw off the hawser had been obeyed when it was first given the collision might have been averted.

The Lord Ordinary assoilzied the defenders.*

The pursuers reclaimed.

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* "NOTE.— . . . . The Lord Ordinary is of opinion that the collision was occasioned by the sole fault of Luke Skelly, the pilot in charge of the 'Colina,' and that there was no defect or insufficiency in the 'Colina,' and no fault on the part of her crew, which in any way contributed to the collision. The Lord Ordinary is aware that it has been decided in England that, in order to free the owners under the clause of 'the Merchant Shipping Act, 1854,' founded on by them, the owners must prove that the injury was occasioned solely by the fault of the pilot; and that, if the injury is occasioned by the joint fault of the pilot and crew, or by the fault of the pilot coupled with insufficiency in the vessel, the owners are liable—The London and Edinburgh Shipping Company ('The Iona'), 18th February 1867, 1 Law Reports, P. C. Appeals, 426; The Owners of The 'Velasquez,' 4th July 1867, *ib.* 494; Pollok, 24th June 1851, 7 Moore's P. C. Reports, 427; Rodrigues, 3d June 1854, 10 Hurlestone and Gordon, 110; Trask, 30th July 1863, 2 Moore's Reports, N. S., 260. The Lord Ordinary concurs in the principles laid down in these cases, and has given effect to these principles in deciding the present action."

At advising,— No. 144.

June 18, 1875. Trustees of the Clyde Navigation v. Barclay, Curle, and Co.

LORD JUSTICE-CLERK.—The sum at stake in this case is large, and it involves questions of great importance in regard to the rules of navigation.

The "Colina" is a first-class steamer of the largest size. She was built by Barclay, Curle, and Company, and had not been taken off the hands of the builders when the accident occurred which has given rise to this action. She went down the Clyde on 17th February 1873 under charge of a Clyde pilot on her trial trip, and was returning on the 19th, when she struck a dredger moored in the river, and sank her. This action is raised by the Clyde Navigation Trustees against Barclay, Curle, and Company. The plea in defence is that although the vessel was the property of the defenders they are not responsible, the accident having occurred at a time when the vessel was in charge of a duly qualified pilot, within a district where the employment of a pilot is compulsory, and they found upon the 388th section of the Merchant Shipping Act, 1854. The Lord Ordinary has sustained this defence, and assoilzied the defenders. I am entirely satisfied with the reasoning by which his Lordship has reached this conclusion, but as the case is important I shall shortly state my views.

Although under the statute there is an express provision that if the fault or incapacity of the pilot is the cause of the accident the owner and master are not to be responsible, yet it has been held that the burden is laid upon the owner or master of shewing not only that the pilot was in fault, but that the master and crew were not in fault, and that there is no reasonable ground for saying that, if the master and crew had acted otherwise than they did, the accident would not have occurred. Some observations have been made in the English cases to which we have been referred to the effect that the owners must exclude the possibility of the master or crew having contributed to the accident. Such expressions are rather figurative than strictly judicial. I should prefer to state the law to be that it is not enough for the owners to shew that the damage arose through the fault of the pilot, if there is reasonable room for saying that there was contributory fault on the part of the master or crew.

The question here is, did the damage arise from the fault or incapacity of the pilot, and if it did, was there fault on the part of the master or crew which contributed to the result?

It is said that the owners must be responsible, because they have not complied with the bye-laws of the Clyde Pilot Board, which require "that all steam-vessels must be supplied with a captain or sailing-master who shall be an experienced seaman, and must also be manned with a sufficient number of able-bodied and experienced seamen for the safe navigation of the vessel." It is said that the "Colina" was not supplied with a captain or sailing-master, or with a sufficient crew. The vessel was still the property of Barclay, Curle, and Company, and she was manned on this her trial trip by officers and men who had no regular commission, but were there for the purpose of the trial trip. It is said that this is not sufficient compliance with the bye-law. I think it was a slovenly state of matters, and not one to be commended. It may be quite true, and I think it is proved, that the complement of officers and men was quite sufficient, although the captain and other officers say that they were only there as amateurs. I take it, however, as proved that there were plenty of hands to do the work, and that the work was reasonably well done. But to send a vessel for a trial trip in such a place as the Clyde, with no one on board who can say

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that he was responsible, is not to my mind a proper compliance with the regulation, and if the case had turned on this, I should say that the provision had not been complied with.

But the question is solely whether the accident happened through the fault of the pilot, who was master of the vessel for the time being, and if it did, whether there was any fault on the part of the owners or owners' servants which contributed to the result.

Now, there is not the smallest doubt as to the cause of the collision. It was simply that the pilot kept the helm too long to port after he had given the order to port the helm in order to clear a small boat which was in the way on the north side, some distance farther down the river; and after he found that the vessel was going into the south shore, instead of running her aground, which was the only chance of avoiding a collision with the dredger, he put the helm hard to starboard, which had not the effect of clearing the dredger. The pilot does not deny this. He says the vessel gave a sheer to the southward; but the real truth is, that he had kept the helm longer at port than he supposed. For the moment he forgot that the helm was at port, and when he discovered it, he got into great agitation, and instantly called out to put the helm to starboard.

The cause of the accident is thus beyond a doubt. The question then is, whether the master or crew, or any defect connected with the ship, contributed to the damage. I am at a loss to find any trace of such contributory fault. If the orders of the pilot had not been obeyed, if there were not sufficient men to obey the orders, it would have been a very serious matter, all the more so from the state of the authority of the officers and crew; but there is no trace of this in the evidence. Every order was promptly obeyed, and the pilot himself says so most positively.

It is suggested that there was not a proper look-out. But the pilot knew that the dredger was there. He had seen it on the 17th as he went down, and it is proved that he saw it as soon as they came round the bend of the river. Moreover, Durie went forward and blew the whistle when they came in sight, and no question is even asked as to the look-out. There is no pretence for saying that the accident happened in consequence of the dredger not being duly seen, and the pilot himself says there was plenty of room to clear her.

It is further suggested that there was a short period in which the accident might have been averted if there had been more men on board. The "Colina" had two tugs attached to her, one at the stern and one at the bows, and the hawser of the bow tug, to a certain extent, assisted the helm when put to starboard. A minute or two before the collision the pilot changed his mind, and although he did not countermand the order to starboard the helm he seemed to think that he could still run into the shore and so avoid striking the dredger by taking it on the port tack, and accordingly he called to the tug to throw off the hawser. The tug did not at first obey, not having heard the order, and then the pilot ran to the end of the bridge and called out loudly. They did hear, and they threw off the hawser. It is suggested that if there had been the proper compliment of men, and if they had been discharging their duty, there might have been some one to hear and repeat the order to throw off the hawser when it was first given, and so the vessel might possibly have got to the south side of the dredger. But the pilot himself distinctly says that he was not in want of any assistance. I cannot come to the conclusion that if any one else had been there he would have done better. But if the rope had been cast off that moment

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it was hopeless to have avoided the collision, for this simple reason, that the order to reverse had been given before the order to cast off the hawser. The helm was still to starboard, and at the moment the first order was given to throw off the hawser the vessel was only sixty yards from the dredger, a distance which would be traversed, at the rate the vessel was going, in thirty or forty seconds.

It is said that there was no one in charge of the vessel at all. Theoretically that might be so, but practically it was not. Mr Ferguson, one of the owners, says that the first and second officers were in charge. "Durie was practically in command after the pilot, and under Durie was the second mate." Durie disclaims responsibility, but he does not dispute the fact that he was discharging the duty of first officer.

Upon the whole evidence I am of opinion that the vessel was quite sufficiently manned for the purpose of navigation; that the orders of the pilot were immediately and promptly obeyed; and that it was owing to his mistake in the navigation, and to that alone, that the collision took place. Under these circumstances I see no ground for excluding the provisions of the Act of Parliament, which provide that, in such circumstances, the owner or master should not be responsible.

LORD NEAVES.—I concur. It is quite plain that the leading fault which caused the accident was on the part of the pilot. But if there is room for holding that something wrong on the part of the master or crew contributed to the result the defenders will still be liable. This rule must be applied in a reasonable sense. We are not to set our imaginations wild in search of something done or left undone by the master or crew which might possibly have altered the result. I cannot find that anything was done or left undone by the master and crew which could reasonably be said to have contributed to the accident.

I do not wish to give any encouragement to the idea that a ship requires to be less efficiently manned on her trial trip than at any other time. I do not think, however, that it has been made out upon the evidence that the ship was not fully officered and manned.

LORD ORMIDALE.—I regret that I am unable to concur in the opinions of your Lordships and of the Lord Ordinary.

On the occasion when the collision in question took place, the "Colina" had a pilot on board, as she was bound to have by law. He, and he alone, was entitled to direct the course of the vessel. But there was also a duty upon the owners, or those in possession of the ship. They were bound to have an efficient master and crew on board for the purpose, among others, of keeping a look out and promptly carrying into effect the orders of the pilot. The defenders, accordingly, aver in the first article of their statement of facts, that the "Colina" "was, at and prior to the collision, tight, staunch, and strong, well manned and officered, and in every way fitted for the navigation of the Clyde."

It would be hard, no doubt, upon the defenders, to be made responsible for the fault of the pilot, whom they were compelled by law to employ; and to relieve them so far the 388th section of the Merchant Shipping Act, 1854, provides that "no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot within any district where the employment of such pilot is com-

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pulsory by law." The defenders, however, were not exempt from all charge or responsibility. The law on this point has been stated by Sir Richard Kindersley in delivering the judgment of the Judicial Committee of the Privy Council in a recent case of a collision, as follows:[1]—"In construing these Acts it has been established as a principle that in order to entitle the owners to the benefit of exemption from liability thereby provided they must prove that the damage for which it is sought to make them liable was occasioned exclusively by the default of the pilot. It is not enough for them to prove that there was fault or negligence in the pilot; they must prove to the satisfaction of the Court which has to try the question that there was no fault whatever on the part of the officers and crew of the vessel, or any of them, which might have been, in any degree, conducive to the damage." I admit that we are not to found upon every expression in the opinion of a Judge, however eminent, in its strictest literal sense; and I do not say that I differ from the reasonable view of the principle taken by your Lordships. Still the principle is established, not only by the passage in the judgment which I have just quoted, but in that of many others to be found in the reports, to the effect that the *onus* lies upon the owners, not only to shew that there was fault in the pilot, and in him alone, but also that they or their servants, or others for whom they are answerable, did not by negligence, or, indeed, any act of omission or commission, contribute to the collision and consequent damage.

I do not think that anything turns on the circumstance that when the collision in question occurred the vessel was on her trial trip, and in regard to this I understand both your Lordships agree with me. Indeed a steamer or other vessel on her trial trip may require a larger and more efficient and vigilant crew than when fairly afloat, more especially when the trip takes place in a crowded river like the Clyde, while as yet the ship's powers and mode of working are unknown. All the more skill, efficiency, and vigilance are therefore required, I should think, on such an occasion, to avoid danger.

The question is whether there was any blame in relation to the collision we are now considering attributable to the defenders, or, to put it more correctly, have they shewn that there was none, and that the fault was solely and entirely that of the pilot. That there was fault on the part of the pilot I concur with both your Lordships in thinking to be free from doubt; but I cannot concur with your Lordships in holding that there was no contributory fault on the part of the defenders or their servants, and still less in thinking that they have satisfied the *onus* which was upon them of shewing there was not.

In the first place, I must consider what was the state of the vessel in regard to officers and crew when the collision took place. The defenders were bound to have an efficient crew, officers, and master or captain. A pilot would be very useless unless there were persons on board promptly to carry out his orders, and to aid him by keeping a vigilant look-out. Now, the evidence shews that there was not the full complement of officers and crew on board, and those that were on board, so far, at least, as the officers are concerned, appear to have been present as idlers or amateurs rather than in the discharge of duty. In short, the evidence shews that the "Colina" was, as regards her officers and crew, in a very deplorable condition, so much so that it is not the least surprising that

[1] "The Iona," Feb. 18, 1867, L. R. 1 Privy Council App., see p. 432.

an accident occurred. This goes far, I think, to increase the *onus* on the defenders of shewing that there was no contributory fault on their part.

There are two points on which I think they have not satisfied the *onus* which was upon them,—first, in regard to throwing off or slipping the hawser of the tug; and, secondly, in regard to keeping a good look-out and giving the necessary warnings to the pilot.

With regard to the first point, it does not require much knowledge of navigation to see the importance of slipping the hawser of the tug the moment the pilot gave an order to that effect. Gordon, the master of one of the barges moored alongside the dredger, says,—"If the tug had not pulled her (the 'Colina') to the north, she would not have struck the dredger, and I believe she would have run into the south bank below the dredger, and clear of both dredger and barges." The witnesses John Macdonald and James Barrie (the masters of the dredger and of the other barge) gave evidence to the same effect. There were two ways of slipping the hawser which connected the tug with the "Colina." It might have been slipped from the tug, or it might have been slipped or cut if necessary from the "Colina" herself. Skelly, the pilot, says, in the course of his evidence,—"When I saw the 'Colina' was not coming round to her starboard helm I cried to the bow tug to slip her hawser. I did so in order to let the 'Colina' run upon the south bank and keep clear of the dredger as a last resource. The 'Colina' would have been none the worse of going upon the bank, which was a soft one, and she would not have run foul of the dredger. My order was not obeyed immediately, because the noise of the paddles and the steam prevented the people in the tug from hearing me. Accordingly I whistled, and signalled to the tug by hand to spring the rope, which was then done. Had the tug been cast loose when I first gave the order I think the vessel would have gone clear of the dredger, and run on the south bank." Here the state of the "Colina" as regards her officers and crew comes to be of great importance. Had the master been at his post, in place of idling and smoking his cigar, the hawser might have been cut and the collision avoided. But there appears to have been no master or any one else to assist in that matter. Skelly, the pilot, expressly says,—"I had no officer beside me to help in signalling to the tug."

With regard, again, to the look-out, I have not been able to find any witness who says that there was a man stationed to keep a look-out at all; and no such man has been examined as a witness. I agree, however, with your Lordships that the pilot appears to have seen the dredger in plenty of time. But I cannot hold that this is enough to exonerate the defenders. The pilot's attention is necessarily directed to other matters as well as keeping a look-out, and there ought to have been a man or men stationed on the forecastle or bows for the purpose of looking out and reporting every danger ahead. The case of the "Iona," in which Sir Richard Kindersley delivered the judgment of the Privy Council, is very instructive on this point. The circumstances were very similar to the present case. The "Iona" ran down a barge in broad daylight just as here. The pilot saw the barge 300 yards off just as here; and yet it was held that the owners of the "Iona" were liable, in respect that the master and crew had failed to keep a good look-out.

In these circumstances, into the minute details of which it is unnecessary to enter, I am of opinion that in respect of want of promptitude in seeing that the order of the pilot to throw off the tug was carried into effect, and failure to keep

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a proper look-out, the defenders have failed to exonerate themselves; and I am therefore of opinion that in place of being assoilzied, they ought to be subjected in liability to the pursuers for the damage sustained by them in consequence of the collision.

LORD GIFFORD was absent.

THE COURT adhered.

WEBSTER & WILL, S.S.C.—FRASERS, STODART, & MACKENZIE, W.S.—Agents.

No. 145.

June 26, 1875. Sturrock v. Rankin's Trustees.

MRS JESSIE RANKIN OR STURROCK, First Party.—*J. A. Crichton.*
RANKIN'S TRUSTEES, Second Parties.—*Fraser.*

Trust-Settlement—Condition in Restraint of Marriage.—A truster directed that a part of the profits of his business, which was to be carried on by his trustees after his death, should be paid to his daughters, "but in the event of any of my said daughters being married her share of said profits shall lapse and fall into the residue of my estate," in which all his children were to participate. *Held* that the bequest was intended as a provision for the truster's unmarried daughters so long as they remained unmarried, and that the limitation was not invalid as a condition in restraint of marriage, and that a daughter who was married at the date of the settlement had no interest in the bequest.

Observations on the English rules as to conditions in restraint of marriage attached to bequests.

2D DIVISION. I.

DAVID RANKIN, wine merchant, Kilmarnock, died on 8th October 1873, leaving a trust-deed dated 17th February 1872. He was survived by his second wife, Janet Tod Guthrie or Rankin, and two sons—John Buchanan Rankin and Guthrie Rankin; and three daughters—Eliza Smith Rankin, Jane Mackay Rankin, and Jessie Rankin or Sturrock, of his first marriage, and seven children of his second marriage.

The fourth provision of his trust-deed was as follows:—"Fourth, In order that the full benefit may be obtained from my means, invested in my business as a wine and spirit merchant, &c., in Kilmarnock and elsewhere, carried on under the firm of William Rankin and Son, and for the better maintenance of my widow and children, it is my desire that the business be carried on for some time by the said John Buchanan Rankin and Guthrie Rankin, and James Blair (presently a partner in the business), under the supervision of my said trustees, and for that purpose I authorise and empower my trustees to allow whatever capital I may have invested in the business at the date of my decease to remain therein; and my trustees will allow suitable salaries to the said John Buchanan Rankin, Guthrie Rankin, and James Blair, for their management; and it is my desire that my trustees shall, while the business is so carried on, cause half-yearly balances to be made up in the months of February and August in each year, and to be vouched and docqueted, and shall report the same to the beneficiaries hereinafter named, and on the annual profits being ascertained my trustees shall dispose of the share thereof belonging to me as follows, viz.:—They shall pay over one-third thereof to the said Janet Tod Guthrie or Rankin, one-third thereof to my daughters Eliza Smith Rankin, Jane Mackay Rankin, and Jessie Rankin, equally among them, and the survivors and survivor of them, but in the event of any of my said daughters being married her share of said profits shall lapse and fall into the residue of my estate; and they shall hand over the remaining third to the said Janet Tod Guthrie or Rankin to be expended by her for the use and behoof of the younger children of our family until

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they shall severally attain majority, and thereafter the said third of my share of profits shall fall into the residue of my estate."

With regard to the residue of her estate the truster directed that, on the death of his widow, "they (the trustees) shall divide and pay over one-third thereof to and among my whole daughters by both marriages, equally among them, share and share alike, payable on their severally attaining majority or being married; and shall pay over and divide the remaining two-thirds of my said means and estate to and among my whole children, equally among them, share and share alike, payable to my sons on their severally attaining majority, and to my daughters on their severally attaining majority or being married."

His daughter, Jessie Rankin, was married to John Sturrock junior on 21st December 1871, during the lifetime of and with the consent of her father, and before the date of the execution of the settlement. At her marriage she got an outfit from her father of the value of £150.

The first balance of the business, which had been carried on by the trustees, was struck at 31st January 1875. Mrs Sturrock claimed a share of the one-third of the profits directed in the settlement to be paid to the truster's daughters. The trustees resisted the claim, on the ground that it was provided in the deed as above quoted, and that "in the event of any of my said daughters being married her share of said profits shall lapse and fall into the residue of my estate." A special case was prepared setting forth the above facts—Mrs Sturrock being the first party and the trustees the second parties thereto.

Mrs Sturrock contended that the condition, being in restraint of marriage, was illegal, and therefore that no lapse had taken place. She further contended, that supposing it were not illegal upon that ground, it was inapplicable to her, because she was married, not merely before the truster's death, but before the execution of the trust-disposition and settlement. On the other hand, the trustees contended that the condition upon which the legacy was to be paid was valid and not illegal; that the object of the truster was to secure an income to unmarried daughters of the first marriage by giving them one-third of the truster's share of profits, he assuming that any married daughter would be supported by her husband, and that there was nothing illegal in her father making such a distribution of the income from his estate among his daughters.

The question for opinion and judgment was whether the party of the first part was entitled to claim a share of the one-third of the profit from the business.

Argued for Mrs Sturrock;—(1) The clause founded on by the trustees amounted to an absolute prohibition to marry, and as such was illegal,[1] and must be held *pro non scripto*. (2) In this case the daughter was clearly entitled to her share, because she was married at the time of the execution of the deed, and was named in it as a person who was to take.

Argued for the trustees;—(1) The rules which prevailed in England as to conditions were no part of the law of Scotland, and were looked on with disfavour even by English lawyers.[2] (2) The true construction of the deed was that a married daughter would not presumably require the temporary assistance till division, while unmarried ones would.

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[1] Bellairs v. Bellairs, July 3 and 16, 1874, L. R., 18 Equity, 510; Allen v. Jackson, March 22, 1875, L. R., 19 Equity, 631.

[2] Stackpole v. Beaumont, April 14, 1796, 3 Vesey, 88—Lord Chanc. Loughborough, and Master of Rolls (Jessel), in Bellairs, *supra*; Bulloch v. Bennet, June 12, 1855, 7 De Gex, M'N., and Gordon, 283; West v. Kerr, Dec. 22, 1854,

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LORD JUSTICE-CLERK.—The question in this case arises under the trust-disposition and settlement of David Rankin, who was a wine-merchant in Kilmarnock, and the clause under which the dispute occurs is to the following effect:—After other provisions have been made, the truster provides, in the fourth place, that in order to the better maintenance of his widow and children his business shall be carried on under the supervision of the trustees, and his capital left in the business; and that when the annual balance of profits has been struck, "they shall pay over one-third thereof to" his widow, "one-third thereof to" his three daughters "equally among them; . . . . but in the event of any my said daughters being married her share of said profits shall lapse and fall into the residue of my estate." The residuary clause of the deed provides that one-third of his whole estate shall be divided among his daughters, and the remaining two-thirds among his whole children.

The share or fund which is the subject of the present special case is one-third of one-third of the profits accrued since the date of the truster's death in 1873. It is maintained by the first party, Mrs Sturrock, that that amount belongs to her, and we had an able argument as to how far a condition in restraint of marriage is to be held *pro non scripto*. If it were necessary to decide that general question I should go entirely along with the argument submitted for the trustees. It is not the law of this country, as it is in England, that where such a condition diminishes the interest of the beneficiary in the legacy it is to be held *pro non scripto*. That rule, along with its various qualifications, such as the distinction between the effect of conditions precedent and conditions subsequent, and the different results which follow if the legacy be from personalty or from realty or mixed estates, and the difference between limitations on the legatee's right and conditions attached to it, form no part of our law, and has been much regretted by jurists in the sister country, as may be gathered from the remarks made by many of them in the cases cited to us, and particularly those of Master of the Rolls Jessel, in the recent case of Bellairs.[1] Whatever may have been the early law in this country any such rules have been repudiated altogether now.

In the ordinary case it is not the law of Scotland that a testator may not attach to any of his gifts such conditions as regards the marriage of the legatee as may seem reasonable. It is not necessary to go farther for authority on this point than the case of Kidd v. Kidds, where that doctrine was recognised. But this is not a case where that point is raised at all. The question is relative to a fund which is realised by the labour of the trustees out of the capital of the trust-estate, and the testator has directed what the trustees are to do with the money so obtained. Mrs Sturrock wishes to get a share of this fund, but the deed has distinctly said she is not to have it. On what ground she can rest her claim I fail to see. She never had a right to a share of this fund, so she can suffer no forfeiture. No restraint has been put upon her, for she was married before the death of the testator; so whatever may be the principles of law with regard to such restraint they do not apply to this case. We

6 Irish Jur. 141—Lord Chanc. Brady; Kidd v. Kidds, Dec. 10, 1863, 2 Macph. 227, 36 Scot. Jur. 525.

[1] *Supra*, p. 851, note 1.

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are asked to ordain the trustees to pay a sum of money to a person who is expressly excluded in the deed.

I think that the whole argument for Mrs Sturrock proceeded on a misconception of the English cases. What is meant by the distinction between conditions precedent and subsequent in such cases is fully explained by the Master of the Rolls in the case of Davis v. Angel, June 6, 1862, 6 Law Times, 850.

In this case there never was a gift to Mrs Sturrock at all, and she never lost anything under this provision of the settlement. We must answer the question in favour of the trustees, and to the effect that Mrs Sturrock is entitled to no share of this fund.

LORD NEAVES.—I am of the same opinion. I am satisfied that the somewhat arbitrary and fanciful rules which obtain in England form no part of our law.

LORD ORMIDALE.—I was desirous, before this case was decided, to have had an opportunity of examining the case of Bellairs, which was cited by one of the parties as being in point. I have had that opportunity, and am now quite satisfied, in accordance with the views of your Lordships, that it cannot be looked upon as a precedent to govern the present case.

The circumstances of the two cases are essentially different. In Bellairs' case the Master of the Rolls proceeds, and the report shews that the judgment was founded on the principle that the condition which formed the turning point was a condition subsequent and not a condition precedent. Indeed, I gather from the report that if it had been a condition precedent the judgment would have been different. If we consider the present case by that rule there can be no doubt that the condition here was a condition precedent, because the bequest never vested. In Bellairs' case it did vest, and was then made the subject of a condition that, in the event of the marriage of the legatee, it should be forfeited, which is quite different from the terms of the bequest in the present case.

But, independently of that circumstance, and supposing the case of Bellairs was precisely similar to the present, I am not satisfied that it should control our decision now. It is clear that a variety of distinctions exist in the law of England in reference to matters of this kind of which there is no trace in our law at all. There is a distinction, for instance, that the rule given effect to in Bellairs' case does not apply to heritage, and other distinctions of a like nature which do not exist in our law. Besides, the Master of the Rolls himself states in Bellairs' case his opinion of the unreasonableness of the principle he gave effect to, and says he would have decided differently had it not been for some prior decision in another case which he held to govern him but which need not govern us.

On the whole I am clearly of the same opinion as your Lordships; and if it were necessary that we should have authority for our judgment we have it in the case of Kidd v. Kidds. It would be very unfortunate, indeed, if the rule contended for, on the strength of Bellairs' case, were held to prevail, as it would, I fear, endanger the stability of many family arrangements and settlements.

The only other question raised was as to the construction of the terms of the bequest, independently altogether of the principles with which I have hitherto dealt. It was suggested that, according to the terms of the bequest, the restriction could have no application to Mrs Sturrock, because at the time of the exe-

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cution of the settlement she was already married; and if it was desired to exclude her as a married daughter, why was the bequest not made to the other two unmarried ones only? In answer to that I have to say that it is probable Mr Rankin may have contemplated that, when the bequest came to vest, that Mrs Sturrock might have become a widow, and then, in that contingency, that he wished her to participate in his bounty. That question, however, is not before us now for determination, and I am not to be understood as giving any opinion upon it. It is enough that, in reference to the only point we have to decide, the fair construction of the terms of the bequest support the views we have taken of it.

Lord Gifford.—I am entirely of the same opinion. Under this settlement, in reference to Mrs Sturrock, there is no question at all of condition in restraint of marriage. That is not the category under which the case falls. The only question is, what was the true meaning and intention of the testator, and has he effectually expressed his intention? As I read the clause the testator contemplated that his widow and children would or might require maintenance and support after his death. He expressly declares that he is making provision "for the better maintenance of my widow and children," and then he proceeds to direct his business to be carried on for their behoof. I think that the true meaning of the clause is in substance this:—"My daughters are to be maintained out of a portion of the profits of my business until they marry, when it is to be presumed they will no longer require it." It is said, however, that the provision involves a forfeiture in the event of marriage, and is thus illegal. I do not think it does. The word "lapse" simply means cease; and when there is such a cessation from payment the amount so ceasing to be paid is to go to increase the residue which is to be divided among all the children.

I do not think we have in Scotland, what seems unfortunately to exist in England, the rule that in the construction of a *mortis causa* settlement the validity and effect of a provision may depend upon the mere form of expression, so that the same provision if made in one form is good and in another bad.

If I follow aright the English cases which have been cited to us they seem to shew that if a father provides an annuity to his unmarried daughter "till her marriage," or "while she is unmarried," this provision will receive effect; but if he provide the very same annuity to his unmarried daughter, and declare that she shall forfeit it on her marriage, then the provision of forfeiture will be ineffectual, and the annuity will continue for life. I think it clear that this is not the law of Scotland. With us provisions, especially provisions of a will or settlement, receive effect not according to form or expression, but according to their true meaning, if that can be discovered from the words used. All settlements must be construed by us in accordance with the intention of the testator, and it would be very unfortunate if such technical rules as seem to exist in England were to be allowed to govern the construction of deeds like that before us.

I think the provision in this deed is not a condition in restraint of marriage, but simply a provision for unmarried daughters, who, in the view of the testator, had no other means of support; and if this be so there is an end to the question, even if it were such a condition. However, I agree with the argument for the trustees that none of the English rules exist in our law.

On both grounds I think Mrs Sturrock's claim a bad one.

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A further strong argument arises from the fact that she was married before the death of the testator, and could not be restrained; but I have already given sufficient grounds for my concurrence in the proposed judgment.

THIS interlocutor was pronounced:—"The Lords . . . . are of opinion and find that the party of the first part is not entitled to claim a share of the one-third of the profit from the business of William Rankin and Son which has now been declared by the last balance-sheet, and find it unnecessary to answer the rest of the question: Find no expenses due to either party, and decern."

DUNCAN & BLACK, W.S.—JOHN GALLETLY, S.S.C.—Agents.

No. 146.

July 2, 1875.
Renwick v. Von Rotberg.

JAMES RENWICK, Pursuer and Appellant.—*Moncreiff.*
F. VON ROTBERG, Defender and Respondent.—*Thoms.*

Reparation—Injury by Dog—Culpa.—In order to render the owner of a dog liable for culpably and negligently allowing it to bite one of the lieges it is not necessary to prove that the dog ever bit any person before; it is enough to shew that the owner had some reason to believe that the animal might do mischief in the circumstances in which it was placed.

A dog was put up for sale at an auction, but was not sold. The auctioneer thereupon requested the owner, who was present, to take the dog away. He did not immediately comply with this request, and the dog was meanwhile tied up to a wall of the auction mart, where he bit a boy who was passing. *Held* that the custody of the dog had reverted to the owner, and that there being sufficient proof that he knew the dog to be of a ferocious nature he was liable in damages.

2D DIVISION. Sheriff of Midlothian and Haddington. I.

THIS was an action of damages raised before the Sheriff-court of Midlothian by James Renwick, as administrator-in-law of his pupil son, James Renwick junior, against F. Von Rotberg, on account of injuries sustained by the pursuer's said son from a bite by a dog belonging to the defender.

The pursuer averred that the dog, a large Spanish bloodhound, was dangerous to the lieges, or at least of a ferocious disposition, and known by the defender to be so, but that he had nevertheless failed to take proper precautions to prevent the dog injuring the lieges.

The following facts were proved:—On 23d September 1874 the defender brought his dog to Messrs Moir's establishment to be sold at an auction. The dog was put up for sale, but no one bid the reserve price. The auctioneer then told the defender, who was present, to remove the dog, and bring him back next Wednesday. He did not, however, comply with this request, being engaged in conversation. One of the servants in the establishment then tied the dog to a wall with a chain about a yard and a half long. About ten minutes after, young Renwick, who happened to be sent to the auction to fetch his father, was passing within reach of the dog, when he was seized by him and severely bitten.

Two veterinary surgeons—one Professor Williams—deponed that Spanish bloodhounds are naturally of a ferocious character.

A lamplighter, who lighted the lamps in the lane where the dog was kept, stated that whenever he went to light or extinguish the lamp the dog made a rush at him, but as there was a wall between them the dog could do him no harm. He added, that the defender on one occasion said to him, "You need not be afraid of the dog, it will not harm you. If you call it by his name, he will not harm anybody."

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It was proved that the dog had once attempted to worry another dog, but there was no evidence that he had actually attacked a person.

The defender swore that the dog had been always perfectly quiet, and to corroborate the statement adduced his maid-servant, who said that she was not the least afraid of the dog.

The auctioneer, Riddell, deponed that when the defender came to him about the sale of the dog the defender said, "what a valuable watch dog he would be to any one who needed such an animal, for he would allow no stranger to come near the place," and mentioned that he was of a ferocious nature. The defender denied that he said that the dog was ferocious.

The Sheriff-substitute (Hallard) assoilzied the defender, on the ground that the dog was not in his custody at the time of the accident.

The Sheriff (Davidson) adhered on appeal, on the further ground that it was not proved that the dog was of fierce and dangerous habits.

The pursuer reclaimed.

Argued for the appellant;—In the case of a dog of this breed, whose natural ferocity was sufficiently proved, it was not necessary to prove that the dog had actually bitten another person before it bit the pursuer's son. Much less evidence was required to establish the owner's knowledge that it was dangerous than in the case of an animal of a naturally gentle disposition.[1]

For the respondent the under-noted cases were cited.[2]

LORD NEAVES.—The ground on which the Sheriff-substitute assoilzied the defender has been practically abandoned. The moment the dog was taken out of the catalogue the custody returned to the defender.

This is not the case of an animal of native growth and well-known tendencies. The dog was a Spanish bloodhound. Professor Williams tells us that these dogs are naturally of a ferocious character. There is sufficient corroboration that this dog was ferocious in the lamplighter's evidence. The defender told him that he need not be afraid of the dog,—"If you call him by his name, he will not harm anybody." Unfortunately his name was not generally known, so that that spell could not be applied.

We must recall the interlocutor of the Sheriff.

LORD ORMIDALE.—I am of the same opinion. I think that, independently of the evidence of Professor Williams, which is necessarily of a somewhat speculative character, it is sufficiently proved by what the defender himself said to Riddell that he believed that this dog might be dangerous if brought into a concourse of people.

LORD JUSTICE-CLERK.—It is clear that after the lot had been passed for the day the custody returned to the defender, who was on the spot, and was told to take his dog away.

As regards the other ground of defence it may be that unless the owner has some reason to believe that the animal may do mischief in the position in which he is placed he is not liable. But if Riddell, the auctioneer, is to be believed,

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[1] Brown v. Stewart, June 26, 1824, 3 S. 157 (N. E. 127); Worth v. Gilling, Nov. 2, 1866, L. R. 2 C. P. 1; Hudson v. Roberts, June 4, 1851, 6 W. H. and G. 697, 20 L. J., N. S., Ex. 299.

[2] Fleming v. Orr, April 3, 1855, 2 M'Q. 14, 27 Scot. Jur. 364; Clark v. Armstrong, July 11, 1862, 24 D. 1315, 34 Scot. Jur. 640.

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the defender not only thought, but said, that the dog was of a ferocious nature. The defender denies this, but I am rather inclined to believe the auctioneer, who is not a party to the action.

The Sheriff says that "it does not detract from the harmless character" of the dog "that it did not like the proceedings of the lamplighter. The objection to him was reasonable, for his approaches were of a somewhat suspicious appearance, and no doubt the dog considered it had the daily merit of repelling him." The Sheriff seems to look upon *bona fides* on the part of the dog as conferring a sort of privilege on the owner. Perhaps the dog bit the boy *in bona fide*, but I am afraid we cannot sustain that defence.

On both grounds I think the pursuer is entitled to prevail.

LORD GIFFORD was absent.

THIS interlocutor was pronounced:—"Find that the dog in question belonging to the respondent (defender in the inferior Court), was of a dangerous and ferocious nature, and that he was known to be so by the respondent; and that the respondent warned the auctioneer, on the occasion of the sale libelled, that the dog was ferocious: Find that on the day libelled the dog was exposed for sale but was not sold, and that the auctioneer thereupon desired the respondent to take the dog away, and bring him back on the next Wednesday; that the respondent, instead of complying with this requisition, permitted the dog to be tied up to the wall of the building by a strapper in the establishment of Messrs Moir, and that while so tied up he attacked James Renwick junior, the pupil son of the appellant (pursuer in the inferior Court), and severely injured him: Find that the dog was at that time in the custody of the respondent (defender), and that he is liable in reparation to the appellant, as father and administrator-in-law of his said pupil son accordingly, and assess the damages at the sum of £25: Therefore sustain the appeal, recall the judgment appealed against, and decern against the respondent for payment to the appellant, as administrator-in-law foresaid, of the said sum of £25: Find the respondent liable in expenses in both Courts," &c.

BOYD, MACDONALD, & LOWSON, S.S.C.—MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—Agents.

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WILLIAM HARRISON AND HENRY HARRISON, Suspenders.—*D.-F. Clark—Asher—Mackintosh.*
THE ANDERSTON FOUNDRY COMPANY, Respondents.—*Sol.-Gen. Watson—Balfour—R. V. Campbell.*

Patent—Jury Trial—Process.—Observed that in a question of infringement of patent the objection that the patent is bad in law is always open at the trial as an answer to the pursuer's issue of infringement, and the Judge at the trial, if he is satisfied, on the true construction of the specification, that the patent is bad in law, ought to state his opinion in law to that effect to the jury, and direct them to find a verdict for the defenders.

Patent—Specification.—The specification of a patent for the invention of "improvements in looms for weaving" set forth that the invention consisted "in new or improved simple and most efficient modes of and arrangements of mechanism for actuating the set or sets of 'compound' or 'multiple' shuttle-

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boxes of looms for weaving striped, checked, and other ornamental or figured fabrics requiring two, three, or more shuttle-boxes and shuttles in each set." The specification proceeded to describe in detail, with reference to accompanying drawings (1) a complete shuttle-box moving and holding mechanism, and (2) a complete pattern mechanism, but no part of either was claimed or described as new, nor was any part disclaimed as old. The specification concluded by claiming—"First, the construction and arrangements of the parts of pattern mechanism and shuttle-box moving and holding mechanism generally for actuating the shuttle-boxes of power-looms, all substantially in the new or improved manner herein described and shewn in the accompanying drawings, or any mere modification thereof."

Opinion (*per cur.*), that the patent was not a valid patent for improvements, in respect that it did not describe the improvements and define the novelty otherwise and in a more specific form than by the general description of the entire machines, and failed to limit the patentee's claim to the specific improvements invented by him.

Observed (*per* Lord President) that a new combination of old parts to produce a new result, or to produce a known result in a more useful and beneficial way, may be a good subject-matter of a patent, but only under the conditions that the combination shall be claimed as a combination, and be so described as to shew intelligibly what is the novelty, and what the merit of the invention.

1st Division. Presiding Judge, Lord Gifford. B.

Vide supra, p. 122.

William and Henry Harrison, engineers at Blackburn, in Lancashire, brought this note of suspension and interdict against the respondents, the Anderston Foundry Company of Glasgow, to restrain them from infringing letters-patent for the invention of "improvements in looms for weaving" obtained by Quintin and James Whyte of Glasgow in 1868, and assigned by them to the suspenders in 1871, "and, in particular, from making, vending, or using any mechanism or mode or arrangement of mechanism for actuating the shuttle-boxes of power-looms for weaving striped, checked, or other ornamental or figured fabric, constructed in the manner described in the said letters-patent and specification, or constructed in manner substantially the same, and from making, using, or vending any power-loom for weaving such fabrics constructed with or embracing such mechanism, or mode, or arrangement of mechanism foresaid, and from further or otherwise infringing the said letters-patent."

The suspenders alleged that in manufacturing and selling power-looms fitted with mechanism for actuating the shuttle-boxes made according to a patent obtained by Mr M'Ilwham, their (the respondents') manager in 1869, the respondents were infringing their patent of 1868.

In defence the respondents stated,—(Stat. 1) "Quintin Whyte and John Whyte, in whose favour the letters-patent libelled on were granted, were not the first and true inventors of the alleged invention described in the said letters-patent and specification, and the said invention was not first published in Great Britain by the said Quintin Whyte and John Whyte, or either of them. The said alleged invention was published, and was publicly known and used in Great Britain prior to the date of the said letters-patent." (Stat. 2) "Inventions or contrivances similar to, or substantially the same with the alleged invention described in the letters-patent founded on by the complainers were described and disclosed in"—(Here followed a list of patents, those of most importance being (1) a patent obtained in 1853 by Matthew Andrew Muir, one of the partners of the Anderston Foundry Company, and worked by them to a small extent; (2) a patent obtained in 1856 by James M'Ilwham, manager of the Anderston Foundry Company, and largely worked by them; (3) a patent obtained in 1861 by John Hirst junior and James

Hollingworth, but never worked; and (4) a patent obtained in 1862 by Thomas Knowles and others, and worked to some extent in England). (Stat. 3) "The alleged invention specified and described in the letters-patent and specifications libelled on was publicly used in Great Britain prior to the date of the said letters-patent in the following amongst other instances."—(Here followed the names of a number of manufacturing firms in England and Scotland). (Stat. 4) "The alleged invention claimed in the final specification of the said Quintin Whyte and John Whyte does not constitute any manner of improvement upon looms for weaving as previously known and used, and it is not useful, beneficial, or advantageous to the public." . . . . (Stat. 5) "The said Quintin Whyte and John Whyte, in the said letters-patent, specification, and drawings, do not sufficiently distinguish between what was old, or was in use and known at and prior to the date of the said letters-patent, and what is new or what is claimed to be their invention. Further, the said Quintin Whyte and John Whyte claim as new, inventions and contrivances which were old and well known at the date of the said patent."

The respondents pleaded;—2. The alleged letters-patent founded on by the complainers are null and void or invalid, in respect—(1) The said Quintin Whyte and John Whyte were not the first and true inventors of the alleged invention described in the letters-patent and specification; (2) the alleged invention was publicly known prior to the date of the letters-patent; (3) the alleged invention was publicly used prior to the date of the letters-patent; (4) the said alleged invention is of no public utility; (5) the said Quintin Whyte and John Whyte, in the specification and relative drawings, do not sufficiently distinguish between what is old and not claimed by them, and what is alleged to be new and claimed by them. 3. Even assuming the said letters-patent to be in all respects valid, the prayer of the note should be refused, in respect the respondents have not infringed the said letters-patent.

The following description will explain the specification in the suspenders' patent for "improvement in looms for weaving":—In the old hand-loom the shuttle was shot at first by the hand of the weaver, and afterwards by a blow from a weapon called the pick or pick stick. When the weaver required to change the colour of his warp-thread he merely laid down the shuttle he was using at the time in a box attached to the side of the loom, and took out the new shuttle which he placed on the shuttle-race.

When the power-loom came to be introduced it was necessary to provide a mechanism for changing the shuttles without the intervention of the weaver. This was done by attaching to the end of a vertical rod, called the spear, a box composed of a number of compartments or cells, open at each end, and placed directly one above the other, the cells being just large enough to receive each a shuttle, the number of compartments or cells in the shuttle-box varying with the number of shuttles desired to be used. This shuttle-box was so placed at the side of the loom that it presented one open end of its compartments or cells to the shuttle-race, and the other to the pick stick (which in the power-loom was worked by the machinery), the shuttle projecting just sufficiently for its end to receive the blow of the pick-stick. The shuttle-box was moved up and down at the end of the spear so as to present the proper shuttle to the shuttle-race at each pick.

The mechanism by which this result was attained consisted of two parts, first, that which moved or "actuated" the spear with the shuttle-box attached; and, second, that which guided or controlled the motion of

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the shuttle-box according to the pattern required. The former was called "the shuttle-box moving mechanism," the latter "the pattern mechanism."

In the early attempts of inventors to attain this result, the shuttle-box was raised by the application of direct force, or, as it was said, "by positive motion," but it was allowed to fall by the mere force of gravity. This, which was called the "drop-box" mechanism, was found to answer sufficiently well in the large looms used for the manufacture of heavy goods, where a low speed of 40 to 50 picks a minute was all that was required. But in looms made for weaving the lighter fabrics, where a high rate of speed could be attained, even up to 130 and 140 picks per minute, it was found that the action of gravity was not sufficiently rapid to bring down the shuttle-box soon enough to ensure exactness in working. Inventors therefore applied themselves to devise some means of attaining greater rapidity without loss of exactness. Positive motion was then applied to lower as well as to raise the shuttle-box, and a means was also sought to check the motion of the shuttle-box, so as to insure that it neither rose too far nor fell too low, but presented the proper shuttle to the race with an exactness that avoided all jarring of the parts of the loom.

The suspenders' patent was for an invention having this end in view. It was described in the specification thus:—"Our said invention consists in new or improved simple and most efficient modes of and arrangements of mechanism for actuating the set or sets of 'compound' or 'multiple' shuttle-boxes of looms, for weaving striped, checked, and other ornamental or figured fabrics, requiring two, three, or more shuttle-boxes and shuttles in each set."—(Here followed a detailed description of the various parts of the machine as delineated on the drawings and marked with numbers from 1 up to 62, whereof from 1 to 29 belonged to the shuttle-box moving mechanism; 30 to 35 to the connection between it and the pattern mechanism; and 36 to 62 to the pattern mechanism). "Although the new check shuttle-box moving mechanism (numbers 1 to 29) has, so far, been only shewn and described as applied to a three shuttle-box loom it is equally applicable for working a four, five, or six shuttle-box, and it can be worked with the pattern mechanism of check looms now in use where these are in a good state and of a suitable construction and only the shuttle-box moving mechanism required, and many of the improvements in the pattern mechanism, numbers 30 to 62, may be applied to other pattern barrels and mechanism heretofore or now in use for check shuttle-boxes. . . . Having thus particularly described the nature of our said invention, and the manner in which the same is or may be performed, we have to state that we do not restrict ourselves to the precise details herein described or delineated, but what we believe to be novel and original, and therefore claim as the invention secured to us by the hereinbefore in part recited letters-patent is,—

"First, the construction and arrangements of the parts of pattern mechanism and shuttle-box moving and holding mechanism as herein distinguished, generally for actuating the shuttle-boxes of power-looms, all substantially in the new or improved manner herein described and shewn in the accompanying drawings or any mere modification thereof.

"Second, the construction and use of duplex depressers for actuating a lever connected to the shuttle-box of a power-loom, so as to shift and set or bring these to rest by a positive motion taken or derived from one of its main shafts, whether the lateral acting position of the depressers is determined by simply bringing it to rest on the pattern pins in the improved manner herein distinguished or by the 'positive'

motion of the pins in turning the barrel, all substantially in the new or improved manner herein described and shewn in the accompanying drawings or any mere modification thereof.

"Third, the construction and use of a reversing pattern barrel with many annular rows of pattern pin holes, having a setting or pattern lever traversed across these holes intermittently by pins in the barrel for regulating or setting the actual moving mechanism of power-loom shuttle-boxes, whether the pattern pins used actually move the pattern or setting lever or only form a rest therefor, all substantially in the new or improved manner herein described and shewn in the accompanying drawings or any mere modification thereof.

"Fourth, the construction and use of pattern barrels with simple resting pins only for determining the position of the pattern lever and depressers of the actual shuttle-box moving mechanism of power-looms, all substantially in the new or improved manner herein described and shewn in the accompanying drawings, or any mere modification thereof."

The case was tried before Lord Gifford and a jury on 22d March to 2d April 1875 upon these issues, in which the suspenders were pursuers:—"It being admitted that Quintin Whyte and John Whyte, of the city of Glasgow, obtained the letters-patent, No. 6 of process, dated 29th October 1868, and sealed 19th March 1869, and filed the specification, of which No. 7 of process is a certified printed copy, and that the said letters-patent were assigned to the pursuers by assignation, dated 30th September 1871—Whether, from the 29th October 1868 to the 19th September 1874, or during part of said period, and during the currency of the said letters-patent, the defenders did, at their works at Anderston, Glasgow, wrongfully, and in contravention of the said letters-patent, use the invention described in said-letters patent and specification? or, (1) Whether the said Quintin Whyte and John Whyte are not the first and true inventors of the invention described in the said letters-patent and relative specification? (2) Whether the invention described in the said letters-patent and specification was publicly used in the United Kingdom prior to the date of the said letters-patent? (3) Whether the invention described in the said letters-patent and specification is not practically useful for the purposes therein set forth?"

The jury, by a majority, returned a verdict for the suspenders on all the issues.

Certain exceptions were taken by the respondents (defenders in the issues) to the directions of the presiding Judge, which were thus set forth in the bill of exceptions:—

"After evidence for both parties had been closed and their respective counsel had addressed the jury Lord Gifford charged the said jury, and in the course of his address, *inter alia*, directed them as follows, viz:—

"With reference to the first claim in the specification of Messrs Whyte:—'(1) That according to the sound and true construction of Messrs Whyte's specification the patentees claimed as their invention the mechanical combination and arrangements both of pattern mechanism and of mechanism for shifting and holding the shuttle-boxes described in the specification; and if any distinct, material, and essential parts of that combination and arrangement were not new in their application to such mechanism at the date of the patent, and not being disclaimed, then the patent was void, and the jury must find for the defenders.'

"With reference to the second claim:—'(2) If the jury were of opinion that the use of duplex pressers or depressers actuating a lever so as to shift and set the shuttle-boxes—that is, both to move them and bring them to rest by a positive motion—was not new at the date of the patent

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of Messrs Whyte, then the patent was void, and the jury must find for the defenders.'

"With reference to the third and fourth claims:—'(3) If the jury are of opinion that the pattern barrel and relative mechanism described in Messrs Whyte's specification was not new at the date of their patent, then the patent was void, and the jury must find for the defenders.'

"The pursuers' counsel thereupon asked Lord Gifford to give the following direction viz.,—'That in order to the infringement of the said letters-patent it is not necessary that the defenders construct and use duplex depressers having a lateral action, as described in the second claim of the specification, but that it is sufficient if the defenders construct and use a mechanism in which the steps, as shewn in the specification and drawings are transferred from the depressers to the shuttle-box lever, if the jury are satisfied on the evidence that such mechanism is a mere modification of the mechanism referred to in the said claim, and described in the specification and drawings.'

"Which direction his Lordship gave.

"Whereupon counsel for the defenders excepted. (First exception).

"The counsel for the defenders then asked Lord Gifford to give the following directions to the jury, viz.:—

"'(1) That if the first claim be not for the parts of the mechanism therein mentioned, but only for a combination, the letters-patent are void, and the defenders are entitled to a verdict in respect that the specification and relative drawings describe the mechanism of a pattern motion and shuttle-box motion considered as a whole, without distinguishing the improvements made thereon by the patentees.'

"Which direction his Lordship refused to give in the terms asked, but with special reference to the direction he had already given.

"Whereupon counsel for the defenders excepted. (Second exception).

"'(2) That if the jury are satisfied in point of fact that any part or parts of the combination or arrangement embraced in the first claim were new in their application to pattern or shuttle-box mechanism at the date of the letters-patent the patent is void, and the defenders are entitled to a verdict in respect that the patentees have failed to distinguish between those parts which are new and those which are old.'

"Which direction his Lordship refused to give in the terms asked, but under the same reference to the direction he had already given.

"Whereupon counsel for the defenders excepted. (Third exception).

"'(6) That if the second claim be for a combination, and not for parts of the mechanism therein mentioned, the letters-patent are void, and the defenders are entitled to a verdict in respect that in the specification and drawings the patentees have described the combination as a whole, without distinguishing the improvements made thereon.'

"Which direction his Lordship refused to give as asked, but again explained to the jury the necessity of disclaiming essential parts of the mechanism not new.

"Whereupon counsel for the defenders excepted. (Seventh exception).

"'(7) That if the jury are satisfied in point of fact that any part or parts of the mechanism claimed in the second claim were new in their application to shuttle-box mechanism at the date of the patent the letters-patent are void, and the defenders are entitled to a verdict, in respect that the patentees have failed to distinguish between those parts which are new and those parts which are old.'

"Which direction his Lordship refused to give in the terms asked, but under the like explanation.

"Whereupon counsel for the defenders excepted. (Eighth exception).

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"'(8) That if the jury are satisfied in point of fact that any part or parts of the mechanism claimed in the second claim were new in their application to shuttle-box mechanism at the date of the patent, the said claim must be limited to the particular combination in the particular manner described in the specification and drawings, in respect that the patentees have failed to distinguish between those parts which are old and those which are new.'

"Which direction his Lordship refused to give, under the like explanation.

"Whereupon counsel for the defenders excepted." (Ninth exception).

The respondents at the same time moved for a new trial.

It was arranged that counsel should be heard both on the rule and on the bill of exceptions at the same time.

Argued for the respondents, the Anderston Foundry Company;—(1) The patentee in his first claim claimed the construction of the parts and the arrangement of the parts of pattern mechanism and shuttle-box moving and holding mechanism as therein distinguished. Now, that was not a claim for a combination.

[LORD PRESIDENT.—Can you be heard to argue that under your bill of exceptions? Lord Gifford's first ruling was not excepted to. If the ruling is good, and the jury did not attend to it, then you may be heard to object. If they did attend to it, whether it is good or bad, you can have nothing to say. But if the ruling is bad, and the jury disregarded it, can we open up the verdict without an exception having been taken?]

The respondents were entitled to shew that the ruling was bad, and that the jury disregarded it, and yet did not themselves put a proper construction upon the claim. Now, the ruling was bad, because this first claim was not for a combination; it was for the construction of the parts of a machine and for their arrangement. There was no hint of a new combination of parts, themselves either new or old, to form this machine. The Judge was therefore wrong in the ruling which he gave. But then the jury did not follow him. If they had followed him it was impossible for them, on the evidence, to hold that every "distinct, material, and essential" part of the patentee's alleged invention was new. Having then disregarded the ruling that was given, they had also failed to put the proper construction on the claim for themselves, namely, that this was a claim for the construction of the parts of a machine, and for their arrangement,—a claim, in fact, for a machine and its individual parts. Had they put that construction upon it, they could not, on the evidence, have arrived at the verdict at which they did. But (2) taking Lord Gifford's first ruling, that the first claim in the patent was for a mechanical combination, to be sound, then the law applicable to it was this—not that if any merely mechanical parts of the machine were old the patent was void, but that if any distinct features of the combination, not being mere mechanical parts, were not new in their application to such mechanism, then the patent was void. Such, it was understood, was the rule of law intended to be laid down by Lord Gifford.[1] Now, along with this first

[1] Carpenter v. Smith, 1841, Webster's Patent Cases, 530; Haworth v. Hardcastle, 1834, Webster's Pat. Ca. 480; Templeton v. Macfarlanes, Feb. 23, 1848, 10 D. 796, 20 Scot. Jur. 263, and H. of L. June 27, 1848, 1 Clark and Fin. 595, 20 Scot. Jur. 518.

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ruling must be taken the second and third exceptions. These two propositions flowed directly from the obligation incumbent upon a patentee when he claimed the invention of a new combination, to make it clear what gave it its special virtue as a combination—what differentiated it from any other combination—what was essential to its usefulness and to its novelty—what was new and what was old in it—in order that the public might know what they could use without infringing his patent.[1] That recognised obligation upon the patentee led to the first and second rulings asked by the respondents, and contained in their second and third exceptions, as well as to the ruling actually given. They should have been added to give effect to it. They were not by any means the same thing. The ruling contained in the second exception was a pure statement of law. The ruling given by Lord Gifford and the ruling contained in the third exception followed from it, but assumed certain facts to have been proved. The respondents were therefore entitled to complain of the refusal to give these two rulings asked for by them. But (3) taking Lord Gifford's first ruling as sufficient by itself, the respondents were entitled to a verdict. The evidence was overwhelming to the effect that all the important parts of the machine had previously existed in one or other combination,—nay, had all previously existed in the same combination,—for the same end. The jury had therefore gone contrary to evidence in finding for the suspenders. The same might be said even more strongly on the second claim in the specification, and on Lord Gifford's second ruling with regard to it. Both the first and the second claims had been anticipated. (4) The suspenders had failed to prove infringement, and the jury had gone contrary to the evidence in finding for them on the issue of infringement.

Argued for the suspenders, William and Henry Harrison;—(1) The specification set out by disclosing the leading features of the invention. It was said to consist in new or improved and most efficient modes of actuating, and in arrangements of mechanism for actuating the set or sets of compound shuttle-boxes of looms,—the method and the means of carrying out the method to attain the desired result. The specification then proceeded to point out that there were two main parts of the patented mechanism, 1st, the shuttle-box moving mechanism, and second, the pattern mechanism. There then followed a detailed description of the minor parts of both main parts, and then the claims were stated. The first claim was for a combination of the parts composing these two main parts of the mechanism. The respondents had misread this claim. They had treated it as if it were a claim for the construction of the parts, and for the arrangement of the parts of the pattern mechanism and shuttle-box moving and holding mechanism, as therein distinguished. But it was not so. It was truly for the construction of the pattern mechanism, &c. and for the arrangement of the parts of the pattern mechanism, &c. It did not claim any particular part of either combination, but it claimed each combination as a whole. "Construction" meant putting together, not formation,—the putting together by arranging the subordinate parts already described to form the two main parts or combinations. The second claim was a special claim for the combination of

[1] Macfarlane v. Price, 1816, 1 Starkie, 199; Hill v. Thompson, 3 Merivale, 622, Webster's Pat. Ca. 235; see also *dictum* of Lord Eldon in this case, quoted in Crane v. Price, 1842, Webster's Pat. Ca. 409; Foxwell v. Bostock, 1864, 4 De Gex, Jones, and Smith, see Lord Westbury's opinion, at p. 309.

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parts forming the shuttle-box moving mechanism. The third claim in the same way was a special claim for the combination of parts forming the pattern mechanism; and the fourth claim was for a particular modification of the pattern mechanism. Now (2), founding on certain English cases, the most recent and important of which was Foxwell v. Bostock,[1] the respondents had contended that the patent, if for a combination, was bad on the very face of the specification, because it did not specially distinguish the novelty of the invention,—did not say wherein the combination differed from previous combinations. But admitting that it was in many cases necessary to differentiate, that did not prevent a claim to a combination as new, the component parts of which were old. Nor was it necessary to state pointedly that the claim was merely for the combination, and to disclaim the several subordinate parts. Here the arrangement was claimed as the novelty, and it was not necessary to say wherein that arrangement differed from other arrangements. Being a new and improved arrangement, it was claimed as an invention. The rule laid down by Lord Westbury in Foxwell v. Bostock was not an absolute rule applicable to every patent, but only to the kind of case he was dealing with. It had been so read in subsequent cases,[2] and was not inconsistent with the earlier cases, many of which were much more in point here.[3] The result of them all was that a patent was to be construed in accordance with what the specification disclosed. A patent was not therefore necessarily void for not stating that certain parts were new and certain parts old. It was quite possible to have a good claim, as here, for a new and improved combination or arrangement of parts, all of them old, provided it were shewn that they had never before been used in conjunction,—that there had never before been substantially the same arrangement or combination of them. (3) The respondents had failed on the evidence to shew that any substantially the same combination had been in prior public use. All they had succeeded in shewing was that the individual parts, or some of them, had been also parts of prior inventions. But that was not sufficient. (4) Infringement had been satisfactorily proved. The respondents' machine was just substantially a similar combination of similar parts, colourably varied here and there by the use of mechanical equivalents, so as to make it look to the eye of an unskilled person a different machine. (5) The only exceptions which were now pressed were the second and third. The Judge was right to withhold the first direction asked, on which refusal the second exception was taken, because it was putting to the jury a question which it was for the Judge to answer. It was putting to the jury to construe the specification and say whether it claimed the parts or the combination. The direction asked was simply to the effect that the specification was void in law. If that were so, it was for the Judge to withdraw the case from the jury, and not to give them directions. The second direction asked was merely a repetition of that which the Judge himself had already given, and so was rightly refused. The exceptions therefore should be disallowed, and the verdict should stand.

At advising,—

LORD PRESIDENT.—This case was tried before Lord Gifford and a jury at the

[1] *Vide supra*, p. 864, note.

[2] Parkes v. Stevens, June 4, 1869, L. R. 8 Equit. Ca. 358, Nov. 12, 1869, L. R. 5 Chan. Ap. 36; Murray v. Clayton, May 6, 1872, L. R. 7 Chan. Ap. 570.

[3] Cornish v. Keene, Jan. 30, 1837, 3 Bing. N. C. 570; Lister v. Leather, Feb. 23, 1858, 8 El. and Black. 1004; Newton v. Grand Junction Ry. Co. May 4, 1850, 5 Welsby, Hurl., and Gordon, 331; Sellars v. Dickinson, May 4, 1850, 5 Welsby, Hurl., and Gordon, 312; Templeton v. Macfarlanes, *supra*, p. 863, note.

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sittings of the First Division after last winter session. Besides the pursuers' issue of infringement there were issues for the defenders bringing before the jury allegations of prior publication of the invention, of prior public use, and of inutility. The jury found for the pursuers on all the issues. The defenders have presented a bill of exceptions, and have also obtained a rule on the pursuers to shew cause why the verdict should not be set aside and a new trial granted on the ground of the verdict being against evidence. With the assent of both parties we appointed counsel to be heard on the bill of exceptions and the rule for a new trial at the same time; and although it is necessary to pronounce a separate interlocutor on each it will be convenient that we should give our opinions on both at once—discriminating, however, between the grounds of judgment applicable to the one and the other.

Among the various questions which have been argued before us, under the bill of exceptions and the rule taken together, that which naturally occurs as first in order is the inquiry, what is the subject-matter of the patent—wherein consists the novelty and merit of the patentees' invention?

The title of the patent, "Improvements in Looms for Weaving," is so general and vague as to afford no available information, and the same may be said of the first paragraph in the specification:—"Our said invention consists in new or improved simple and most efficient modes of and arrangements of mechanism for actuating the set or sets of 'compound' or 'multiple' shuttle-boxes of looms for weaving striped, checked, and other ornamental or figured fabrics, requiring two, three, or more shuttle-boxes and shuttles in each set." For, though this paragraph shews that "the actuating the set or sets of compound or multiple shuttle-boxes of looms for weaving striped, checked, and other ornamental or figured fabrics, requiring two, three, or more shuttle-boxes and shuttles in each set," is the matter with which the invention is concerned, this gives no information that is not afterwards more distinctly given, viz. that the parts of the power-loom to which the invention is applicable are (1) the shuttle-box moving and holding mechanism, and (2) the pattern mechanism. The specification then proceeds to describe a complete shuttle-box moving and holding mechanism, and a complete pattern mechanism; but in neither the one description nor the other is any part claimed or described as new, nor is any part disclaimed or characterised as old. The patentees, however, state that their improved shuttle-box mechanism may be used with old and unimproved pattern mechanism, and their improved pattern mechanism may be in like manner used with old and unimproved shuttle-box moving mechanism.

There being, therefore, no means from the introductory part of the specification, or from the detailed description to which I have referred, of discovering wherein the invention consists, or what is the novelty which the patentees claim, the reader is necessarily driven to the four different heads of the claim, to ascertain what is the new and useful invention which the patentees undertake and are bound to publish to the world by their specification, or, in other words, what it is that they desire to prohibit all the world but themselves from using without their license.

The first head of the claim is for "the construction"—(reads claim, quoted *supra*, p. 860).

This is not very clearly expressed, but I am prepared to give the patentees the fullest indulgence, and, indeed, to adopt what I understand to be their own interpretation. There is no claim for a combination of pattern mechanism and

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shuttle-box moving mechanism, for these are claimed "as herein distinguished," *i.e.*, distinguished from one another. There is no statement that any part or parts of either mechanism are new, or that any part or parts are old or disclaimed. There is no statement that the combination of specified parts of either mechanism is new. The claim is simply for the construction of the pattern mechanism, and the arrangement of its parts in the new and improved manner described in the specification and shewn in the accompanying drawings, and for the construction of the shuttle-box moving and holding mechanism, and the arrangement of its parts in the new and improved manner described in the specification and shewn in the accompanying drawings. Now, each of these mechanisms is described in the specification and shewn in the drawings as a whole, and thus the claim is in effect for the two entire machines, without even an attempt to state in what the novelty of either the one or the other consists.

The pursuers contend that this is a claim for a combination of old things, the combination alone being new, and that such a combination is in law a good subject-matter of a patent. No doubt a new combination of old parts to produce a new result, or produce a known result in a more useful and beneficial way, may be a good subject-matter, but only under the conditions that the combination shall be claimed as a combination, and be so described as to shew intelligibly what is the novelty and what the merit of the invention, so that all the world may have the benefit of the publication, and so that every one may know what he is to avoid as patented in dealing with such mechanism. In this respect the first head of the claim clearly fails. There is no discovery or explanation of the novelty. On the contrary, the claim is simply in each case for the whole machine, as shewn in the drawings and described in the specification.

The patent is therefore, in my opinion, void in law, in respect of its claiming too much; for the vice under which the first head of the claim thus labours is, on well known principles of patent law, sufficient to void the whole.

The defence founded on this legal objection to the patent could not have been disposed of before trial, because there is so much technical language employed in the specification that the Court could not safely apply their minds to its construction without the evidence of experts to explain that technical language, or without some knowledge of the mechanism of power-looms. But the objection that the patent is bad in law is always open at the trial as an answer to the pursuers' issue of infringement, and the Judge at the trial, if he is satisfied, on the true construction of the specification, that the patent is bad in law, ought to state his opinion in law to that effect to the jury, and direct them to find a verdict for the defenders. Lord Gifford did not follow this course in the present case, and that leads me to consider, in the next place, what are the questions raised by the bill of exceptions.

The first, second, and third directions given by his Lordship are not excepted to by the defenders, and are sound, on the assumption that the patent is not on the face of it void in law. Neither, on the same assumption, does there appear to me to be any serious objection to the direction challenged by the defenders' first objection.

The other exceptions taken by the defenders are entirely against the refusal of the presiding Judge to give the jury certain directions demanded by the defenders themselves. I am of opinion that not one of the propositions which Lord Gifford was asked to adopt and state to the jury as a direction in law was calculated to instruct the jury, or lead them to a right result. On the contrary,

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it appears to me that the effect of them would have been misleading. The defenders nowhere ask his Lordship to tell the jury that the patent is void in law, and that they must find a verdict for the defenders. If they had done so, either his Lordship would have complied with their request, or if he refused, they would have had an exception which I should have been prepared to sustain. But being of opinion that the patent is void in law, I find it impossible to sustain any of the negative exceptions, for that would be in effect deciding that at the next trial the presiding Judge ought to direct the jury in terms of one or more of the directions which Lord Gifford refused to give. This is of course out of the question, if I be right in holding that the only proper direction to be given is that the patent is void in law, and that on that ground there must be a verdict for the defenders.

For these reasons, I am for disallowing the exceptions.

But it becomes necessary also to consider the case as presented to us on the evidence under the rule for a new trial, for it is only by this means, so far as I can see, that the defenders can obtain the remedy of a new trial, which, in consequence of the way in which they dealt with the law at the last trial, is the only remedy open to them.

In dealing with this branch of the case, it must be assumed that the patent is not void in law on the mere construction of the specification, or, in other words, the specification must be read as if the first head of the claim were not there at all, and as if the entire claim were to be found in the second, third, and fourth heads of the specification.

The second head of the claim relates to the improved shuttle-box moving and holding mechanism, the use of which by the defenders constitutes the alleged infringement of the patent.

This head of the claim is not liable to any legal objection on the mere construction of the specification, if what is claimed be new, and the invention of the patentees. It is a claim for "the construction and use of duplex depressers for actuating a lever connected to the shuttle-box of a power-loom, so as to shift and set or bring these to rest by a positive motion taken or derived from one of its main shafts, whether the lateral acting position of the depressers is determined by simply bringing it to rest on the pattern pins in the improved manner herein distinguished, or by the 'positive' motion of the pins in turning the barrel, all substantially in the new or improved manner herein described, and shewn in the accompanying drawings, or any mere modification thereof."

This claim comprehends (1) the use of duplex depressers,—or, as they are called elsewhere in the specification, pressers,—for of course it would not substantially alter the machine to turn it upside down, seeing that the motion of these pressers is positive, and not depending at all on gravitation; (2) the pressers also must act together, or, as the witnesses well express it, in partnership; (3) they are used for actuating a lever connected with the shuttle-box of a power-loom; (4) the effect of their joint action is to "shift and set,"—that is to say, when one of the pressers has pressed one arm of the lever, so as to shift the shuttle-box connected with it, the other presser, in the moment that the shifting motion is complete, meets the other arm of the lever and stops it, so as to make the shuttle-box in its new position perfectly steady; (5) this joint action of the pressers in shifting and setting is produced by two separate motions, one a positive motion, derived from one of the main shafts, and the other a motion derived from the pattern mechanism.

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Is this, then, a novel mechanism for the purpose of shifting and setting the shuttle-box of a power-loom? The answer on the evidence, I think, must be that none of the parts of what is described in this second head of the claim is new, nor is the combination of them new.

It appears to me that the specification of Hirst and Hollingworth's patent, filed 11th September 1861, seven years before the date of the pursuers' patent, discloses and describes substantially the same thing that is here claimed. They have got duplex pressers acting upwards instead of downwards (an immaterial variation, for the reason already stated), acting in partnership, for actuating the lever connected with the shuttle-box—acting so as to shift and set (the only difference being, that instead of steps on the pressers there are studs on the lever), their joint action being produced by two separate motions, one a positive motion derived from one of the main shafts, and the other derived from the pattern mechanism. It would be idle in giving judgment on a question of this kind to examine the precise words of Hirst and Hollingworth's specification. The nature of their invention is best seen in the model No. 64, which demonstrates to my mind the substantial identity of the two machines. Upon the evidence bearing on this patent of Hirst and Hollingworth I think the jury ought to have returned a verdict for the defenders on the first issue for the defenders, and their verdict, in so far as it finds for the pursuers on that issue is against the whole weight of the evidence.

Again, in the year 1862, Thomas Knowles and others obtained a patent for certain "improvements in looms for weaving," the specification of which is said to contain a description of an invention which is an anticipation of the pursuers'. This I am not prepared to affirm, though the two inventions or alleged inventions come very near one another. But this Thomas Knowles is proved to have manufactured and sold 100 machines according to the model No. 66 of process some years before the date of the pursuers' patent. Now, this model No. 66 is said to differ materially from the description in Knowles' specification. But if machines made according to model 66 were made and sold before the date of the pursuers' patent, and are substantially identical in principle and construction with the pursuers' machine, as described in the second head of the claim, then that will be in law prior use of the patent invention sufficient to invalidate the crown grant. The fact of the manufacture and sale and use of machines conform to model 66 being clearly proved, the only remaining question is whether they are substantially identical with the pursuers' shuttle-box moving and holding mechanism.

The skilled witnesses for the defenders are all clear in the affirmative, and even some of the witnesses for the pursuers are generally unable to resist the same conclusion. Mr Collier, the leading expert examined by the pursuers, while anxious to shew that model 66 differs in essential particulars from Knowles' specification, admits that "the model is in accordance with the pursuers' patent." And, again, he says "in a machine the model would be an infringement of the pursuers' patent." And, again, "this model, No. 66, is within the principle of the pursuers' patent."

Independently of this evidence, a comparison of the model 66 with the pursuers' machine 59 is quite enough to enable the Court to pronounce that the two are substantially identical.

There is thus, in my opinion, clear evidence of prior use of the patent invention, and the consequence must be that the verdict of the jury, in so far as it finds for the pursuers on the defenders' second issue, is against the evidence.

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It is a matter of course that if the verdict of the jury ought to have been for the defenders on the defenders' first and second issues (the issues of prior published invention and prior use), then the verdict ought to have been for the defenders on the pursuers' issue of infringement also, for there can be no infringement of patent right where the patent is invalid for want of novelty.

The result is, that the rule for a new trial must be made absolute.

LORD DEAS concurred.

LORD ARDMILLAN.—In this very complicated and important case we have before us a bill of exceptions, and we have also a motion for a new trial on the ground that the verdict for the pursuers was against evidence. The verdict was by a majority of the jury, and it cannot be questioned that the evidence on which they pronounced their verdict was, as regards the facts, and more especially as regards the skilled testimony, conflicting. In judging of the evidence we must bear in mind the legal principles applicable to the facts.

The patent founded on by the pursuers is supported on its specification without any amendment. There have been no disclaimers, and it must be construed as it stands. The construction of the specification, as distinguished from its sufficiency when construed, is for the Court. We must read and construe it fairly, not with severity of criticism against the claimant—quite the contrary,—but with firm enforcement of the requirements of clear and honest disclosure.

So construing this specification, I cannot read the first claim as a claim for the invention of a combination only. There might be such a claim, but we have it not here. It is possible to claim as an invention an entirely new combination of parts not in themselves new; and in such a case, the improvement by new combination being clearly explained, the want of novelty in some of the parts, or even in all the parts, will not make void the patent, since it is only taken for new combination. But in such a case, where the combination alone is claimed, it is, in my opinion, the duty of the claimant to state plainly in his specification that he does claim no more than the combination as his invention. He must make it manifest that he claims as new—as original, as the subject of his patent—a combination only, so as to exclude and disclaim the parts—the materials or elements of the combination. I do not mean that the word "only" or "exclusively" must be used; there are no *voces signatæ* which must be always employed. But the plain meaning and scope of the claim must be clearly brought out. This is well explained by Lord President Colonsay in the case of Morton v. Middleton, 20th March 1863,[1] and is recognised as law in several other decisions. The specification before us I have found it impossible on fair construction so to read as to arrive at any other conclusion than that there is here no claim for the invention of a new combination exclusive of novelty in the parts combined. In arriving at this conclusion I use no subtlety or severity of criticism. I take the words in their plain meaning. It is the duty of the claimant to bring out clearly the nature of his improvement and the limits of his alleged invention; and, reading this specification with reference to that plain duty resting on the claimant, I am convinced that this is not a claim for a combination only—in other words, that the parts or materials of combination are not disclaimed or excluded from the claim of invention. The machine is claimed in whole as a new invention. No part is excepted from the

[1] 1 Macph. 718, 35 Scot. Jur. 542.

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claim of the specification, and the particular nature of the improvement said to be new is not explained.

If this be the true reading of the specification, then I am of opinion that, in the event of its being admitted or ascertained that the parts or materials of combination are not new, the patent is not valid. There is no disclaimer. No distinction is taken between the new and the old parts of the machine. No one part is, in this claim, set forth as novel, while others are old. If, therefore, this is not a claim for combination only, it must be a claim for the invention or new application of all the parts constituting in combination the machine claimed.

In point of law I think it is well settled, both in England and in Scotland, that where, in a claim not limited to combination only, there is no distinction stated discriminating between the parts of the machine claimed as new and the parts of the machine recognised as old, then the patent is void, if any substantial part of that machine is old, and is not excepted or disclaimed. It is not necessary for me to refer again to the authorities on the subject, which are most instructive and satisfactory. Your Lordship has already explained them, and the decision of Lord Chancellor Westbury in the case of Foxwell v. Bostock, in 1864, is, in my opinion, conclusive on this part of the case. (Reads from vol. iv. De Gex, Jones, and Smith, p. 311.) In Scotland the case of Templeton, though the circumstances are different, is, as regards the principle of construction and of decision, to the same effect.

Taking this view of the specification and of the first claim I am of opinion that the patent founded on by the pursuers cannot be enforced.

But the motion for new trial is before us, and I am further of opinion, in regard to the second claim, that the verdict of the jury on the first and second issues for the defenders, on which the verdict is for the pursuers of the action, is contrary to the evidence.

I think that on this evidence the pursuers were not the true inventors. The invention was anticipated and made public by the specification and patent of Messrs Hirst and Hollingworth in 1861. It appears to me that a careful comparison of the two machines, viz., the pursuers' machine constructed from their specification, and the machine constructed from the specification of Hirst and Hollingworth, must be made, and I think the comparison leads to the result—at least it has led me to the result—that they are truly the same—the same in the very particulars which are set forth as giving originality.

I do not think that any sufficient grounds for distinguishing between them have been supported either by evidence or by argument. Everything set forth in the second claim in the pursuers' specification is to be found in the machine constructed from the specification of Hirst and Hollingworth. It is, however, said that the invention of Hirst and Hollingworth was not used, probably in consequence of other machines of superior manufacture having been brought into the market or into competition. But the specification explains the invention of Hirst and Hollingworth, and, when followed by letters-patent, was a proclamation of the invention; and we are not now considering a plea of prior public use, but of anticipation and publication. I think it impossible to dispute that the specification by Hirst and Hollingworth afforded the information required for constructing the machine, which is the very counterpart of that which is claimed by the pursuers as their original invention. We have thus on the evidence before us proof of anticipation and prior publication, which ought to have satisfied the jury, and that is quite sufficient to sustain the objection taken to the enforce-

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ment of the pursuers' patent. In negativing the first issue for the defenders I am accordingly of opinion that the verdict of the jury is contrary to evidence.

In like manner, I am of opinion that the machine patented by Knowles in 1862 is also so entirely identical with the pursuers' machine, that, if publicly used, that prior public use is a fatal objection to the validity of the pursuers' patent.

I do not think that on the evidence before us there is any reasonable doubt that Knowles' patent machine is in substance and in action the same as the pursuers'. I think it possesses all the peculiar properties and forces and applications of power which are set forth in the pursuers' specification, and which we see in the pursuers' patent machine.

I have read all the evidence with great care, and have come to the conclusion that in Knowles' machine, as in No. 66, we have "duplex pressers or depressers" for actuating a lever connected to the shuttle-box of a power-loom, so as to shift and set them by a positive motion taken from one of the main shafts. We have the steps under the government of the pattern mechanism, and we have the position of the depressers determined by bringing them to rest on the pattern pin. In these particulars the invention, and the machine of Knowles, machine No. 66, corresponds almost exactly with that of the pursuers, any varieties which appear being merely modifications or equivalents. The invention is really the same; the machine is substantially the same.

Now, there is no doubt that Knowles' machine was publicly used. It was sold for use, and put to use, and that is enough; for it is quite settled law that public use does not mean use by the public, but means use in public, as distinguished from use in secrecy. It is open use, not hidden use.

On this second issue for the defenders I also think that the verdict of the jury for the pursuers of the action is contrary to evidence.

I need not enter on the question of proof of infringement, on which, if it stood alone, there might be difficulty. If the patent is invalid, and if the pursuers are not the true inventors, and if there has been prior use, that is sufficient.

Although I have expressed my opinion that the patent of the pursuers is exposed to fatal objection in consequence of defective and misleading specification, yet I agree with your Lordships that the particular exceptions here taken to the directions of the Judge who tried the cause do not satisfactorily bring out the nature of this objection. None of the exceptions correctly or adequately present the point of law on which the invalidity of the patent rests. It is therefore sufficient for us, having indicated our opinion on the patent for the guidance of the parties, to set aside this verdict as contrary to evidence.

LORD MURE.—I concur with your Lordships on both the important questions raised in this case, and I have only to add, that, after repeated perusal of the pursuers' specification, I have been unable to find in it any sufficient disclosure of the nature of the invention. There is no distinct description or statement of what the improved invention is, separate from the description of the manner in which the machine claimed, and its component parts, are to be put together. And although that description may be sufficient to enable a workman of ordinary skill to practise the invention so as to effect the contemplated result, the specification is, I think, altogether insufficient as a compliance with another important legal requisite of a patent—viz., that it should shew persons who read the specification what part of the mechanism they may adopt and what they must avoid adopting, if they would not infringe the patent. Now, in this latter

respect the patent here in question is, in my opinion, defective, and therefore void in law; for it does not indicate where the improvement lies, or in what it consists, and is therefore open to the serious objections which are so clearly and forcibly explained by Lord Westbury in deciding the case of Foxwell v. Bostock, referred to in the argument. The patent is for an improved piece of mechanism, or an improved combination and arrangement of machinery; and the specification and relative drawings exhibit and describe the entire machine which embodies the improvement. But this description, to use the words of Lord Westbury, "does not distinguish the improvement, and thereby renders it undiscoverable, except upon a minute comparison and collation of all existing combinations, with the new combination that is claimed; and a specification so framed is, I think, bad in law, for it has the effect of concealing rather than disclosing the nature of the invention."

As regards the motion for a new trial, I agree with your Lordship that the verdict is wrong as to both the first and second issues for the defenders; for the patent and relative specification of Hirst and Hollingworth appear to me to be substantially an anticipation of the pursuers' claim, while the evidence is conclusive as to the public prior use of a machine professing to be made after the model of Knowles' specification, which the pursuers' leading witness, Mr Collier, says "is just the pursuers' patent, in regard to raising and stopping at equidistant points. In a machine the model would be an infringement of the pursuers' patent." And there is other evidence to the same effect.

LORD GIFFORD.—I concur in the opinion which has been delivered by your Lordship, and in the judgment proposed. I would content myself with a silent concurrence were it not that I happened to be the Judge before whom the case was tried; and it may not be unsuitable that I should make one or two observations on the points now before us, and give some explanations as to the course which the case took at the trial.

Though the case is very complicated and difficult in detail, and although at the trial a great many questions were raised and submitted to the jury, we are now relieved of many of these questions, and of the difficulties connected therewith. Questions of great nicety and difficulty, however, are still left, and on these we have had the benefit of a very full and a very able argument. I think that there are now before us substantially but two points,—the first, a simple question of law—simple, however, not in any degree in the sense of being easy, but only in respect that it is unmixed with disputed facts; the second, a pure question of fact.

The first question is, whether the patent is or is not invalid in point of law?

The second question is, whether the verdict is against evidence?

As to the first question, it appears to me that the validity of this patent, in point of law, turns entirely on the first claim in the specification. Had that first claim not been stated I think there would have been no valid legal objection to the other claims,—I mean no valid legal objection to these claims as stated, and apart altogether from questions of previous use or previous publication of the invention claimed. It is the first claim which endangers the whole specification. And the objection arises in this way, that the patentees have not in that first claim, or in any part of their specification, complied with the conditions on which alone they are entitled to protection. The absolute and indispensible condition of the patent and monopoly claimed by the patentees is

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that they must disclose the nature of their invention, and the manner in which it is to be performed. While they have done the latter with great minuteness they have failed in their first claim, or anywhere else, to state what their invention is; for I am not able to find in any other part of the specification a satisfactory account of what the invention truly is, or of the elements or parts in which the invention of the patentees truly consists.

It is only another way of stating this objection to say that the patentees have failed to distinguish in their specification what is new and what is old in the mechanism described—have failed to point out what parts of the mechanism are claimed as new, and the parts which, though equally described in the detailed description, are yet admittedly not new, but have long been in use. The patentees must disclose this in order that the public may know what it is they are prohibited from using. If they fail to disclose this distinctly and intelligibly the law most justly denies them the monopoly which it otherwise confers. Hard words were used at the trial as to the conduct of the defenders here. They were said to have pirated the patentees' invention, and to have robbed them, or rather their assignees, of its fruits. But it must not be forgotten that there may occur a piracy in a patentee's own specification quite as bad as any committed against him. If he claims more than he has invented—if he claims as his own what was known before, and what was not his but was the property of the public or of a prior patentee, then he himself becomes the pirate, and takes or attempts to take a monopoly of what really was the common property of the public.

The question in law is, then, have the patentees sufficiently described what their invention truly is. The specification first describes, in great detail and with great minuteness, the whole of the shuttle-box shifting mechanism, and then at the end they proceed to state specifically what they claim in what are known as the claiming clauses of the specification. As introductory to the claims or claiming clauses in this specification the patentees say,—"Having thus particularly described the nature of our said invention, and the manner in which the same is or may be performed, we have to state that we do not restrict ourselves to the precise details herein described or delineated, but what we believe to be novel and original, and therefore claim as the invention secured to us," is "first, the construction and arrangements of the parts of pattern mechanism and shuttle-box moving and holding mechanism as herein distinguished, generally for actuating the shuttle-boxes of power-looms, all substantially in the new or improved manner herein described." Now, this is simply a claim for the whole machine, and I think it follows, from what has been already said, that the only hope of a patentee who makes such a claim as this is to shew that the whole machine and every part and feature of it is new. I can imagine that he might succeed in the case of the first machine introduced to effect an entirely new object, as was the sewing-machine when first invented. The inventor of the first sewing-machine might very well say, "I claim the whole machine as new; not the parts of it, wheels, rods, and levers, but the machine itself. There never was a sewing-machine before; it is all new, and it does what was never done before." This might well be quite valid and effectual, but it is different when a man comes to claim a patent avowedly for an improvement upon a constituent part of a well known machine—for an improvement, in fact, in mere mechanism. In such a case the patentee must tell wherein the improvement consists, for the improvement is the invention and not the whole machine.

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Now, the patentees here have not only failed to tell the public what they truly claim as their invention, but they have even failed to tell the jury at the trial, or the Court during the recent argument, what the really novel features of their invention are. They have called witnesses to speak to this question, but each one points to something different from the other. What is this but just trying to do by means of the testimony of skilled witnesses what they ought to have done in their specification. They should have said what they claimed and what they disclaimed, and then we should have been able to determine whether their disclaimer was sufficient, and whether their claim was good. But instead of that they claim the whole, and take their chance of a jury holding that there were really novelties in the machine. Some of the jury might hold that one thing was new, and some that another thing was new,—but yet they would unite in finding for the pursuers. But this will not do. The patentees themselves must tell what is new, and if they claim too much the patent goes. Any other rule would be contrary to the spirit of that law, the protection of which the pursuers seek, and contrary to the equitable right of the public.

This is still more strongly brought out by the second claim, for after claiming the whole machine they claim four or five separate features of it. If I could have read the statement in the second claim as a departure from the first claim, if I could hold the second as a disclaimer of the first claim, as if the patentees had said we do not claim the machine generally, but only the following features of it, then this might do. But I cannot so read the claim. The first claim is not a disclaimer, it is a primary and substantive claim, and if it is bad it will destroy the whole patent. Now, the observations of the Judges in several of the English cases seem to me very applicable here. They are to the effect that wherever the machine is old, and the claim truly for improvements in mechanism, the claim must not be made by describing the whole machine, but by specifying what the improvements are. As Lord Westbury says, it is the improvement that is the novelty, and unless we can find what the improvement is we cannot sustain a patent simply for an improved manufacture.

Here, then, the whole machine being described and claimed, whereas it is sought in evidence to make the invention consist merely in certain features of the machine as described, the patent must, I think, be held bad in law.

This would be sufficient for the determination of the case, but I wish to add some explanation as to the course which the case took at the trial, and of my reason for leaving the case to the jury.

At the close of the pursuers' evidence, and when it was apparent that the validity of the patent in point of law was open to serious question, I expected, or half expected, that this question of law, clearly rising on the pursuers' own case, would in some form or other be raised by the defenders. I half expected that the defenders would move me to hold the patent bad in law, and direct the jury to find for the defenders. And I should have been glad to have had a discussion on that point before the case proceeded farther. But no such motion was made, and having perfect confidence in the ability and discretion of the counsel who had charge of the defenders' case, and at the same time feeling great distrust of my own judgment on a question of difficulty not raised and not argued by the parties, I did not think it my duty *ex proprio motu* to take and sustain an objection which was not raised by the defenders themselves. The result would have been most serious if I had done otherwise and been found to be wrong by this Court. The whole trial would have been abortive, and the

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whole expense of it would have been lost. By that time the expense of the trial and of the defenders' witnesses had substantially been incurred, and I thought that any pure legal question as to the validity of the patent would not be injured, but might be better brought out by the whole evidence being exhausted. I therefore thought it the safest plan to allow the trial to proceed. Besides, I thought I saw a legitimate object which the defenders had in withholding this objection, and which I shall mention immediately.

The case was then concluded in the ordinary way, and each party claimed a verdict from the jury, and still no hint was given of any objection to the patent as bad in law, apart from the counter issues of want of novelty and want of utility on which a verdict was asked. I then charged the jury, and only then arose for the first time a series of questions of law, raised by both parties, on the form of directions which I was asked to give to the jury. But even then no direct motion was made to withdraw the case from the jury altogether. Instead of that I was asked by the defenders to give a number of directions which I refused to give, and which form the subject of the bill of exceptions now to be disposed of by the Court. In reference to these directions I have not altered my opinion in the least. I should again refuse them were I to preside at a new trial.

Now, I may say I am even glad that the defenders took the course they did, because it will, I think, conclude the case once for all. The reason which the defenders had for allowing the trial to proceed, or one of their reasons, I presume, was that they felt they had such a very strong case on prior disclosure and prior use that they wished a verdict upon their counter issues, and that of course they could not obtain if the case were withdrawn from the jury altogether. Still farther, if the defenders had taken their objections to the validity of the first claim and I had sustained it, and if the Court had affirmed my judgment, then the pursuers might simply have proceeded to enter a disclaimer, and to lop down their specification and claims to proper dimensions. We should then have had, or might have had, a fresh accusation of infringement and a fresh trial. But as the case has been conducted, we have had it fully tried on the counter issues, and while we find the patent bad in law, we are also of opinion that, even if it is not bad in law, the verdict is contrary to evidence in point of fact, and there is no encouragement to the patentees to disclaim, because, unless they have very different evidence to submit from that laid before the jury, they must fail on the question of fact of prior disclosure and prior use. I also venture to think that even the legal question of the validity of the patent has had beneficial light thrown upon it by the defenders' evidence. I should have been sorry, even on the legal question, to have been without the assistance afforded by the evidence of Mr Bramwell and the other witnesses for the defenders. On this ground also, I am glad that the case proceeded before the jury, and that I did not withdraw it altogether at the close of the pursuers' case.

THESE interlocutors were pronounced :—

"Disallow the exceptions, and find no expenses due in the discussion thereon."

"Having heard the counsel for the parties on the rule granted to shew cause why the verdict should not be set aside and a new trial granted, make the rule absolute, set aside the verdict, and grant a new trial, reserving the expenses of the trial."

HAMILTON, KINNEAR, & BEATSON, W.S.—DAVIDSON & SYME, W.S.—Agents.

ANGUS MACKINTOSH, Pursuer.—*Fraser—Campbell Smith.*
THOMAS GRAHAM WEIR, Defender.—*D.-F. Clark—Balfour.*

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July 3, 1875.
Mackintosh v. Weir.

Reparation—Res Judicata—Lunatic.—A person who had been confined in a lunatic asylum raised an action of damages against, *inter alios*, the medical men who granted the certificate on which the warrant for his confinement proceeded. Upon an issue "whether . . . the defenders did wrongfully and without due inquiry and examination grant the certificate, . . . the pursuer not being then insane, nor in such a state of mental derangement as to require confinement in a lunatic asylum, to the loss, injury, and damage of the pursuer," the jury found that the pursuer was insane at the date in question, and that he was justifiably sent to and confined in an asylum. The verdict was applied, and the defenders assoilzied.

The pursuer subsequently raised an action against one of the medical men, founded on the granting of the certificate, and concluding for damages for slander. *Held* that the action was excluded *exceptione rei judicatæ*, in respect that the pursuer was attempting to try over again the question which had been decided in the former action, viz., whether or not the certificate was justifiably granted, and that the general claim of damages made and decided upon in the former action included a claim for reparation for injury to character concluded for in the present action.

Penalty—Lunatic—Statute 55 *Geo. III., c.* 69, *secs.* 8 *and* 19.—The statutory penalty of £50, to which a medical man is liable who grants a certificate of lunacy without due inquiry, cannot be sued for by the injured party.

Slander—Witness—Privilege.—In an action against a medical man for alleged wrongful granting of a certificate that the pursuer was insane the defender was examined as a witness for the pursuer. *Held* that the privilege of a witness under such circumstances was absolute, and that an action of damages for slander, founded on what the defender stated in evidence, could not be made relevant by any allegation of malice.

2D DIVISION. Ld. Craighill. I.

IN June 1852 a petition was presented to the Sheriff of Midlothian for warrant to remove Mr Angus Mackintosh of Holme to Saughtonhall Lunatic Asylum, with a relative certificate signed by George Glover, surgeon, and Thomas Graham Weir, M.D., by which they declared, on soul and conscience, "that from our own personal observation, and from the report of credible witnesses, we believe the foresaid Angus Mackintosh of Holme to be in such a state of mental derangement as to require confinement in an asylum."

The Sheriff having granted warrant as craved Mr Mackintosh was removed to Saughtonhall Asylum and confined therein.

In 1858 Mr Mackintosh brought an action of damages against Mr Hugh Fraser, W.S., the agent who prepared the petition, and also against Mr Glover and Dr Weir, concluding for £10,000 as damages and solatium for having been confined as a lunatic, he being then sane.

The case was tried before the Lord President and a jury in July 1859, the issue directed against the medical men being as follows:—"Whether, on or about the 12th day of June 1852 the defenders, George Glover and Thomas Graham Weir, did wrongfully and without due inquiry and examination grant the certificate of which No. 29 of process is a copy, the pursuer not being then insane, nor in such a state of mental derangement as to require confinement in a lunatic asylum, to the loss, injury, and damage of the pursuer?"

The jury returned a unanimous verdict that the pursuer was insane on the morning of 12th June 1852, and that he was justifiably sent to and detained and confined in Saughtonhall Asylum, and therefore unanimously found for the defenders.

The pursuer moved for a new trial, which was refused.[1] The verdict was applied, and the defenders assoilzied on 27th January 1860.

[1] Mackintosh v. Fraser and Others, Jan. 20, 1860, 22 D. 421, 32 Scot. Jur. 187.

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July 8, 1875. Mackintosh v. Weir.

An appeal by the pursuer to the House of Lords against these interlocutors was dismissed.[1]

On 27th January 1875 the present action was raised by Mr Mackintosh against Dr Weir.

The conclusions of the summons were for declarator,—"First, that a medical certificate or other writing was signed, on or about the 12th day of June 1852, by the defender, and George Glover, surgeon, which asserted or stated that from the defender's own personal observation, and from the report of credible witnesses, he believed the pursuer to be in such a state of mental derangement as to require confinement in an asylum, and which imported or implied that acts done or committed by the pursuer had been personally observed by the defender, or that alleged facts had been reported to him on credible testimony which afforded reasonable and probable cause for believing the pursuer to be a furious or fatuous person, or lunatic, and a person proper to be incarcerated in a madhouse under the provisions of the Acts 55th George the Third, chapter 69, 9th George the Fourth, chapter 34, and 4th and 5th Victoria, chapter 60; secondly, That no such acts or alleged facts as aforesaid had ever been observed by, or reported to the defender; and, thirdly, that, therefore, the said medical certificate was and is false and slanderous;" and, further, for "payment to the pursuer of the sum of £20,000 sterling in name of damages and as a solatium for slander in the premises, as also to make payment in such manner as the Court may direct of a penalty of £50 sterling, and the expenses of recovering the same, in terms of the said Act 55th George Third, chapter 69."[2]

In his condescendence the pursuer founded his claim of damages for slander (1) upon the granting of the certificate of insanity; (2) upon statements made falsely, calumniously, and maliciously by the defender in July 1859 when examined as a witness in the trial of the action at the instance of the pursuer against Mr Fraser, Mr Glover, and the present defender (Cond. 5.); (3) upon statements made falsely, calumniously, and maliciously by the defender when examined as a witness in the trial of an action at the instance of the pursuer against Drs Smith and Lowe, the keepers of Saughtonhall Asylum (Cond. 6).[3]

The pursuer pleaded, *inter alia*;—3. The defender having contravened the Act 55 George III., cap. 69, ought to be ordained to make payment of the penalty therein provided, with expenses. 4. Although the procurator-fiscal is entitled and required to sue for said penalty, this does not exclude on his failure the title to sue of the pursuer; the penalty

[1] Mackintosh v. Fraser and Others, April 20, 1863, 1 Macph., H. L. 37, 35 Scot. Jur. 457.

[2] 55 Geo. III. c. 69, sec. 8,—"If any medical person shall sign or give any . . . certificate or report, without having carefully visited and examined the person to whom it relates, and without having endeavoured to ascertain in a proper manner, by such examination and otherwise, that such person is a furious or fatuous person or lunatic, and proper to be confined in a house for the reception of such persons, every such medical person shall forfeit and pay for such offence or neglect the sum of £50, and the expenses of recovering the same."

Sec. 19 enacts, "That it shall and may be lawful for the procurator-fiscal of every county or stewardry where any house for the reception and the care or confinement of furious or fatuous persons or lunatics is situated, and he is hereby required to enforce the due execution of this Act, and to sue for and recover all penalties or forfeitures granted by this Act, by action or complaint before the Court of Session, or the Sheriff or Steward's Court: Provided always that such action or complaint shall be brought within twelve calendar months after the offence shall have been committed, or the penalty incurred."

[3] See Mackintosh v. Smith and Lowe, June 22, 1864, 2 Macph. 1261, 36 Scot. Jur. 631, aff. March 9, 1865, 3 Macph., H. L. 6, 37 Scot. Jur. 318.

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for the wrongful act is absolutely imposed, and any one having a substantial interest may sue for its imposition and recovery, and the limitation of the period of suing is applicable merely to the procurator-fiscal. 5. The plea of *res judicata* is not maintainable as a defence against any of the conclusions of the present action, because these conclusions have not been embraced in any previous action; *separatim*, it is not maintainable, in respect that the present action concludes for the infliction of the statutory penalty, which has never been sued for in any Court.

The defender pleaded, *inter alia*;—1. The action is excluded *exceptione rei judicatæ*, at least it is so excluded, in so far as founded upon the defender's granting the said certificate. 2. The pursuer's statements are not relevant or sufficient in law to support the conclusions of the summons. 3. In so far as directed to recover the statutory penalty sued for, the action cannot be maintained, in respect that (1) the pursuer has no title to sue for the said penalty, and (2) the time limited for suing for the same has long ago expired.

The Lord Ordinary, on 27th May 1875, pronounced this interlocutor:—"Having heard parties' procurators on the closed record, and more especially on the first, second, and third pleas in law for the defender, and considered the debate, productions, and whole process, Finds, in the first place, that the pursuer has no title to sue for the statutory penalty of £50 concluded for in the summons; and, *separatim*, that the time within which the said penalty could competently be sued for has long ago expired: Finds, in the second place, that the action, in so far as it is founded on, as well as in so far as it concludes for reparation for injury alleged to have been sustained by the granting of the certificate, which is the subject-matter of the first, second, and third conclusions of the summons, is excluded *exceptione rei judicatæ*: And finds, in the third place, that the conclusion for damages, in so far as founded (1) on the evidence given by the defender at the trial referred to in article V. of the condescendence, and (2) on the evidence given by the defender at the trial referred to in article VI. of the condescendence, is not supported by statements relevant and sufficient to sustain said conclusion: Therefore sustains the third plea in law, and also, to the extent foresaid, sustains the first and second pleas in law for the defender: Dismisses the action, and decerns: Finds the defender entitled to expenses," &c.*

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* "NOTE.—. . . . . The sufficiency of the grounds of action has been argued with great earnestness and ability, but in the opinion of the Lord Ordinary that argument was inconclusive, and the action, therefore, has been at once dismissed.

"Three things are complained of by the pursuer. The first is the granting of the certificate referred to in the three first conclusions of the summons. The second is the evidence given by the defender, referred to in article 5 of the condescendence, and the third is the evidence given by the defender at the trial referred to in article 6 of the condescendence. The first of these things, it is necessary to add, is on the present occasion made the subject of a double claim. What is first claimed is a statutory penalty of £50, and there is next claimed a portion of the £20,000 of damages 'in the premises,' concluded for in the present action.

"(1) As to the statutory penalty, the Lord Ordinary considers that the case is quite free from difficulty. The statute referred to (54 Geo. III., c. 69) authorises the penalty to be sued for by the procurator-fiscal, but confers no title on the person said to have been wronged or on any private party. The rule that, in such circumstances, the pursuer or prosecutor designated by the statute has the only instance, is, as the Lord Ordinary understands, firmly fixed. The imposition of the penalty, the provisions for its recovery, the use for which it is to be applied, and the time within which the suit must be brought, are all the creatures of the statute. Everything must be carried out in the way enacted. Common law rules or considerations of expediency need not be

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Argued for the pursuer;—The plea of *res judicata* was not applicable, the former action being laid upon personal injury, and the present on

appealed to as reasons for supplying something which has not been provided, because the statute is the only code, and gives no warrant for any procedure not sanctioned by its enactments. The circumstances (1) that the procurator-fiscal is the only party authorised to sue, and (2) that the penalty when recovered is to fall into the rogue money of the county, the Lord Ordinary thinks, conclusively shew that the penalty in question cannot be sued for by the pursuer. It is hardly necessary to say anything as to the effect of the lapse of time upon the title to sue asserted by the pursuer. He admits that had the present action been raised by the procurator-fiscal it must have been thrown out as too late, the statute providing that the penalty in question could not be recovered unless sued for within a year after it had been incurred. But it is said that this condition does not affect any other pursuer or prosecutor than the procurator-fiscal, and in one aspect of the thing there is truth in this statement. The procurator-fiscal, and he alone, is rendered subject to the condition, but this only upon the assumption that he is the only pursuer or prosecutor entitled to recover. The recovery of the penalty is the thing that is barred. The protection of the alleged wrongdoer against long delayed actions is the end to be accomplished, and the idea that a private party assuming that at any time he might sue, can sue at a period when suit by the procurator-fiscal would be precluded, appears to the Lord Ordinary to be too extravagant to be seriously urged on the consideration of the Court.

"2. The plea of *res judicata*, so far as regards the ground of action, rested upon the granting of the certificate referred to in the three first conclusions of the summons, is, in the opinion of the Lord Ordinary, fully supported by the facts admitted on the record. The thing complained of, according to the plain meaning of the conclusions of the summons, is the granting of that certificate; but this has already been made the ground of an action between the present pursuer and the present defender, in which final judgment was pronounced. This is concisely proved by the issue printed in article 7 of the defender's statement, page 14 of this record. That trial resulted in a verdict for the defender, and that verdict having been applied, became the ground of a judgment by which the defender was assoilzied. How, after this, can the same question be submitted of new for the decision of the Court? Judgment once given is given once for all, and it would be hard to conceive a case in which the plea of *res judicata* could be more clearly established.

"3. The other matters of complaint for which damages are claimed are set forth in articles 5 and 6 of the condescendence. These also, the defender contended, are barred by the plea of *res judicata*, but the Lord Ordinary has been unable to adopt this conclusion. The plea of *res judicata* is in itself a technical plea, or, at any rate, is a plea to which effect is given only on certain well recognised conditions, of which one is that the thing alleged to be barred as a ground of action has, as a ground of a former action, already been decided. Now, the statements complained of on the present occasion were not the grounds of any former action; and consequently to them, as the Lord Ordinary thinks, the plea of *res judicata* cannot be applied. The result of the first litigation, however, between the pursuer and the defender is not wholly immaterial in this part of the present case. What is complained of are statements made by the defender as a witness. These the pursuer admits to be privileged; and so malice must be proved before liability against the defender could be established. Malice, consequently, is alleged, but has it been relevantly libelled? The Lord Ordinary thinks that it has not. The mere use of the word 'malice' or the word 'maliciously,' is not in every case enough. It is often necessary that, so to speak, the use of the word should be justified by averments, which, if proved, will afford reasonable ground for the imputation. Here the epithet 'maliciously' is, so far as the present point is concerned, all which is put upon record, and yet the present, more than most cases, is a case in which more was required, because the slander complained of, and the uttering of which is ascribed to

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slander.[1] Statements made by a witness were actionable, if malice was averred.[2]

Counsel for the defender were not called on.

LORD JUSTICE-CLERK.—The substance of this action is precisely the same as that begun in 1858. There is no difference except that the phraseology is somewhat varied. The pursuer was confined in a lunatic asylum upon a certificate granted by the defender and another medical man. The pursuer raised an action against the defender and others, in which the thing put in issue was sanity or insanity, or at all events, whether Dr Weir was justified in granting the certificate which he did. The pursuer now proposes to try the question whether he was sane at the date of granting the certificate, and whether the defender can render a sufficient reason for saying that he was insane, after the Court and the jury have decided that he was insane, and that he was justifiably sent to the lunatic asylum.

It is said that the present action is laid upon slander, whereas the former action was laid upon the personal confinement. This is a difference in words, but without a shadow of substance. In the former action reparation was sought, including to the full everything which the pursuer could recover in the present action. If he had been found sane the damages which he would have recovered would have included injury to credit and feelings. So far then as the conclusions of the actions there is not the slightest difference between the two, except that those of the present action are more limited.

We are not put to discuss questions which have arisen in some of the cases in the books, where, for instance, it has been held that a decision in a criminal cause is not necessarily *res judicata* in a civil cause. Here there is a complete and absolute identity between the two actions; and, therefore, I have no hesitation in adhering to the Lord Ordinary's interlocutor upon this point.

As to the other ground of action, where a party is put into the witness-box in an action against himself, and there maintains his ground, I hope there is no doubt at all upon the point. The House of Lords has recently decided under less favourable circumstances than the present that no action will lie for statements thus made in the witness-box.[3]

LORD NEAVES.—The former action concluded for reparation in every possible way in which reparation could be sought. It is not necessary for a party to state all the grounds of damage. It is enough to state "to the loss, injury, and damage of the pursuer," and the jury will consider all the grounds of damage. The pursuer could there have proved everything that he suffered in feelings, character, credit, &c. He put it to the jury,—"Was I sane or insane?" For it is no injury to a man to say that he is insane if he is really insane. The whole basis of that action was the question of sanity or insanity. The jury, pro-

malice, consists of a statement which has been found to be true by the two juries before whom the evidence complained of, as set forth in articles 5 and 6 of the condescendence, was given by the defender. In these circumstances, the Lord Ordinary considers that the plea of irrelevancy must be sustained.

"The result of all is, that the action has been dismissed."

[1] (On *res judicata*)—Gillespie v. Russell, June 26, 1857, 19 D. 897, 29 Scot. Jur. 415; Robertson v. Melville, Feb. 24, 1860, 22 D. 893, 32 Scot. Jur. 375.

[2] Watson v. Burnet, Feb. 8, 1862, 24 D. 494, 34 Scot. Jur. 359; see also Macfarlane and Cleghorn on Issues, p. 82.

[3] Dawkins v. Lord Rokeby, June 28, 1875, L. R. 7, E. and I. App.

No. 148. July 3, 1875. Mackintosh v. Weir.

ceeding with their inquiry in a very business-like manner, found that the pursuer was insane, and that the doctor who had been called in to perform a public duty had only discharged that duty in certifying that the pursuer was insane. The whole claim of damages thus fell to the ground. To say that the pursuer did not go to the jury on the slander is perfectly extravagant.

With regard to the statements by Dr Weir as a witness, the case cited by the pursuer is not in point, even if it had gone to a final decision. There the person had put himself into the box, and was therefore not under compulsion to speak.

With regard to the penalty here claimed, it is impossible to contend that the party injured is entitled to recover a statutory penalty unless that is declared in the statute. It is not intended for his pecuniary benefit at all. It is imposed for the public interest, and is due to the Queen, if Parliament has made no other provision for its disposal. The injured person has no right to penalties. Reparation is his right, which can neither be supplemented nor superseded by a penalty.

LORD ORMIDALE concurred.

LORD GIFFORD.—I am of the same opinion.

With regard to the point whether there is any ground of action against the defender in respect of the statements made by him as a witness I think that the Lord Ordinary's ground is somewhat too narrow. I should prefer to say that the privilege of a witness in such circumstances is absolute.

THE COURT adhered.

P. H. CAMERON, S.S.C.—JOHN T. MOWBRAY, W.S.—Agents.

No. 149. July 6, 1875. Jackson v. M'Iver.

THOMAS JACKSON (Mackenzie's Trustee), Appellant.—*Balfour—M'Kechnie.*
JOHN M'IVER, Respondent.—*Kinnear—Trayner.*

Bankrupt—Ranking—Blank Bill—Cautioner—Accommodation Bill.—A lent B £300 and at the same time took in security from B a blank bill stamp for £2000, signed by him and indorsed by four other persons, A being in the knowledge that no relation of debtor and creditor subsisted between B and the indorsers. B not having paid the £300, and one of the indorsers having become bankrupt, A, who had filled up the blank stamp as a note for £2000, claimed to rank on the bankrupt indorser's estate for that amount till the dividends should amount to £300.

Held that the bankrupt indorser was in reality only a cautioner, and that A was only entitled to rank on his estate for the £300 actually lent to B.

2D DIVISION. Sheriff of Inverness. I.

THE following narrative of the facts of this case is taken from the opinion of Lord Gifford :—

"This is an appeal by the trustee on the sequestrated estate of Alexander Mackenzie, draper, Inverness, against a judgment of the Sheriff-substitute of Inverness, ordaining the appellant as trustee upon Alexander Mackenzie's sequestrated estate to admit the claim of the respondent, John M'Iver, as a creditor of the said Alexander Mackenzie for the sum of £2000, and to rank the respondent for that amount, but only to the effect of the respondent receiving payment of £300, to which extent the respondent restricts his claim. . . .

"The present respondent, John M'Iver, claims to be a creditor on the

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estate of the bankrupt Alexander Mackenzie "for the sum of £2000 contained in a promissory-note dated 11th May 1874," of which the respondent, John M'Iver, is the holder. This promissory-note is granted by Donald Mackay, manufacturer in Inverness, in favour of four parties or firms, and by the note, *ex facie* as it now stands, Donald Mackay promises, fifty days after date, to pay to these four parties, or order, the sum of £2000, value received. The payees or promisees are (1) Munro and Company, (2) Alexander Mackenzie, the present bankrupt, (3) Turnbull and Company, and (4) William Mackenzie. The note bears to be blank indorsed by these four parties, and the present respondent, Mr M'Iver, produces the note, and claims to be onerous holder. Sequestration of Alexander Mackenzie's estate was awarded on 23d June 1874 during the currency of the note. The note is produced by Mr M'Iver with an affidavit in which he depones that the bankrupt Alexander M'Kenzie is now, and was at the date of his sequestration, indebted to the respondent in the sum of £2000 contained in the said promissory-note; but he goes on to explain that the said promissory-note for £2000 was indorsed to him only in security of £300 contained in another promissory-note of the same date (11th May 1874) granted to the deponent by the said Donald Mackay, the original promissor in the large note, and he restricts his ranking to the effect of drawing full payment of the sum of £300.

"As the respondent, Mr M'Iver, was *ex facie* onerous holder of the note for £2000, want of value or other objections could only be proved by his writ or oath, and, accordingly, in the proceedings before the Sheriff, the trustee on Alexander Mackenzie's estate referred the whole cause to Mr M'Iver's oath. We have his deposition before us, and in that deposition alone we must find the facts of the case. The deposition, however, is quite candid, and there can be no real dispute as to what the facts truly are.

"It appears from the deposition that about 11th May 1874 Donald Mackay applied to the respondent M'Iver to assist him in raising money. Mackay brought with him a blank bill stamp with four indorsements on it, and he asked the respondent M'Iver to sign it as an additional indorser. This blank bill stamp is now the note claimed on for £2000. Mackay's object was, by means of the respondent's indorsation along with the four other names already indorsed, to raise money by discounting the note, the same being filled up as a bill or note for £2000 or for some smaller sum; and he in substance explained this to the respondent. The stamp would carry £2000. The respondent M'Iver refused to sign the blank stamp or to pledge his credit for any such sum, but he ultimately agreed to lend Mackay £300, provided he received security therefor. Both parties, Mackay and M'Iver, adjourned to the Commercial Bank with a view to carrying out the transaction, and in order to obtain the advice of the bank agent, Mr Fraser, who was also the respondent's agent. The whole matter was explained to Mr Fraser, and the first proposal seems to have been that the bank should discount the note which it was proposed to fill up for £2000. Fraser, as bank agent, refused to do this, and then the proposal was reverted to that the respondent M'Iver should lend Donald Mackay £300. It was found that Mackay had no security to offer for this £300 excepting the blank bill with the four indorsements, and ultimately on the security of this blank bill stamp M'Iver took Mackay's promissory-note for £300, dated 11th May 1874, which he indorsed back to Mackay, who got cash for it over the bank counter. In security of this bill for £300 Mackay delivered to M'Iver the blank bill stamp for £2000, putting his name on the face of it as promissor, but without filling it up for any sum or in any way, and in this state M'Iver received it as security and left it with the bank agent to keep for him unfilled up.

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"The £300 note fell due on the 14th June 1874 and was dishonoured by Mackay. The respondent M'Iver had to retire it, and thereby was and is the undoubted creditor of Mackay for £300 and interest. M'Iver got back the bill stamp still blank from Fraser and took it to his law-agent, Mr Macandrew, instructing that gentleman to 'protect my interests.' The respondent gave no specific instructions to Mr Macandrew, but simply gave him the blank bill stamp with the four blank indorsements, with a general order to protect his, M'Iver's, interests. In pursuance of these general instructions, it appears that Macandrew, the respondent's agent, did fill up the blank bill stamp for the sum of £2000, making Mackay the promissor, and inserting the names of the four indorsers as the promissees. It does not appear when the blank stamp was so filled up, but it must have been after the 14th June and before 24th August. It was after Mackay had dishonoured the £300 bill, and before the claim in Mackenzie's sequestration. It was filled up by Macandrew as the respondent's agent, and of course this is just the same as if it had been filled up by the respondent himself. The affidavit and claim in Mackenzie's sequestration followed, and the question now is—is the respondent entitled to rank on Alexander Mackenzie's estate for the full sum of £2000 in order that the respondent may draw dividends to the full amount of £300, which admittedly was his sole and only debt."

Thomas Jackson, the trustee on Mackenzie's estate, rejected the claim, and M'Iver appealed to the Sheriff.

The Sheriff-substitute (Blair), on 10th May 1875, pronounced this deliverance:—"Finds that the oath is negative of the reference: Finds further, in point of fact, that the bill in question was given to the appellant in satisfaction, not of a prior debt, nor in preference to other creditors of the bankrupt, but of an instant cash payment, and as a *novum debitum* arising within sixty days before bankruptcy: Finds in law that the Act 1696, c. 5, does not apply to the present case: Therefore recalls the deliverance appealed against, and remits to the respondent, the said Thomas Jackson, as trustee on the sequestrated estate of the bankrupt, Alexander Mackenzie, draper, High Street, Inverness, sole partner of the firm of Mackenzie Brothers, drapers there, to admit the appellant's claim, and to rank him upon the said sequestrated estate in terms of his claim, and decerns."

The trustee appealed to the Second Division of the Court of Session.

At advising,—

LORD GIFFORD.—(After the above narrative of the facts)—I am of opinion that the respondent, on the proved facts of the case, is not entitled to rank on Alexander Mackenzie's estate for £2000, but only £300, being the full sum which the respondent actually advanced.

I think it is proved by the respondent's oath that he knew that the four indorsers of the blank stamp, of whom the bankrupt was one, had not given any money to Donald Mackay, the proposed promissor in the note. They were not Mackay's creditors to any extent, but had merely lent him their names by indorsing the blank stamp in order that he might raise money thereon. This is perfectly apparent upon the oath—Mackay brought the blank stamp unfilled up, and his proposal was that the respondent should subscribe with the other indorsers so as to enable him, Mackay, the better to raise money. At that time there was no real debt between Mackay and the four indorsers. There was only a mandate enabling Mackay to raise money by filling up and discounting the blank stamp. Now, if Mackay had got £2000 from the respondent, and there-

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upon the bill had been filled up for that sum, there is no doubt the indorser, as well as Mackay, would have been liable to the respondent for the sum so advanced. But this was not what was done. The respondent only lent £300 to Mackay, and it was only in security of this £300 that he received the blank stamp. The legal result is, that the indorsers of the blank stamp became cautioners or securities to the respondent for the £300 he had lent Mackay. That was their legal relation and position—nothing more. No doubt they signed a blank obligation carrying £2000, and gave Mackay a mandate to make it a bill for that amount, which would have been good in the hands of any *bona fide* holder. And if £2000 had been raised upon it they would have been liable for that full sum, but as only £300 was raised they were cautioners for that limited amount and for no more. The moment the respondent admits, as he was bound to do, that he only lent £300, and that he got the indorsers' names as security therefor, that moment he fixes the liability of the indorsers as simple cautioners for the sum lent, and for nothing else. It is just as if the indorsers had said to Mackay—we will be cautioners for you either to the bank or to anybody else for whatever sum you can raise not exceeding £2000; and this being fairly communicated to the creditor who advanced the money he cannot hold them liable for more than the sum he actually lent. A mere cautioner, who is admittedly nothing else than a cautioner, can never be liable for a larger sum than was due by the principal debtor. Cautionry is an accessory obligation, and the accessory can never be bound for more than the principal. Cautioners in a cash credit bond, admitted to be such, or holding a back-letter, can never be liable for more than the balance due by the principal, although the bond *ex facie* may be for a much larger amount. In short, whenever it is admitted, or is shewn by competent evidence, that a personal obligant (for I am dealing with the case only of personal obligation) is merely cautioner for another, and this to the knowledge of the creditor, then the creditor cannot claim from the cautioner or rank upon his estate for a larger sum than was due by the principal debtor.

The fallacy of the very ingenious argument submitted for the respondent lay in not distinguishing between the personal obligation of a cautioner and a real debt or real subject assigned in security. If there had been a real debt of £2000 due by the four indorsers to Mackay, and if this debt had been assigned to the respondent, he being *in bona fide* and believing it to be a debt and taking the £2000 bill and debt in security of the £300 which he lent, then the case would have been wholly different. The respondent would have been out and out assignee to the debt which formed the subject of the security, just as if the security had been a policy of insurance which might be for a sum ten times the loan advanced on it. In such a case the creditor would be entitled to recover the full debt or the full sum in the policy as absolute assignee, subject only to a liability to account to his debtor, the cedent. It is quite otherwise with the mere personal obligation of a cautioner brought home to the knowledge of the creditor as such,—that is, as mere cautioner at the time the debt is contracted. In such a case I know no instance where the cautioner was held liable to the creditor in a larger sum than that due to the creditor by the principal debtor.

So far as regards the proposed ranking for £2000 is concerned, therefore, I think it must be disallowed and restricted to a ranking for £300, the only real debt, but the respondent will be entitled to a ranking for this limited sum of £300 against the estates of each of the co-obligants. The trustee was wrong

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in rejecting the claim altogether—the Sheriff-substitute has erred in admitting a ranking for too large a sum.

The grounds of judgment which I have above indicated are different from those taken by the trustee in his deliverance, and from those pleaded by the trustee before the Sheriff-substitute. I do not think that the statute 1621 or the statute 1696 have any relation whatever to the present case. There is no question of conjunct or confident parties holding gratuitous deeds from the bankrupt struck at by the Act 1621—there is no question of a security given for a prior debt contrary to the Act 1696—there is no room for the plea of fraud at common law—and these are the points which seem to have exclusively occupied the attention of parties in the Court below. But the sole question really is, is it proved that the respondent took these indorsers as simple cautioners for the £300, the only sum lent, and if so, for what sum is he entitled to rank on their respective estates? He cannot rank on these estates for a larger sum than he could have required them actually to pay had Mackay been the only party insolvent.

LORD NEAVES concurred.

LORD ORMIDALE.—I also concur, and in support of the views expressed by Lord Gifford in favour of the proposed judgment I may refer to the case of Peek Brothers, &c. v. Fleming, 16th November 1849, 12 D. 122 (21 Scot. Jur. 566), which is almost exactly in point.

The LORD JUSTICE-CLERK concurred.

THIS interlocutor was pronounced:—"Sustain the appeal, alter the deliverance of the Sheriff-substitute appealed against, and remit to the said trustee to rank the claim of the said John M'Iver to the effect of his receiving a dividend on the sum of £300, with interest thereon from the 14th day of June 1874: Find no expenses due to or by either of the parties, and decern."

G. & H. CAIRNS, W.S.—IRONS & ROBERTS, S.S.C.—Agents.

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July 6, 1875.
Gibb v. Crombie.

WILLIAM GIBB, Pursuer and Appellant.—*Macdonald—Lang.*
J. AND J. CROMBIE, Defenders and Respondents.—*Sol.-Gen. Watson—Jameson.*

Reparation—Personal Injury—Culpa—Factory Acts, 13 *and* 14 *Vict. c.* 54, *sec.* 1, 7 *and* 8 *Vict. c.* 15, *sec.* 21, *and* 19 *and* 20 *Vict. c.* 38, *sec.* 4—*Contributory Negligence—Young Person.*—A lad between seventeen and eighteen, while employed at night work in a factory, was injured by the belt of a teasing machine, at which he was working, slipping off the drum and catching his arm. The body of the machine was boxed in, but the belt and lower pulley were not fenced. In an action of damages by the lad against his employers, laid on breach of the Factory Acts, which forbid the employment of persons under eighteen at night work, or at unfenced machinery, the defences were (1) that the defenders had been induced by the pursuer's representations that he was above eighteen to engage him as an adult, and had paid him adult's wages; and (2) that the accident occurred through the pursuer's own fault. *Held*, after a proof, that the defenders had not used sufficient diligence to ascertain the pursuer's age before they employed him at night work; that the machine was not duly fenced in terms of the statutes; and that the defenders had failed to prove contributory negligence on the part of the pursuer, and accordingly that the de-

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2D DIVISION. Sheriff of Aberdeen and Kincardine.

I.

fenders, having been guilty of a double breach of the Factory Acts, were liable to the pursuer in damages.

Question, how far misrepresentation of his age by the pursuer, or contributory negligence on his part, would have barred his claim, had they been proved.

THIS action was raised on 13th February 1874 in the Sheriff-court of Aberdeenshire by William Gibb, with consent of his father as his administrator-in-law, against J. and J. Crombie, manufacturers, Grandholm, for damages for an accident which occurred to the pursuer, while in the defenders' employment, about five o'clock on the morning of 2d April 1873.

The condescendence set forth that on 2d April 1873 the pursuer, being then seventeen and a half years of age, and therefore a young person within the meaning of the Factory Acts,* was working at a wool teasing machine in the defenders' works, which was not securely fenced in terms of the Factory Acts,† and was otherwise defective, when the driving belt of the fan flew off the pulley, and caught the pursuer, by which his right arm was so severely injured that it had to be amputated.

A further ground of liability was maintained against the defenders, viz. that the accident occurred while the pursuer was employed at night work contrary to the provisions of the Factory Labour Amendment Act, 1850 (13 and 14 Vict. c. 54) sec. 1, which forbids the employment of young persons between six at night and six in the morning.

The defenders did not dispute that their mill was a factory within the meaning of the Factory Acts, but they stated the following defences:—(1) That the pursuer, when he applied to them for employment, represented himself to be eighteen years of age, and that on the faith of these representations they engaged him and paid him as an adult; (2) that they had made sufficient arrangements for keeping the machinery in good order, and given the command of all necessary materials for that purpose to properly qualified persons; (3) that the accident happened through the pursuer's own fault in laying hold of some part of the machine and gearing while in motion, contrary to his instructions.

A proof was taken, of which the result was shortly as follows:—Mr Richard Brooks, the defenders' mill manager, deponed:—"I remember pursuer applying for employment. He and Benjamin Ross came to my house and asked for night work. I asked their age. They smiled, and said eighteen."

The pursuer and Ross denied that Mr Brooks had put any question

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* By the 73d section of the Factory Regulation Act, 1844 (7 and 8 Vict. c. 15), the words "'young person' shall be taken to mean a person of the age of thirteen years, and under the age of eighteen years."

† By the 21st section of the Factory Regulation Act, 1844 (7 and 8 Vict. c. 15), it is, *inter alia*, provided that "every part of a steam-engine and water-wheel, and every hoist or teagle near to which children or young persons are liable to pass or be employed, and all parts of the mill-gearing in a factory, shall be securely fenced."

By the 4th section of the Factory Act, 1856 (19 and 20 Vict. c. 38), it is enacted that the above quoted section, "so far as the same refers to the mill-gearing, shall apply only to those parts thereof with which children and young persons and women are liable to come in contact, either in passing or in their ordinary occupation in the factory."

The fencing of driving straps is specially dealt with by the Factory Acts,—the inspector being empowered to direct any driving strap or band which, in his opinion, is dangerous, to be fenced, and in the event of a difference of opinion between him and the mill-owner, whether it is necessary and possible to do so, the question is referred to arbitration—7 and 8 Vict. c. 15, sections 43, 60, and 19 and 20 Vict. c. 38, section 6.

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about age, and another lad named Mitchell stated that he heard the conversation, and that nothing was asked or said about age.

The pursuer was set to work on the night shift, and had been in the defenders' employment about four weeks before the accident.

Mr John Crombie junior, one of the defenders, deponed:—"I recollect ordering muster of night shift. I had passed the night shift one night, and thought some of them looked under the age. Next morning I ordered them before me, and they came in the afternoon. This was a few days before the accident. I don't recollect the particular individuals who came. I think I recollect Ross, but I don't recollect pursuer. Brooks brought them in one by one. I asked all whose appearance made it necessary what their age was—all about whom there could be the slightest doubt. There was one, at least, if not more, discharged in consequence."

Mr Brooks' evidence as to this inspection was as follows:—"I ordered the night shift to the office shortly before the accident. Mr John Crombie jun. told me to do so, because he thought some did not look the age. Gibb and Ross came down among the others. I took them one by one to Mr John Crombie jun. He asked Gibb if he was eighteen, and pursuer said Yes, and he said that would do. Pursuer left. I also took Ross in, and Mr Crombie told me he was to leave."

The pursuer stated with reference to this occasion:—"I was only asked if I was working in the teasing room at night. I said, Yes; and nothing more was said. I don't know why I was wanted down."

It was proved that young persons employed by day got from 7s. to 10s. a-week, whereas the pursuer received 15s.

The body of the machine at which the accident occurred was boxed in. The fan belt and lower pulley were not fenced. Several of the defenders' witnesses stated that it was not the practice to fence the fan belts of such machines, and that fencing the belt would be so inconvenient as to make it practically impossible.

No one was present when the accident occurred. The pursuer stated:—"I was oiling the fan, and as I was going back from doing so the belt sprang and took me, and, before I knew where I was, had my right arm round the drum. The belt snapped then, and I got free." He denied that he was touching the strap at the time, and attributed the accident to the bad state of the bushes into which the fan fitted.

The defenders adduced several mill-managers and others, who stated that, in their opinion, the accident could not have happened in the way described by the pursuer, and that unless the pursuer had been tampering with the belt it could not have caught his arm.

The Sheriff-substitute (Dove Wilson), on 4th December 1874, pronounced this interlocutor:—"Finds that at the time the injury libelled was sustained the pursuer was a young person within the meaning of the Factory Acts, and was employed in breach of their provisions by the defenders at night work, and at unfenced machinery: Finds that the injury happened in consequence of his being so employed: Finds that the defenders have failed to prove that the pursuer was so employed through his own fault, or that his own negligence contributed to the accident: Finds therefore that the defenders are liable in damages; modifies the same to the sum of £100 sterling, and decerns for said sum against the defenders: Finds the defenders liable in expenses."

The defenders appealed to the Sheriff (Guthrie Smith), who, on 16th February 1875, pronounced this interlocutor:—"Sustains the appeal; recalls the interlocutor appealed against: Finds that it is not proved that the injuries of the minor pursuer were caused by any want of fencing or

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other defect in the machine in question for which the defenders are responsible; and in respect it appears that they had used all due diligence to enforce the provisions of the Factory Acts, they are not liable to the pursuer or his father for his being employed at night work under eighteen years of age, contrary to the requirements of said Acts: Therefore assoilzies the defenders from the conclusions of the summons: Finds the pursuer liable in expenses," &c.*

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* "NOTE.—With the consent of the parties the Sheriff went to the defenders' mill to see the machine at which the accident occurred. It is a teaser of the description usually found in woollen factories, standing by itself in a part of the building specially devoted to this kind of work, with abundance of room for the person in charge to move about. In accordance with the usual arrangement, the body of the machine, which is its most dangerous part, is all boxed in, and a slide opens and shuts at the end where it is fed and discharged.

"The fan which blows away the dust from the wool in the process of teasing is driven by a belt at the side, passing round the drum; and it was this belt which caused the accident. The pursuer says he had been oiling the fan and was in the act of returning when the belt sprang, caught his right arm, and before he knew where he was had it round the drum. He is the only witness to the occurrence, and it is not easy to understand how the accident could have happened in the way described; for, first, there was no need for his being so close to it; and, second, the strap of the upper pulley which passes round the axle of the drum and is on the outside of the fan strap, must necessarily have acted as a fence in keeping the latter in its place in the event of its slipping off. The more likely explanation is, that the strap having slipped, the pursuer was trying to put it on, without first stopping the machine, which it is admitted was contrary to orders, and indeed would be a most dangerous proceeding. If this is how it happened, there is plainly an end of the case; for, all question of fencing apart, a master is not liable to a workman himself for the consequences of his own folly, at least when he possesses the intelligence which may be supposed to be possessed by a lad of eighteen. While the Factory Acts make fencing in certain circumstances a matter of statutory obligation, the omission of which both subjects the offender to penalties, and entitles the injured person to redress, it has been laid down in each of the three kingdoms 'that the action must be subject to the rules of common law, and one of these is, that a want of ordinary care, or wilful misconduct on the part of the plaintiff, is an answer to the claim,'—Caswell v. Worth, January 18, 1856, 25 L. J. Q. B. 121, and 5 El. and Bl. 849; Traills v. Small and Boase, July 4, 1873, 11 Macph. 888, 45 Scot. Jur. 540, and an Irish case, M'Cracken v. Dargan, 1 Ir. Jurist, N. S. 404.

"The pursuer, however, denies that he was touching the strap at the time, and a large body of evidence has been led on the question whether anything could have been done by the defenders to prevent such an occurrence as the pursuer says did happen on the occasion. As regards the mill-gearing, meaning thereby the train of toothed wheels at the upper part of the side of the machine, any further protection was evidently unnecessary, because they are practically out of anybody's reach; and although, no doubt, the term as defined by the Act of 1844, section 73, must be held to include every 'wheel, drum, or pulley' by which motion is communicated from the moving power to the different parts of the machinery, two observations fall to be made on the provisions of the statute relating to fencing. In the first place, these parts of the gearing only now require to be fenced 'with which children, young persons, and women are liable to come in contact either in passing or in their ordinary occupation in the factory'—19 and 20 Vict. c. 38, sec. 4. In the second place, so far as the Sheriff is aware, the term has never been held to apply to belting. That is specially dealt with in the Act, the inspector being empowered to direct any driving strap or band which, in his opinion, is dangerous, to be fenced, and in the event of a difference of opinion between him and the mill-owner, whether it is necessary and possible to do so, the question is referred to arbitration—7 and

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The pursuer appealed to the Court of Session.

In the course of the argument for him it was maintained that, even if it were held to be proved that the pursuer had said that he was eighteen, there was not necessarily any deception on his part, as in popular language that might mean that he was in his eighteenth year.

At advising,—

LORD ORMIDALE.—The decision of this case turns very much on the view that may be taken of the bearing and effect in some particulars of the Factory Acts.

It is proved that the pursuer was under eighteen years of age when he entered the defender's employment and was set to work by them in their mills, and it is not disputed that the accident occurred within the time defined by the Factory Acts as night work.

The first question raised by the defenders is, whether they were so deceived by the pursuer in regard to his age at the time they engaged him as to deprive him of the benefit of the pleas which might be otherwise available to him

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8 Vict. c. 15, sections 43, 60, and 19 and 20 Vict. c. 38, section 6. Now, it is abundantly proved that the risk of injury from young persons coming in contact with the strap in question never occurred to any one; that in similar establishments it is not customary to have any special protection at this part of the machine, and no instance is mentioned of any factory inspector having deemed it his duty to interfere. Upon these facts the Sheriff has no difficulty in holding that the guarding of the fan belt is not made matter of statutory obligation; and as regards the alleged liability of the belt to slip off from the looseness of the bushes, the pursuer has entirely failed to shew that any defects which may have arisen from wear and tear were directly connected with the accident.

"The remaining ground of action pleaded for the pursuer is, that the accident having happened at night the defenders took the risk of it, because the pursuer, being under eighteen, ought not to have been allowed into the mill after six P.M. It seems to be a sufficient answer that he was employed as an adult, at an adult's wages, and in the belief that he was an adult in point of fact. The pursuer came asking night work from another work where he had been working on the night shift. Young persons employed by day get from 7s. to 10s. a-week, adults by night 14s. and upwards; and the pursuer received 15s. While, therefore, his motive for passing himself off as being four or five months older than he really was is intelligible, it is impossible to understand what object the defenders had to gain by wilfully breaking the law. Mr Brooks says, that he expressly asked him his age before he was engaged. This the pursuer denies; but it is not disputed that the question was repeated in a different but much more formal manner sometime after he had obtained admission to the defenders' mill. Having reason to suspect that some of the night hands were under age they caused a general muster to be made, and the whole being passed through Mr Crombie's room, every one about whose age there could be a doubt was expressly asked the question. That the examination was particular is proved by the fact that it resulted in a number of dismissals, including the pursuer's companion, Ross, who succeeded along with him in passing Brooks at the time of the engagement. At the above muster the pursuer again denies that he was asked his age, but if the question were not put in so many words he must have quite well understood the object of the proceeding, and that to be found out meant being turned out. A factory hand of eighteen is far too intelligent not to understand that. To give him damages for having successfully eluded detection on that occasion, notwithstanding that the defenders were doing their best to comply with the law, on the ground, forsooth, that 'young persons' like him required protection against themselves, and that this was the object of the factory legislation, would be bringing the matter to a point which is in violation of the plainest equity, and never could have been contemplated."

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under the Factory Acts. After a careful examination of the evidence I have come to the conclusion that there is no ground for such a defence. The pursuer denies that he was asked his age when he was engaged, and in this he is corroborated by the witnesses Benjamin Ross and John Mitchell, who were present on the occasion. On the other hand, Mr Brooks, the defenders' manager, makes this statement,—"I remember pursuer applying for employment. He and Benjamin Ross came to my house and asked for night work. I asked their age. They smiled, and said eighteen." What was this but practically saying, "Oh, we had better say eighteen, and let there be no more about it." Mr John Crombie junior, one of the defenders, also says that, having some suspicion as to the age of those employed in the night shift, he directed the young men to be paraded before him for inspection. They were accordingly passed in review before him, but he cannot undertake to say whether the pursuer was one of them or not. Brooks, however, says he was there, that Mr Crombie "asked Gibb if he was eighteen, and pursuer said yes, and he said that would do." Such is the whole evidence founded on by the defenders in support of their plea of deception by the pursuer. But, keeping in view the testimony of the witnesses Ross and Mitchell, I cannot hold that there is sufficient evidence to establish that there was any deception at all. And if I am correct in this, it is unnecessary to deal with the question whether, if it had been otherwise, a good plea might not have arisen to the defenders. The spirit as well as the terms of the statutes appear to import an absolute prohibition against employment of children and persons under eighteen years of age at night work in factories of a certain description. I fear that if it were held enough to exoner the owners or occupiers of such factories for a young person seeking employment to say with a smile that he was above eighteen, the object of the Acts would be entirely defeated. But it is sufficient for the present case that it is not proved that any proper inquiry was made by the defenders as to the pursuer's age, or that he practised any deceit upon them in regard to that matter.

And that it was illegal for the defenders to employ the pursuer, a young person under eighteen years of age, at night work, cannot be disputed. This itself gives the pursuer a claim to damages although there was nothing more in the case. For the defenders' plea, that they had made sufficient arrangements for keeping the machinery in good order, and given the command of all necessary materials for that purpose to properly qualified persons, cannot avail them, if I am right in holding that they had no right to employ the pursuer at all at night work in their mill.

The defenders committed another violation of the statutes in not having the machinery, where the pursuer was at work, and had occasion to pass, duly fenced, as required by the Acts. It rather appears that the belt which was the immediate cause of the injury did not require to be fenced. But the fan shaft and lower pulley did require to be fenced, and if they had been fenced the fair inference is that the belt would not have detached itself, and the accident would not have occurred.

Upon these two grounds, therefore, the employment of the pursuer at night work at all, and the non-fencing of the machine at which he was set to work, it appears to me that the defenders are liable in reparation to him.

The defence which the Sheriff has apparently given effect to is contributory fault. But, first, I can see no evidence of that, it being mere conjecture on the part of the learned Sheriff that the lad had been tampering with the strap.

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And, secondly, although I assume that any person, young or old, provided he is of sufficient intelligence to know what he is about, who wantonly and wilfully thrusts his arm into machinery, is not entitled to damages, there is no evidence whatever in the present case that the pursuer so acted. Such a defence would require to be well supported by the facts before it could be entertained against the plain policy of the Factory Acts, which were intended to afford a protection to young persons against the carelessness and inexperience incidental to their age. In other words, the object of these Acts is to protect children and young persons against themselves.

On the grounds I have now adverted to, I am of opinion that the interlocutor of the Sheriff ought to be recalled, and that of the Sheriff-substitute restored. With regard to the amount of damages, it was not suggested that the sum fixed by the Sheriff-substitute is excessive, and I see no reason for thinking that it is.

Lord Neaves.—I concur. I do not say that under certain circumstances a defence may not arise that the employer has been so excusably deceived as to the age of a young person, by a forged certificate of birth for instance, as to make it right that he should be exempt from liability for violating the law, which he had no intention of doing. But where the fact is proved that the accident happened to a person under eighteen during the night shift, it lies upon the employer to justify what he did, and this on clear grounds. I do not think that has been done here. The examination as to age was so cursory as to suggest a doubt whether it was not gone through as a matter of form. At all events, it was not such as to convince me that every care was taken which ought to have been taken.

The object of these Factory Acts is to protect young persons against themselves. There is a strong temptation to overstate their age when the difference in wages is so great, and the employer must be on his guard to prevent that temptation from operating.

Although I do not deny that there may be contributory misconduct on the part of a young person, which will disentitle him from recovering, I do not think that contributory negligence is a sufficient defence in such a case as the present. The object of the statute is to prevent the bodies and minds of young persons from being kept too long on the stretch. I cannot therefore make them liable for negligence which may be the result of that over tension of the faculties which it is the object of the statute to prevent.

There is no proof here of any such strong deception as would have deceived a careful and conscientious inquirer; and there is nothing else in the case sufficient to exonerate the defenders.

Lord Gifford concurred.

Lord Justice-Clerk.—I concur. I am not prepared to say—and I understand all your Lordships made the same reservation—that if a lad of seventeen and a-half fraudulently induces his employers, after due inquiry, to believe that he is over eighteen, he can recover. Here there is no such case. The employers were put on their inquiry, and were guilty of gross negligence in not ascertaining his age.

On the point whether contributory negligence would be sufficient to bar the claim, I also wish to reserve my opinion. It is clear that no contributory negligence has been proved.

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THIS interlocutor was pronounced:—"Sustain the appeal: Find that at the time the injury complained of was sustained the appellant, William Gibb (pursuer), was a young person within the meaning of the Factory Acts, and was employed in breach of their provisions by the respondents (defenders) at night work, and at unfenced machinery: Find that the injury happened in consequence of his being so employed: Find that the respondents have failed to prove that the appellant was so employed through his own fault, or that his own misconduct or negligence contributed to the accident: Find, therefore, that the respondents are liable in damages, and modify the same to the sum of £100 sterling: Therefore recall the interlocutor of the Sheriff appealed against, and decern against the respondents for payment to the appellant and his administrator-in-law of the said sum of £100: Find the respondents liable in expenses in this Court and in the Sheriff-court," &c.

WILLIAM OFFICER, S.S.C.—ADAM & SANG, W.S.—Agents.

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REV. ROBERT SHAW HUTTON AND OTHERS (the Minister, Kirk-Session, and Session-Clerk of the Parish of Cambusnethan), Pursuers.—*D.-F. Clark—Balfour.*
REV. ALEXANDER HARPER AND OTHERS (the Minister, Kirk-Session, and Session-Clerk of the *Quoad Sacra* Parish of Wishaw), Defenders.—*Sol.-Gen. Watson—Gloag.*

Church—Parish Quoad Sacra—Marriage—Proclamation of Banns.—Held that the proclamation of banns was prescribed by the Church as a preliminary to the celebration of marriage *in facie ecclesiæ*, and that such proclamation was one of the functions and duties of the office of minister of a church erected into a parish church under the Act 7 and 8 Vict. c. 44, for the district attached thereto as a parish *quoad sacra*.

2D DIVISION, with three consulted Judges. Ld. Mackenzie.

THE question raised in this action was whether the minister and kirk-session of a *quoad sacra* parish, erected under the provisions contained in the 8th section of the statute 7 and 8 Victoria, chapter 44, were entitled to make proclamations of banns of marriages within such church for the district designated and attached thereto.

The present action was raised by the Rev. R. S. Hutton, the minister of the parish of Cambusnethan, and other members of the kirk-session of that parish, and the session-clerk, "against the Rev. Alexander Harper, M.A., minister of the *quoad sacra* parish of Wishaw, and others, constituting or claiming to constitute the kirk-session of the said *quoad sacra* parish of Wishaw, and John Mackenzie, distiller at Wishaw, clerk to the kirk-session of the said *quoad sacra* parish of Wishaw," concluding for declarator "that the defenders are not, and that none of them is entitled to make proclamations of banns of marriages in the church of the *quoad sacra* parish of Wishaw, or to cause or permit proclamations of banns of marriages to be made in the said church, or to demand, exact, or receive dues or fees in respect of such proclamations made in the said church, and that proclamations of the banns of marriages made in the church of the said *quoad sacra* parish of Wishaw have not been and are not legal or valid, but are on the contrary illegal and invalid;" and to have the defenders interdicted "from making proclamations of banns of marriages in the church of the said *quoad sacra* parish of Wishaw, and from causing or permitting proclamations of the banns of marriages to be

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made in the said church, as also from demanding, exacting, or receiving dues or fees in respect of proclamations of banns of marriages made or to be made in the said church."

The pursuers stated, in support of these conclusions—(Cond. 1) "In the year 1855 a district of the parish of Cambusnethan was erected into a parish *quoad sacra tantum*, under the name of the Church and Parish of Wishaw, in virtue of the provisions of the Act 7th and 8th Vict. cap. 44. The defender the Rev. Alexander Harper is the minister; the defender John Mackenzie is the session-clerk; and the other defenders are, along with the said Rev. Alexander Harper, the constituent members of the kirk-session of the said *quoad sacra* parish." (Cond. 4) "The defender John Mackenzie has recently, by the instructions, as the pursuers believe and aver, or at least with the sanction and assent of the other defenders, begun to make proclamations of the banns of marriages in the church of the said *quoad sacra* parish of Wishaw, and to exact and receive dues or fees for so doing." (Cond. 5) "The making of such proclamations in the church of the said *quoad sacra* parish, and the exaction and receipt of fees therefor, were and are illegal, incompetent, and unauthorised, and were and are to the loss and injury of the pursuers, or at least of the said William Grierson as session-clerk foresaid, as well as of the lieges who are induced to rely upon the said illegal and inept proclamations as valid proclamations of the banns of their marriages. The proclamations of banns which have been and are being made in the church of the said *quoad sacra* parish would otherwise have been and would be made in the parish church of Cambusnethan, and the pursuers, or at least the said William Grierson as session-clerk, would have received and would receive dues and fees in respect thereof, of which they have been and are, or he has been, is, and will be deprived by the said proclamations being made in the church of the said *quoad sacra* parish."

The pursuers pleaded;—The defenders are not entitled to make proclamations of banns of marriages in the church of the said *quoad sacra* parish of Wishaw, or to permit such proclamations to be made in the said church, and in respect that they have been and are making such proclamations and exacting such dues or fees, the pursuers are entitled to have decree of declarator and interdict as concluded for.

The defenders admitted the 1st and 4th articles of the condescendence, and pleaded;—(1) No jurisdiction, in respect the proclamation of banns is not a civil but an ecclesiastical institution. (2) The pursuers have not set forth, and do not possess any right or title to insist in the present action. (3) *Separatim*, The defenders are entitled to absolvitor, in respect the parish of Wishaw was regularly erected as a *quoad sacra* parish in virtue of the Act 7 and 8 Vict. cap. 44; and the defenders, as the kirk-session thereof, are entitled to continue the practice of proclamations of banns in the church of said parish as hitherto.

The Lord Ordinary, on 30th January 1875, pronounced this interlocutor:—"Finds, declares, and decerns that the defenders are not entitled to make proclamations of banns of marriages in the church of the *quoad sacra* parish of Wishaw, or to cause or permit proclamations of banns of marriages to be made in the said church, or to demand, exact, or receive dues or fees in respect of such proclamations made in the said church, and that proclamations of the banns of marriages in the church of the said *quoad sacra* parish of Wishaw are not legal or valid, but are, on the contrary, illegal and invalid: Interdicts, prohibits, and discharges the defenders in terms of the conclusion of interdict, and decerns," &c.*

* "NOTE.— . . . . Although publication of banns was first introduced by

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the Lateran Council of 1216, and was afterwards confirmed by the canons of our Provincial Councils in 1242 and 1269, it became, on the Reformation, part of the common law of Scotland. It is one of the requisites of a regular marriage, which is a civil contract. Since the Reformation publication of banns has had, as Lord Jeffrey remarks in the case of M'Donald v. Campbell, March 1836, Jurist, ix. p. 5, more of a civil than of a religious character. And although by the Act of Assembly 1638, sess. 23, c. 21, marriage was prohibited without proclamation of banns, 'except the presbyterie in some necessarie exigents dispense therewith,' yet the Presbyterian clergy, as Mr Erskine states (i. 6, 10), have not exercised such dispensation since the Revolution.

"Various provisions have been made by statute with reference to proclamation of banns. By the Act 1661, c. 34, all persons having their ordinary residences within this kingdom are prohibited from marrying others within England or Ireland, 'without proclamation of banns here in Scotland, and against the order and constitution of this Church or Kingdom,' under the penalties therein specified, one-half whereof belong to the Crown and the other half to the parish or parishes where the married parties resided, 'which pains, corporal and pecunial, shall no wayes be prejudicial to or derogat from the order and censures of the kirks to be inflicted against the delinquents.' By the Act 10 Anne, chapter 7, Episcopal ministers are empowered to celebrate the marriage of persons whose banns have been duly published three several Lord's-days in the Episcopal congregations which the two parties frequent, and in the churches to which they belong as parishioners, and the ministers of the parish churches are thereby obliged to publish the said banns; and by the statute 4 and 5 William IV., chapter 28, it is declared to be lawful to all persons in Scotland, after due proclamation of banns, there to be married by priests or ministers not of the Established Church, and also for such priests or ministers to celebrate marriages. It is thought that no valid change on the present law could be made by the General Assembly with reference to the proclamation of banns, and that such change could only be made by legislative enactment. Proclamation of banns must therefore be held to be much more of a civil than of a sacred character.

"The defenders maintained that it is provided by the statute 7 and 8 Victoria, chapter 44, section 8, that the ministers and elders of a *quoad sacra* parish shall 'have and enjoy the status and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland,' and that the power to proclaim banns is one of the rights and privileges of such parish ministers and elders. But the Lord Ordinary is of opinion that the defenders are mistaken in this. It is, he thinks, no part of a parish minister's or an elder's duty to make proclamation of banns. It is the duty of the session-clerk of the parish to do so, or to get this done by the precentor. The proper legal evidence of such proclamation is a certificate signed by the clerk of the kirk-session of the parish, and a certificate under his hands that the banns were duly published cannot be traversed by proof that all the three proclamations were made on the same day —(Ersk. i. 6, 10). The session-clerk and precentor are not *quoad sacra* officials. The proclamation is not done during divine service, but before it begins; and it is not, the Lord Ordinary thinks, a religious but a civil act. That the defenders attach an erroneous meaning to the words of the statute above quoted is shewn by the provisions of the 13th section of the statute, which empowers the Lords of Council and Session to erect a Gaelic church and congregation into a separate parish, 'although the members of such congregation be scattered, and no territorial district may be assigned to such parish exclusively,' and provides that it shall be lawful for the minister or ministers and elders of such parish 'to have and enjoy the status, all the powers, rights, and privileges of a parish minister or parish ministers and elders of the Church of Scotland.'

"Mr Erskine (ii. 10, 64) states that, 'by annexing *quoad sacra* is understood that the inhabitants of the annexed lands are, for their greater conveniency in attending divine service, brought under the pastoral care of the minister of the church to which they are annexed. But such annexation affects only the

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The case was appointed to be heard before seven Judges.*

Argued for the defenders;—(1) The object of proclamation of banns was by publishing to the parties' neighbours to guard against bigamous and incestuous marriages. Proclamation of banns, therefore, should be made in the church of the *quoad sacra* parish to which the inhabitants were enjoined to resort, and not in that of the original parish from which it had been disjoined. (2) The grounds of the Lord Ordinary's judgment were, first, that marriage was a civil contract; and, second, that it was not part of the duty of the minister, or the minister and kirk-session, to proclaim banns of marriage. Now, though marriage was a civil contract, the ceremonies connected with it were ecclesiastical ceremonies,—the

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inhabitants; the lands continue in all civil respects part of the old parish.' If this be a correct designation of the effect of erection of a parish *quoad sacra*, the claim of the defenders that they have a right to proclaim the banns of persons within the annexed district is inadmissible."

* The following are the principal Acts of Assembly and Acts of the Scots Parliament bearing on the question:—

Act of Assembly, sess. 23 and 24, December 17 and 18, 1838, article 21.—"Anent marriage without proclamation of bans, which being in use these years bygone hath produced many dangerous effects: The Assembly would discharge the same, conforme to the former Acts, except the presbyterie in some necessarie exigents dispense therewith."

Act of Assembly 1690, c. 6 (28th October).—"The Assembly recommends it to presbyteries to take notice of all ministers within their bounds, whether the late conforming incumbents or others, ... celebrating clandestine marriages without due proclamation of bans: and to censure them accordingly."

Act of Assembly 1690, c. 7 (29th October).—"That the celebration of marriage, without due proclamation of bans, according to order, three several Sabbaths in the respective parishes, be discharged; and that it be recommended to presbyteries to censure the contraveners."

Act of Assembly 1711, c. 5 (16th May).—"The General Assembly did, and hereby do appoint that the Acts of the General Assembly concerning proclamations of banns be duly observed, and that enquiry be made that the person desiring marriage be not within the forbidden degrees, and be single and free persons, that all concerned do consent."

Directory for Public Worship, 1645.—"The solemnisation of marriage" . . . "Before the solemnising of marriage between any persons their purpose of marriage shall be published by the minister three several Sabbath days in the congregation at the place or places of their most usual and constant abode respectively; and of this publication the minister who is to join them in marriage shall have sufficient testimony before he proceed to solemnise the marriage."

1661, c. 34.—"Our Sovereign Lord, and the Estates of this present Parliament, considering how necessar it is that no marriage be celebrat but according to the laudable order and constitution of this kirk, and by such persons as are by the authority of this kirk warranted to celebrat the same:" . . . . "Therefore his Majesty, with advice of his said Estates, statutes and ordains that whatsoever person or persons shall hereafter marry or procure themselves to be married in a clandestine and inorderly way, or by Jesuits, priests, or any other not authorised by this kirk, that they shall be imprisoned for three months, &c. Likeas his Majesty, with advice foresaid, prohibits and discharges all men and women, having both their ordinar residence within this kingdom, to get marriage to themselves with others within the kingdom of England or Ireland without proclamation of bannes here in Scotland, and against the order and constitution of this Church or Kingdom, under the pains following, viz., &c., which panes, corporal and pecunial, shall no ways be prejudicial to or derogat from the order and censures of the kirks to be inflicted against the delinquents."

See also 1672, c. 9; 1695, c. 12; 1698, c. 6; 10 Anne, c. 7; 4 and 5 Will. IV. c. 28.

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proclamation of banns was one of these ceremonies, and it was therefore the duty of the minister and the kirk-session to proclaim banns. (3) Even if proclamation of banns could be looked on as *inter civilia*, the erection of a parish *quoad sacra* carried with it the disjunction of all matters, sacred and civil, the administration of the poor-law and the right to teinds alone excepted. For instance, an applicant for admission to the poors-roll residing in a *quoad sacra* parish required to obtain the certificate of the minister and elders of that parish and not of those of the original parish.[1] The minister of a *quoad sacra* parish was compelled, like every other minister, to contribute to the Ministers' Widows' Fund.[2] A *quoad sacra* parish had its separate registrar of births, deaths, and marriages.[3] (4) But the case really depended upon the true view of the Act 7 and 8 Vict. c. 44, sec. 8.[4] The disjunction effected under that statute was something very different from anything there had been before. That Act was passed in consequence of the Act of Assembly of 1834, and of the Stewarton case.[5] It was vain to go back to prior authorities. They only referred to the law as existing in their day, not to what resulted from that Act. By it a parish erected *quoad sacra* became for every purpose of ecclesiastical and not merely sacred functions and jurisdictions the only parish to which its inhabitants belonged. Its minister and kirk-session were the only minister and kirk-session recognised within its limits. This was very different from the case of the intra-parochial churches erected under 5 Geo. IV. c. 90, and previous Acts. Disjunction and erection, under 7 and 8 Vict. c. 44, was just the erection of a new benefice and a new cure. For purposes of Church order and discipline the minister and kirk-session of the old parish could not interfere in the new. (5) But proclamation of banns was just part of the order and discipline of the Church.[6] All that the Legislature had done was to say in this matter the law of the Church shall be obeyed. Originally the rule as to publication of banns was one enacted by the Church itself. It was accepted by the Reformed Church from the Roman Catholic. It was only recognised by the civil power[7] as an existing rule of the Church which ought to have the support of the civil power. The Church, in requiring the proclamation of banns, was only carrying out her own ecclesiastical law. According to that law the duty of proclaiming banns is laid upon the minister and kirk-session of the parish, who have both the spiritual guidance of and ecclesiastical jurisdiction over the parishioners. The minister and kirk-session of a *quoad sacra* parish are by the Act 7 and 8 Vict. c. 44, placed in that position, and therefore it is not only their right but their duty to proclaim the banns of marriage of the inhabitants.

Argued for the respondents;—There could be no doubt that prior to the passing of the Act 7 and 8 Vict. c. 44, proclamation of banns required

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[1] Murrie v. M'Donald, Dec. 24, 1853, 16 D. 325, 26 Scot. Jur. 154; with which contrast Bell v. Bell, Dec. 10, 1840, 3 D. 204, 13 Scot. Jur. 81, which had reference to one of the parishes incompetently constituted under the Act 5 Geo. IV. c. 90, and the Act of Assembly of 1834.

[2] Grant v. Macintyre, July 14, 1849, 11 D. 1370, 21 Scot. Jur. 567; Cheyne v. Cook, June 20, 1863, 1 Macph. 963, 35 Scot. Jur. 661.

[3] 17 and 18 Vict. c. 80, Registration of Births, &c. Act, 1854, sec. 8.

[4] For 7 and 8 Vict. c. 44, sec. 8, see Lord President's opinion, p. 899.

[5] Cuninghame v. Presbytery of Irvine, Jan. 20, 1843, 5 D. 427, 15 Scot. Jur. 213; see also separate report.

[6] Ersk. Prin. i. 6, 5; Ersk. Inst. i. 6, 10; Bell's Prin., sec. 1510; Lord Advocate v. Ballantyne, March 14, 1859, 3 Irv. 352, 31 Scot. Jur. 387.

[7] 1661, c. 34; 1695, c. 12; 1698, c. 6; 10 Anne, c. 7; 4 and 5 Will. IV. c. 28.

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to be made in the church of the parish. The defenders required to establish the proposition that not only was proclamation of banns now competent to be made in the church of a *quoad sacra* parish, but also that the church of the *quoad sacra* parish had become the only place where proclamation of banns could legally be made for those residing within the *quoad sacra* district. In this question very much turned upon the legal category under which the proclamation of banns was to be brought. There could be no doubt that in Scotland marriage was a civil contract. Even in matters ecclesiastical, according to the ecclesiastical law of Scotland, marriage did not hold the same place that it formerly did. It was no longer looked upon as a sacrament, but was regarded by the Church as a purely civil contract, though a civil contract which should receive ecclesiastical benediction. In order to the contraction of a regular marriage the civil law had declared that the ceremony *in facie ecclesiæ* must be preceded by proclamation of banns. That was the civil ceremony which the law of the country required as precedent to the ecclesiastical ceremony, if the marriage was to be recognised as regular. Further, the proclamation must be made in the church of the parish which the civil law recognised, the parish *quoad civilia*. Although the proclamation of banns had been originally introduced by the Church it had long since, both by common law and statute, become essential to the contraction of a regular marriage. The civil law did not merely recognise, as was contended, that what the Church had done, in ordering proclamation of banns to be made, was legal and within its competency, but also ordained that such proclamation should be made, and enjoined, as a matter of civil enactment, what had previously been a mere order of the Church. If the civil law only meant to recognise the authority of the Church in this matter the result would be that the Church could alter or rescind what it had originally ordered. But after the passing of the Act 1661, c. 34, it was matter of the plainest inference that the clergy of the Church of Scotland were powerless to alter anything connected with the proclamation of banns. That Act said to the clergy,—"Henceforth proclamation of banns shall be a part of the civil law, and you shall be under a penalty if you conduct your ecclesiastical ceremony where it has been neglected."[1] It was not necessary to argue that a *quoad sacra* church was not in a sense the parish church of the persons resident within the *quoad sacra* district. But a *quoad sacra* church was not the parish church in the view of the Act 1661, c. 34. It was the church of the civil parish that the civil law looked to. The Act 7 and 8 Vict. c. 44, had two objects in view,—the first, to give the Court more ample powers than it already had for the division of extensive and populous parishes, and the erection of new parishes *quoad omnia*; the second, to give the Court power, which they had not under the Act 5 Geo. IV. c. 90, of attaching a district to a *quoad sacra* church, and disjoining that district *quoad sacra tantum* from the original parish. The distinction carefully maintained in the statute between the two cases of disjunction *quoad omnia* and disjunction *quoad sacra* shewed that it was the intention of the Legislature that, in the latter case, to all civil effects, the district disjoined *quoad sacra* was to remain part of the old civil parish. The *quoad sacra* parish was erected simply to enable the minister to exercise his sacred calling with the authority of a placed minister, and to give him a definite scope for his exertions, which he had not as the minister of a mere chapel-of-ease under 5 Geo. IV. c. 90, and previous Acts. It was not intended to make

[1] See Lord Jeffrey's opinion in M'Donald v. Campbell, March 1836, 9 Scot. Jur. 5.

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any change in the position of the parishioners in matters of civil regulation, such as proclamation of banns of marriage. Such a change was not to be inferred, but must be made matter of special and distinct legislative enactment. This was made the more clear by the terms used in the 13th section of the Act of 1844 as to the erection of Gaelic churches *quoad sacra* without any district being attached to them. The ministers and kirk-sessions, in the same terms as the ministers and kirk-sessions of *quoad sacra* parishes with a district attached, were declared to have the status, powers, rights, and privileges of parish ministers and kirk-sessions, yet it could hardly be contended that a Gaelic church so erected was the church in which members of the congregation were bound to have their banns of marriage proclaimed.

At advising,—

LORD PRESIDENT.—The question raised by this action is whether persons resident in the *quoad sacra* parish of Wishaw ought to have their banns proclaimed with a view to marriage in the parish church of Wishaw or in the parish church of Cambusnethan, out of which parish the *quoad sacra* parish of Wishaw has been erected.

Now, it seems to me, with reference to the statute of 1844, that the one is just as much a parish church as the other. That statute, to which it is as well to refer at once, enacts by section 8, "That if any person or persons shall, at his, her, or their expense, have built or shall have acquired, or shall have undertaken to build or acquire, a church, and shall have endowed or shall have undertaken to endow the same, it shall be competent for the Lords of Council and Session, acting in their capacity aforesaid of Commissioners for the Plantation of Kirks and Valuation of Teinds, ... to inquire into the circumstances, and to erect such church into a parish church in connection with the Church of Scotland." Now, in that part of the enactment there is nothing said about such church being *quoad sacra tantum*, or a church in any respect different from any other church. Then the section proceeds,—"And to mark out and designate a district to be attached thereto *quoad sacra*, and to disjoin such district *quoad sacra* from the parish or parishes to which the same or any part thereof may have belonged or been attached, and to erect such district into a parish *quoad sacra* in connection with the Church of Scotland, and it shall and may be lawful for the minister and elders of such parish to have and enjoy the status and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland."

By our decree of erection pronounced in the Teind Court we have here created a parish church in connection with the Church of Scotland, and a parish minister and elders forming a kirk-session, who are to enjoy in all respects the status, powers, rights, and privileges belonging to any other parish minister, and any other kirk-session in the Church of Scotland. But it is said that the persons resident in the district which is annexed to this church only *quoad sacra* must in regard to all civil effects be dealt with as still parishioners of the original parish from which the district itself has been disjoined. Of course that necessarily leads to an inquiry into what constitutes the erection of a parish *quoad sacra*; and that again renders it necessary to inquire what is a parish. This latter question takes us back to a remote period of history, for the parochial division of Scotland is unquestionably a matter of antiquity. Indeed I do not think it has been satisfactorily ascertained when it commenced. That it was entirely an

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ecclesiastical division, before the era of the Reformation, cannot, however, I think, be disputed.

The definition of a parish in the canon law (Ferraris Bib. Canon, *voce* Parochia) is a certain territorial district determined by the pope or the bishop, having a permanent rector, with the power of government and jurisdiction over the people within the district, and of administering to them the sacraments and other divine ordinances. The government and jurisdiction which make part of this definition are afterwards explained by the same authority when enumerating the essentialia of a parish—"Quarto requiritur ut unum solum, ac perpetuum rectorem seu parochum habeat, cum cura animarum, et potestate fori pœnitentialis ipsi soli competente, ita ut jure ordinario nullus alius sed solus ac unicus parochus praedictam habeat curam ac potestatem."

Before the Reformation therefore it is clear that the parochial division of the country was a purely ecclesiastical division, and that the parochial establishment was perfectly complete in itself without aid from the civil government. The patrimony of the kirk furnished the pecuniary means of sustaining and carrying on the whole parochial economy. The provision for the parochus or rector, for the maintenance of the ecclesiastical buildings, for the relief of the poor, and for the support of education, were all made by the Church itself out of its own ample revenues.

During this period of ecclesiastical history, therefore, there could not exist any distinction between those parts of the parochial economy which are now reckoned *inter civilia* and those which are reckoned *inter sacra*, because every parochial right and interest fell under the exclusive jurisdiction of the Church. But one of the results of the Reformation was that the patrimony of the Kirk was appropriated by the Crown, and disposed of by the Crown and by Parliament, and thus it became necessary for the Crown and Parliament to provide the means of carrying on the parochial economy. From this time accordingly ministers' stipends, and manses, and glebes, the relief of the poor, the establishment of parochial schools, and the maintenance of churches and churchyards, are provided by Act of Parliament, and all these parts of the ancient parochial economy are thenceforth naturally and even necessarily classed *inter civilia*. But if to the above be added the right of patronage, we shall, I think, have a complete catalogue of the parochial concerns which, after the Reformation, fell to be classed as *inter civilia*.

The parochial division of the country, though originally an ecclesiastical institution merely, has been found in practice very convenient for civil purposes also, and some things which have no connection with the ancient parochial economy have by statute received a sort of parochial character. Of these the most obvious example is afforded by the statutes providing for the maintenance of roads by statute-labour. But it is almost needless to say that this kind of legislation does not affect the question we are considering.

If I be right in the enumeration of the parochial concerns which after the Reformation came to be civil, as distinguished from sacred, it will not be very difficult to fix what remains of the parochial administration to be reckoned *inter sacra*.

That this must embrace the conduct and regulation of public worship, pastoral superintendence, the exercise of Church discipline, and infliction of Church censures, and the administration of the sacraments, will not admit of dispute. But the right and duty of a parish minister extends also to the administration of all

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religious ordinances to the people of his parish. The early liturgy or Book of Common Order of the Reformed Church of Scotland in every exemplar which I have seen, whether MSS. or printed, contains special directions for the manner of conducting the visitation of the sick, the burial of the dead, and the solemnisation of marriage, and in all these services I apprehend the minister is handling sacred things only, and not performing any statutory or civil duty.

If, therefore, the solemnisation of marriage be amongst those sacred things in the regulation of which the state does not interfere, then one would think that everything which was preliminary to that solemnisation should be *inter sacra* also. The preliminaries requisite in order to the proper solemnisation of a marriage *in facie ecclesiæ* are surely matter for the regulation of the Church, and it can hardly be disputed that what the Church requires as preliminary to one of her ceremonies is *inter sacra*, and beyond the interference of the civil law. Although the Reformed Church rejected the idea of marriage being one of the sacraments, it assumed from the first and always retained in its own hands the regulation of the preliminaries of the marriage ceremony, just as it assumed the regulation of the preliminaries of admission to the sacraments which it recognised. I cannot find any difference, so far as the regulation of the preliminaries went, between the ceremony of marriage and the sacraments. Nor is this surprising, for though the Reformers did not consider the ceremony of marriage as a sacrament, they did consider it a blessed ordinance, to be performed in the case of all persons entering into the marriage tie, and therefore to be decently performed by the Church only.

I had occasion, in the case of Ballantyne (March 14, 1859, 3 Irv. 352), to examine very carefully the history of the preliminaries of the marriage ceremony, and I think I succeeded in shewing that from the Reformation down to 1661 the proclamation of banns was left entirely in the hands of the Church. It was a matter of ancient institution. It was not altered in consequence of the Reformation. It has repeatedly been recognised by the Acts of the Church Courts. These ordinances require proclamation of banns as an essential precedent to marriage *in facie ecclesiæ*. When we come to the statutory enactments on the subject we see that the matter of proclamation of banns is not even mentioned, and all that is enforced by the civil power is a compliance with the ordinances of the Church. Such, accordingly, is the tenor of the statute 1661, c. 34, which inflicts penalties only in case of the inorderly celebration of marriage, or in case of its celebration by an unqualified person. This legislation, so far from interfering with the exclusive right of the Church to regulate the form of the ceremony, and its preliminaries, seems rather to recognise that exclusive right. I was, therefore, surprised, on reading the Lord Ordinary's note, to observe that he says that the proclamation of banns in not one of the rights or duties of the minister and elders of a parish, but that it is the duty of the session-clerk of the parish either to proclaim them himself or to have them proclaimed by the precentor. He adds that "the proper legal evidence of such proclamation is a certificate signed by the clerk of the kirk-session of the parish." That is perfectly true; but the certificate of the session-clerk is the proper legal evidence of the proclamation only because he is the servant, and, in this matter, the mouth-piece of the kirk-session and of the minister, with whom, and more especially with the latter, the matter is left by the enactments of the Church Courts on the subject. The minister is the sole person whose right and whose duty it is to make or cause to be made proper proclamation of banns. So at least it is enacted by a series

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of Acts of Assembly, for there is no civil statute regulating this matter. The session-clerk acts entirely as servant of the minister and kirk-session, and the notion of his making the proclamation, or instructing the precentor to make it, of his own right and responsibility, is an entirely new idea to my mind. The precentor has nothing more to do with the matter than any other member of the congregation; but, simply by reason of his exalted seat, he is generally a convenient mouth-piece. By whomsoever made, the proclamation is truly under the authority of the minister and kirk-session, and especially of the minister.

There are other statutes besides that of 1661, c. 34, dealing with pains and penalties to be incurred by those celebrating irregular marriages. Thus the Act 1695, c. 12, which confirms the previous statutes on the subject, deals not only with the irregular celebration of marriage, but also with the irregular baptism of children, and prohibits under penalties the performance of either right by "ministers now out of their churches." Now, it has never been supposed that because the administration of baptism is here made to a certain extent matter of civil regulation, that therefore this enactment was equivalent to an interference with the Church as to the conditions on which the sacrament of baptism was to be administered. And yet the argument in the present case as to the preliminaries of the rite of marriage seems to come up to that.

Again, the Act 10 Anne, c. 7, which permitted the clergy of the Episcopal communion to perform divine service, according to the forms of their Church, conferred on them the right not only to pray and preach, but to administer the sacraments, and marry, without incurring pains and penalties, but only provided the birth and baptism of children so baptised be registered, and "that no Episcopal minister or ministers residing within that part of the United Kingdom called Scotland presume to marry any persons but those whose banns have been duly published three several Lord's days in the Episcopal congregations which the two parties frequent, and in the churches to which they belong as parishioners by virtue of their residence, and that upon the same pains and punishments as are already inflicted by the laws of Scotland in cases of clandestine marriages; and the ministers of the parish churches are hereby obliged to publish the said banns; and in case of neglect or refusal it shall be sufficient to publish the said banns in any Episcopal congregation alone, any law, statute, or custom to the contrary notwithstanding." That is the only statutory enactment which specially requires proclamation of banns. But then it is to be observed that this is an act of toleration, and the Legislature were entitled to affix any conditions they pleased to the concessions thereby granted to persons not belonging to the Established Church. The Act of Queen Anne thus stands in instructive contrast to the statute which requires all the lieges to have their marriages celebrated according to the rules of the Church.

It is also worthy of notice that when this Act of Queen Anne requires the banns of Episcopalians to be published in the parish church it directs its injunction, not to the session-clerk, but to the minister, as the only person who can proclaim or order the proclamation of banns in the parish church.

It appears to me therefore that, in every aspect of the case, proclamation of banns is a matter purely ecclesiastical,—by which I mean not consistorial, but within the regulation and control of the Church as represented by her Courts, and particularly within the control of the minister of the parish.

If, then, a new church is erected, and made a parish church, and a district marked out and attached to it as a parish *quoad sacra*, and the persons resident

within that district are enjoined to resort to that church as their parish church, it certainly would be a very strange thing if that were not the church in which proclamation should be made of their banns of marriage.

Proclamation of banns is not essential to the constitution of the contract of marriage, but has been deemed necessary for decency and order as a preliminary to the Church ceremony. The Church having ordained that there shall be such preliminary, all that the state has said is, a marriage celebrated without this preliminary shall be held clandestine, and those concerned shall be liable to punishment.

A question has been suggested to this effect, if the matter of proclamation of banns is dependent on an order of the Church, and within the jurisdiction of her Courts, what would follow should the Church determine to dispense with this proclamation? The plain answer is, that a regulation of this kind, though originally of Church institution merely, may become so embedded in the customs of the country that it would not be within the power of the Church to dispense with it. I am not saying, however, that it is not within the power of the Church to regulate the practice as to proclamations. It might be found that the present mode of conducting the proclamation had become inexpedient, and that it could be better done in some other way. It would, I think, be within the power of the Church authorities to regulate that matter, and introduce such alterations as were thought advisable. All I do say is, that I do not think that the Church would have the power altogether to abrogate this practice, which, being an immemorial custom, has come to be recognised by the common law of the land.

For these reasons I am compelled to differ from the Lord Ordinary, and to advise that your Lordships sustain the defences.

LORD JUSTICE-CLERK.—We were anxious to have the opinion of your Lordships of the First Division not because we differed in opinion but because we felt that a question of such difficulty, and at the same time of such public interest and importance, should receive the most weighty and authoritative decision possible.

In the opinion delivered by your Lordship in the chair I entirely concur.

LORD NEAVES concurred.

LORD ARDMILLAN.—I have felt this case to be interesting, and attended with some, but not much, difficulty. The question is one which, in regard to the *quoad sacra* parish of Moneydie, I was called on to decide when Sheriff of Perthshire in 1852, and I have now arrived at the same conclusion as I did then—a conclusion in accordance with your Lordship's opinion. Marriage is undoubtedly a civil contract. But the constitution of the contract of marriage is distinct from the procedure by which the sanction of religion is given to the contract. That added religious sanction is appropriate, important, and becoming. But though necessary to the regularity it is not essential to the validity of the marriage, which remains, as Protestant Reformers have always strenuously proclaimed it, a civil contract.

Now, the proclamation of banns is a step of orderly procedure in the celebration of marriage by which religious sanction is given to the contract. It is intended to promote and secure the prior notice of intended marriage, and the

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becoming regularity of the celebration of marriage, but it does not affect its validity. It is not, I think, a step of civil procedure in the constitution of the marriage, but a step of discipline—a step in the orderly ecclesiastical procedure by which the Church gives sanction, seriousness, and solemnity to marriage as the most important and abiding of human contracts. If this view of the proclamation of banns is correct the result is that the banns may be lawfully and validly proclaimed in the *quoad sacra* church at Wishaw, and the interlocutor of the Lord Ordinary should be recalled and the interdict refused.

I shall not presume to add anything more, as I concur entirely in the opinion of your Lordship in the chair.

LORD ORMIDALE, LORD MURE, and LORD GIFFORD concurred.

THIS interlocutor was pronounced:—"The Lords of the Second Division having, along with three Judges of the First Division, heard counsel on the reclaiming note against Lord Mackenzie's interlocutor of 30th January 1875, in conformity with the unanimous opinion of the seven Judges, recall the interlocutor complained of, sustain the defences, assoilzie the defenders from the whole conclusions of the summons, and find them entitled to expenses," &c.

RONALD, RITCHIE, & ELLIS, W.S.—W. & J. BURNESS, W.S.—Agents.

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WILLIAM LOGAN WHITE AND OTHERS (Raeburn's Trustees) AND OTHERS, Pursuers.—*Asher—Balfour.*
WILLIAM DIXON (Limited), Defenders.—*D.-F. Clark—Sol.-Gen. Watson—Moncreiff.*

Process—Proof—Jury Trial—Nuisance—River—6 *Geo. IV. cap.* 120 (*Judicature Act*, 1825), *sec.* 28—13 *and* 14 *Vict. cap.* 36 (*Court of Session Act*, 1850), *sec.* 49—29 *and* 30 *Vict. cap.* 112 (*Evidence Act*, 1866), *sec.* 4.—In an action of declarator and interdict brought to prevent the pollution of a river by water pumped from mineral workings the defence was (1) that the defenders had a prescriptive right to send water pumped from the mines into the stream, (2) that the water was the natural drainage of the lands, and (3) that the pursuers had no interest, as the stoppage of the works would not prevent the flow of water from the mines.

Held (*dub.* Lord Ormidale, *aff.* judgment of Lord Shand), that the pursuers' motion for a proof before the Lord Ordinary instead of a jury trial should be granted. Proof before answer allowed.

2D DIVISION.
Lord Shand.
I.

ON 6th January 1875 Raeburn's trustees, and other proprietors through whose land the river Almond flows, raised an action against the firm of William Dixon (Limited), who were the lessees of certain minerals in the neighbourhood of the river Almond and its tributaries, to have it declared that they were entitled to have the water of the river Almond, and one of its tributaries, the Breich Burn, so far as these streams flowed through their lands, in a pure and unpolluted state. They also concluded for interdict against the defenders discharging any noxious or impure water from their works into these streams.

The pursuers averred that until recently the Breich and Almond had been pure and unpolluted, but that the defenders, in working their pits "by means of pumps or other machinery, take large quantities of polluted water, or other impure matter or substance, from the said pits, and discharge them into or allow them to enter the said Breich River or Burn by means of cuts, ditches, or drains leading from the said pits," and that

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the water of the Breich and Almond into which it flowed became wholly unfit for primary purposes.

The defenders explained that the water complained of was pumped out by them in working the "slatey band" seam of ironstone which lay very near the surface and almost cropped out at the river Breich. They averred that this seam had been worked by former tenants before the year 1780, when it had been worked by pits in the bank above the river, "and the drainage water was discharged from a day level into the river." This working by day level had been continued by various tenants, until, owing to the extent of the operations, pumping had to be resorted to; but whenever the pumping ceased the water rose in the workings and flowed from the old levels into the Breich. The effect of stopping pumping would be, it was stated, to drown out all the seams in the mineral field until the water again rose to the old level and flowed thence into the Breich. They further averred that the water, as pumped, was exactly the same as used to flow from the old day levels, which would again flow into the river if the workings were abandoned, and the whole minerals, which were of great value, would be lost. The water, they said, was the natural drainage water of the ground, "not used in any manufacture, and uncontaminated by any artificial process."

The defenders pleaded, *inter alia*;—2. The pursuers are not entitled to stop the defenders from pumping the water from their pits and discharging it into the Breich, in respect that (1) the water so pumped is the natural drainage of the ground not used for any manufacture, or contaminated by any artificial process; (2) it is necessary for the working and winning of the minerals that the water should be so pumped and discharged; and (3) the defenders, and their predecessors and authors, have been in use so to pump and discharge the said water for a period greatly exceeding forty years, and are therefore entitled by prescription to continue to do so. 3. The pursuers have no interest to maintain the action, in respect that if the defenders' pumping were stopped the water in question would find its way into the Breich otherwise.

The pursuers moved for a proof before the Lord Ordinary, on the ground that the case was not suitable for a jury trial.

The defenders opposed the motion.

On 24th February 1875 the Lord Ordinary pronounced this interlocutor:—"Having heard counsel for the parties, and considered the cause, allows the parties a proof of their respective averments, and to the pursuer a conjunct probation; and appoints the proof to be taken before the Lord Ordinary on a day to be afterwards fixed."*

The defenders reclaimed, and argued;—There was nothing to distinguish this case from an ordinary question of nuisance, which would naturally go to a jury. The question of law as to the right of pumping the water could easily be disposed of by the Judge presiding at the trial.

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* "NOTE.—Had this case been one of the ordinary class of pollution of a stream produced by the refuse of some manufacture I would at once have ordered issues as desired by the defenders with a view to a trial by jury. It is, however, one in which legal questions of novelty and difficulty in reference to the rights of mineral proprietors to drain their workings and otherwise will in all likelihood arise.

"These questions are obviously such as should be determined after a fuller argument than can be given in the progress of a trial before a jury, and, if possible, in a simpler form than that of exceptions to the charge of the Judge; and as I think they will be more satisfactorily disposed of by the Court along with the facts, as these may at the same time be held proved, I have thought it right to allow a proof in terms of the pursuers' motion to that effect."

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Prescription was always pleaded in such cases. The Whitadder case,[1] recently in the other Division, was exactly in point, and that had gone to a jury. The difficulty of the case being for the Judge, a bill of exceptions provided the best and simplest form of review, if review were necessary.

Argued for the pursuers;—The case was a very complicated one, and would be far better tried before a Judge than a jury. The defenders pleaded "no interest to sue," so if the case went to a jury they would have to decide on title to sue. The case of M'Fie v. Stewart[2] was one in point, which had been sent to a Judge and not to a jury, because the questions were delicate.

At advising,—

LORD JUSTICE-CLERK.—The Lord Ordinary in this case thought that the point would be better brought out by a proof before answer than by a jury trial, and that because an important question of law underlies the case as to the rights of mineral tenants where the water complained of is not the subject of an *opus manufactum*. That is the real question which the action is brought to try. The other question to be expiscated, namely, prescriptive use, does not cover the whole ground of the case.

I do not think we should interfere with the Lord Ordinary's judgment.

LORD NEAVES.—I am of the same opinion. I should not, however, be prepared to take the Lord Ordinary's *ipse dixit* upon such a question. I think we ought to see what the special cause is which the parties objecting to a jury trial are prepared to shew.

Here, however, the Lord Ordinary, after hearing the matter fully discussed, has stated the grounds of his opinion, and we have also heard enough to shew that it is doubtful whether there is any pollution at all in the case, except what the defenders call the natural drainage of the ground. That view raises an important point of law, which seems to constitute the essence of the case. I do not say that the natural drainage of the ground is not pollution, merely because it is not the result of a manufacture, if it be produced or used in an unusual way. But it is not clear whether here there is as much or as little pollution as from ordinary rain water. I think a proof before answer is the proper course which the inquiry should follow.

LORD ORMIDALE.—Where, as here, a mere interlocutory judgment regarding a step of procedure, in the course of maturing a case for judgment, is brought under review, I am reluctant to differ from the Lord Ordinary and your Lordships; but I have no hesitation in saying that I would have preferred that the Lord Ordinary had not been deterred by the fear of important points of law arising from sending the case, in its ordinary and natural course, to a jury. Until recently causes of this nature were appropriated to jury trial, and the Court had no alternative but to send them to a jury. Now, however, the Lord Ordinary has it in his power, on cause shewn, to appoint a proof in such cases to be taken before himself. For my own part, I may say that I am not satisfied that any sufficient cause has been shewn in this case for withholding it from a jury, or indeed that any cause has been shewn that might not be urged in almost every case of the kind. As I have already indicated, however, I do not think

[1] Hume and Others v. Young, Trotter, and Co., Jan. 19, 1875, *supra*, p. 338.
[2] Jan. 24, 1872, 10 Macph. 408, 44 Scot. Jur. 190.

it would be advisable to differ from the rest of the Court in regard to an interlocutory judgment pronounced in the course of preparing the cause as to the best mode of getting at the merits.

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LORD GIFFORD.—I am of the same opinion. The rule as to the nature of the special cause which requires to be shewn is rather flexible. An action for damages for slander has been sent to proof before a Lord Ordinary, and the other Division has treated an insurance case in a similar way. As a matter of expediency in this case I think it would be better to have a proof before answer than to raise the questions of law at a jury trial.

THIS interlocutor was pronounced on 6th July :—" Refuse said note, and adhere to the interlocutor complained of; and find the reclaimer liable in expenses since the date of the Lord Ordinary's interlocutor, and remit," &c.

WADDELL & M'INTOSH, W.S.—WEBSTER & WILL, S.S.C.—Agents.

JANE GRAY, Pursuer and Respondent.—*Lancaster.*
GORDON MARSHALL, Defender and Appellant.—*J. P. B. Robertson.*

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July 8, 1875. Gray v. Marshall.

Parent and Child—Illegitimate Child—Proof of Paternity.—In an action of filiation and aliment brought by the mother of an illegitimate child, *held* that the pursuer's allegation of intercourse with the defender was not established by her own testimony, and by evidence of opportunity during the course of an acknowledged courtship, no suspicious circumstances being proved.

2D DIVISION. Sheriff of Linlithgow, Clackmannan, and Kinross. I.

THIS was an action raised in the Sheriff-court at Alloa by Jane Gray against Gordon Marshall, carter, for the aliment of an illegitimate child, of which the defender was alleged to be the father.

The facts sufficiently appear from the interlocutor of the Sheriff-substitute (W. B. Clark), which was as follows :—" Finds that the parties were acquainted with each other for two or three years, and that the defender for several months prior to July 1874 was courting the pursuer with a view to marriage, and that he visited her and frequently walked with her in the evenings in March, April, May, and June of that year on the roads about Dollar, where the parties resided, particularly on the Dollarbank road : Finds that the pursuer depones that in the months above mentioned the defender had carnal connection with her at the side of or near the said road : Finds that on a day in the beginning of July following the pursuer quarrelled with the defender in consequence of his having expressed dissatisfaction that she was encouraging the attentions of another man, and that she thereupon refused to see him again, and the parties never met thereafter till November, when she went specially and informed him of her pregnancy : Finds that the pursuer gave birth to an illegitimate male child on 4th February 1875, of which she depones that the defender is the father : Finds that there is no evidence of suspicious circumstances or improper familiarities on the part of the defender, and that his meetings with the pursuer were known to and recognised by the pursuer's family and acquaintances : Finds that the pursuer has failed to prove that the defender is the father of her said child : Therefore assoilzies him from the conclusions of the summons : Finds him entitled to expenses," &c.

The Sheriff (Monro) on appeal, recalled his Substitute's interlocutor, and found the paternity proved.*

* " NOTE.—The Sheriff does not regard the proof as affording ground for the

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The defender appealed to the Court of Session.

At advising,—

LORD JUSTICE-CLERK.—I have come to agree with the Sheriff-substitute, and am unable to adopt the general views on which the Sheriff has decided this case in favour of the pursuer.

The proof comes to nothing but this,—This girl and the defender were acknowledged lovers, in the habit of courting together as persons in that rank do, with the entire approbation and knowledge of the pursuer's parents. This is not the case of clandestine meetings, or meetings at unreasonable hours, or in a suspicious way. All that is proved is that when the pursuer got out in the evenings she and her acknowledged lover were in the habit of taking walks on the hillside of Dollar, and in the roads and lanes in the neighbourhood. That is all that is proved besides the oath of the pursuer.

The question is, whether mere opportunity afforded by honourable courtship amounts to sufficient corroboration of the pursuer's evidence. I should be very sorry to affirm any such proposition.

It appears that the pursuer and defender had a quarrel. This is not without significance. No intimation was made at that time to the defender of the pursuer's state, or until long afterwards.

In short, apart from the pursuer's evidence, there was nothing suspicious on the part of the defender.

LORD NEAVES.—I entirely concur in your Lordship's observations, and in the result at which you have arrived.

LORD ORMIDALE.—I concur. The case is well summed up in a single finding in the Sheriff-substitute's interlocutor:—"Finds that there is no evidence of suspicious circumstances or improper familiarities on the part of the defender, and that his meetings with the pursuer were known to and recognised by the pursuer's family and acquaintances."

LORD GIFFORD concurred.

THIS interlocutor was pronounced:—"Sustain the appeal: Find that the respondent (pursuer) has failed to prove that the appellant (defender) is the father of the respondent's child libelled: There-

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Sheriff-substitute's finding that the defender 'was courting the pursuer with a view to marriage.' The defender depones he was 'sweethearting with her,' and the pursuer depones that the defender was 'courting her.' These expressions do not necessarily imply a courtship with a view to marriage, and the word marriage is not mentioned in the proof, although some parties no doubt regarded the intimacy as a 'regular courtship.' Even if the defender had an intention of marrying the pursuer that goes a short way, in the Sheriff's opinion, to exclude a '*prælibatio matrimonii*,' unfortunately too common. The very frequent meetings of the parties for a year and a half, their evening walks, often certainly in the dark, on the roads about Dollar, and particularly in the little frequented road to Dollarbank, afforded abundant opportunities for sexual intercourse. The defender admits that he kissed the pursuer, and that he sometimes walked with her up the bank off the Dollarbank road, at a part where there was no fence; and the pursuer explains without contradiction that at the side of the road there are uneven places entirely out of view of the road, and adds that it was there she and the defender had connection. It was no doubt for dalliance of some kind that they left the road; no other explanation of it is offered. It is a case of *solus cum sola in loco suspecto*."

fore recall the judgment of the Sheriff appealed against, and assoilzie the appellant from the conclusions of the summons: Find the respondent liable in expenses in both Courts," &c. No. 153. July 8, 1875. Gray v. Marshall.

H. & A. INGLIS, W.S.—KEEGAN & WELSH, S.S.C.—Agents.

WILLIAM FINDLAY, Pursuer.—*Sol.-Gen. Watson—Trayner.*
JAMES MACKENZIE, Defender.—*D.-F. Clark—Balfour.*

No. 154. July 9, 1875. Findlay v. Mackenzie.

Testament—Destination—Conditional Institute—Heirs and Assignees.—In the construction of a will left by a husband, *held* that a disposition of his whole means and estate in favour of his wife, and "her heirs and assignees whomsoever," was intended to be contingent on the wife's survivance, and that her heirs were not named as conditional institutes.

Opinion (*per* Lord President) that as a general rule, where there is a *mortis causa* disposition to a person, his heirs and assignees, failing the disponee, his heirs will take.

1ST DIVISION. Ld. Craighill. M.

THIS was an action by William Findlay, Blantyre, against James Mackenzie of Glentore, concluding for reduction of the will of the deceased John Todd of Glenduffhill, dated 8th October 1872, on the grounds of incapacity and facility. The pursuer was a nephew and one of the representatives *in mobilibus* of the deceased. The defender was sole executor and universal legatee under the will sought to be reduced.

The defender stated as a preliminary defence that the deceased had executed another will on 27th April 1866, which excluded the pursuer's claims.

He pleaded;—(1) No title to sue. (2) The pursuer's title and interest to sue the present action are excluded by the said disposition and settlement of 27th April 1866.

The deed of 1866 was in these terms:—"I, John Todd, Esquire, of Glenduffhill, near Shettleston, being desirous to settle my affairs for the event of death, and considering that I have already fully provided for my daughter, Mrs Janet Todd or Mackenzie, wife of James Mackenzie, Esq., of Glentore, in an antenuptial contract of marriage entered into and executed by and between the said James Mackenzie and my said daughter with my advice and consent, and that it is my wish to provide farther for my wife, Mrs Helen Coats or Todd, in the event of her surviving me, over and above the provisions already conceived in her favour in an antenuptial contract of marriage between me and her, and in the foresaid marriage-contract of my said daughter,—Therefore I do hereby dispone, assign, and convey to and in favour of my said wife, Mrs Helen Coats or Todd, and her heirs and assignees whomsoever, heritably and irredeemably, my whole means and estate, heritable and moveable, real and personal, wherever situated or addebted, which shall belong and be addebted and owing to me at the time of my death, ... and I hereby nominate and appoint my said wife, Mrs Helen Coats or Todd, to be my sole executrix . . ."

Mrs Todd died in 1869. The provisions in her favour in her own and her daughter's marriage-contracts were so expressed as to be contingent on her survivance, as is explained in the opinion of Lord Deas.

The Lord Ordinary pronounced this interlocutor:—"Having heard parties' procurators on the preliminary defences, and more particularly on the first and second pleas in law for the defender, and considered the debate and whole process, finds that, according to the sound construction of the general disposition and settlement executed by the now deceased John Todd of Glenduffhill, of date 27th April 1866, referred to and founded on in the defences, the disposition of the testator's whole means

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and estate, heritable and moveable, real and personal, thereby granted to his 'wife, Mrs Helen Coats or Todd, and her heirs and assignees whomsoever,' was evacuated by her predecease: Therefore repels the said defences, and appoints the cause to be enrolled with a view to further procedure, and decerns."*

* "NOTE.— . . . . The Lord Ordinary . . . . has adopted and has given effect to the view presented by the pursuer, for the reasons which will now be briefly explained.

"Two things, however, may be premised. The first is, that both parties are agreed that the passage now to be quoted from Erskine's Institutes (b. iii. t. 9, s. 9) is good law. He there says that 'a legacy, where it is devised to a legatee and his executors, is not evacuated by the predecease of the legatee, but passes after the testator's decease to the legatee's executors, not by any right which these executors derive from the legatee to whom that legacy never belonged, he having died before it could have effect by the testator's death, but in their own right as conditional institutes in the legacy.' There is, the Lord Ordinary thinks, no room for distinction between a legacy which, as generally happens, is only a sum charged upon or payable out of the executry, and one which is a bequest or disposition of the whole moveable succession, and therefore on the present occasion the question is not whether Mr Todd could, by disponing his estate to his wife and her heirs and assignees, constitute these heirs conditional institutes, but whether this was done by the deed in which such words are used in the dispositive clause. The second of the things to be premised is, that as the deed in question is a *mortis causa* deed, the intention of the testator as that is evidenced, not by one part of the deed but by the deed as a whole, is the rule by which the present controversy must be determined. This, the Lord Ordinary understood, was not disputed at the debate; and, at anyrate, the point is one which, as he thinks, is firmly fixed. Taking, then, the deed as a whole, or, in other words, reading the dispositive clause in the light thrown upon it by the context, what is the result established?

"The dispositive clause mentions heirs and assignees, but this is not conclusive, otherwise the rule last mentioned would be displaced. Indeed, assignees, as was admitted by the counsel for the defender, could and would take nothing, Mrs Todd having predeceased the testator. They, whether deriving their right through an *inter vivos* or through a *mortis causa* deed, could claim nothing which was not vested in their author. This of itself shews that there may, in the dispositive clause, be a grant in form of words to representatives of a legatee, who, nevertheless, will be entitled to nothing unless the legatee shall acquire the succession. Heirs or executors undoubtedly occupy a more favoured position. They may take though the *nominatim* disponee or legatee died before the testator; but whether they shall or shall not take depends on the purpose for which they were introduced into the destination. Are they conditional institutes, or, in other words, independent legatees, called to the succession in case of the predecease of the *nominatim* legatee? Or are they mentioned merely by way of limitation? The context must be referred to before these questions can be answered.

"Turning, then, to the context, which has here to be consulted, the Lord Ordinary, in the first place, thinks that the purpose for which the general disposition and settlement of 1866 was granted, as explained by the testator in the clause introductory to that containing the disposition, leads almost necessarily to the conclusion that the disposition as granted was contingent on the survivance of Mrs Todd. The testator's wish was to increase the provisions already conferred on her 'in the event of her surviving' the testator. The 'therefore' with which the dispositive clause begins has for its antecedent this purpose, and it is hardly conceivable that the heirs of Mrs Todd, for whom, independently, no desire to provide was expressed, were to be free from the condition by which the right conceived in her favour was effected. In the second place, the clause of the deed in which the executor is nominated also shews that the heirs of Mrs Todd were not regarded by the testator as conditional institutes. Had they

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The defender reclaimed, and argued;—There was no doubt of the general rule of law that under such a destination as the present the heirs of the disponee were called as conditional institutes.[1] It was true that if the other parts of a testamentary deed disclosed a contrary intention that intention would be given effect to. But, *in dubio*, the dispositive clause must rule. And the inference drawn by the pursuer from the references to other provisions in the wife's favour, and from the appointment of the wife as sole executrix, was not justified. He knew his wife, but he could not tell who her heirs would be, and the law would confer on them the office of executors. Besides, the unnecessary and inappropriate mention of a cause of granting did not invalidate a legacy.[2]

The pursuer argued that the question was entirely one of intention, and that the testator's intention was clear that his wife's interest should be contingent on her survivance.

At advising,—

LORD DEAS.—The deceased John Todd, afterwards of Glenduffhill, was married to the also deceased Helen Coats, in 1844. On that occasion an antenuptial contract of marriage was executed between the spouses, to which James Todd, then of Glenduffhill, father of John, became a party, and conveyed the lands of Glenduffhill to the spouses in conjunct fee and liferent, but for the wife's liferent only, and to the children of the marriage in fee, but under the real burden of payment to the wife, if she survived her husband, of £15 for mournings, and a liferent annuity or jointure of £40, restrictable to £12 in the event of her second marriage, and also under the real burden of her liferent, in the event of her survivance, of the upper flat and garrets of the mansion-house of Glenduffhill, to be suitably furnished, and a convenient garden and the driving of her coals, but all to be forfeited in the event of her second marriage.

In June 1865 Mr Todd's daughter, Janet, who was the only surviving child of his then subsisting marriage with the said Helen Coats, was married to the defender, James Mackenzie. Mr Todd, on that occasion, became a party to an antenuptial marriage-contract between these spouses, whereby he conveyed his estate of Glenduffhill to "himself in liferent, for his liferent use allenarly, and to the said Janet Todd and the heirs of her body or her assignees and disponees, whom all failing, to the nearest heirs whomsoever of the said John Todd" himself; but under the reservations and burdens following,—1st, under reservation of the said John Todd's liferent allenarly; 2d, under the burden of implement-

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been so, they, in case of her predecease, would have been appointed, but they are neither named nor referred to in the clause containing the nomination. The testator nominates and appoints 'my said wife, Mrs Helen Coats or Todd, to be my sole executor.' This is all that was required, if she was the only person intended to take under the disposition, but it is not all which was required, and certainly was not all which was to be expected, if the will of the testator was that her heirs were to take in the event of her predeceasing the testator. Their omission from the nomination seems plainly to suggest that, though mentioned in the dispositive clause, they were mentioned because they might take through Mrs Todd, and not because the testator intended to make them independent legatees, or, in other words, conditional institutes.

"Numerous decisions were referred to at the debate, and these have been taken into consideration by the Lord Ordinary, but there is in truth little, if any, controversy between the parties as to the law of the case, and therefore he thinks it unnecessary to bring them here under review. All will be found collected on pp. 634-36 of the first volume of Mr M'Laren's Treatise on Wills."

[1] Ersk. 3, 9, 9; Boston v. Horseburgh, 1781, M. 8099. [2] Ersk., 3, 9, 8.

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ing the whole provisions exigible from the said lands in favour of Mrs Todd (Helen Coats), contained in the antenuptial contract of marriage of 1844, between her and the said John Todd, but excluding the liferent thereby provided to her of the upper flat and garrets of the old mansion-house; 3d, under the burden of the liferent use, in the event of her survivance, of the new mansion-house (erected by Mr Todd), offices and garden, in lieu of the upper flat and garrets and garden of the old mansion-house; 4th, under the burden of payment to Mrs Todd, if she survived her husband, of a liferent annuity of £20; and 5th, under reservation of Mr Todd's right to feu for buildings and to work minerals, &c. The destination of the estate of Glenduffhill in this deed became afterwards the subject of decision in this Court on 18th July 1874 (*ante*, vol. i. 1203.)

In the meantime, on 2d April 1866, Mr Todd executed the *mortis causa* deed now under consideration. That deed proceeds on the narrative that the granter had already fully provided for his daughter (Mrs Mackenzie) by the antenuptial contract executed with his advice and consent between her and James Mackenzie, "and that it is my wish to provide farther for my wife, Mrs Helen Coats or Todd, in the event of her surviving me, over and above the provisions already conceived in her favour in an antenuptial contract of marriage between me and her, and in the foresaid marriage-contract of my said daughter." On this narrative the deed proceeds,—"Therefore, I do hereby dispone, assign, and convey, to and in favour of my said wife, Mrs Helen Coats or Todd, and her heirs and assignees whomsoever, heritably and irredeemably, my whole means and estate, heritable and moveable," under the burden of his debts, funeral expenses, and such gifts or legacies as he might leave,—"and I hereby nominate and appoint my said wife, Mrs Helen Coats or Todd, to be my sole executrix, reserving power to alter, and dispensing with delivery in usual form."

Mrs Todd predeceased her husband, having died on 2d February 1869. Their daughter, Mrs Mackenzie, died without issue on 7th September 1872, having survived her mother, but predeceased her father. After the death of his wife and daughter Mr Todd executed two deeds, both dated 3d October 1872, the one conveying his estate of Glenduffhill to Mr Mackenzie, under burden of the granter's debts, and a variety of legacies, and the other conveying his personal estate to Mr Mackenzie. Mr Todd died on 7th June 1873, leaving a sister, Mrs Frame, several nieces, and a nephew by another sister, Mrs Findlay, and a nephew, James Todd, who was his heir-at-law, being the son of a deceased brother. The deed conveying Glenduffhill to Mr Mackenzie has been reduced on the ground of want of capacity, facility, and circumvention, and the present pursuer, as one of Mr Todd's next of kin, now seeks, on similar grounds, to reduce the deed which conveys the personal estate to Mr Mackenzie. The pursuer is met by the preliminary objection that the title and interest to reduce this last-mentioned deed is not in the pursuer, but in the heirs of Mrs Todd under Mr Todd's *mortis causa* deed of April 1866. These heirs,—who have hitherto made no claim,—are said to be her nephew, James Coats, in regard to heritable succession, and her brother James Coats, and two sisters, as regards moveable succession. It is not said, however, whether Mr Todd left any other heritable estate than the lands of Glenduffhill; but we know, from previous litigation, that the inventory of his personal estate was given up at £1277 odds, including a debt of £1068 odds due by Mr Mackenzie himself. The Lord Ordinary has repelled the defence that the pursuer's title and interest

are excluded by the deed of 1866, holding that Mrs Todd's heirs were not conditional institutes under that deed, but that the conveyance in favour of Mrs Todd was conditional on her surviving her husband, which she did not do; and in the result arrived at by the Lord Ordinary I entirely concur, although I do not adopt all the observations contained in his note.

As regards legacies, properly so called, the general rule is that they become void by the predecease of the legatee, because they are presumed to have been bequeathed from personal favour to the individual. Lord Stair accordingly states the rule thus:—"This is common to all legacies, that if the legatar die before the testator the legacy becomes void, and is not transmitted to the heirs and successors of the legatar"—(Stair, iii. 8, 21).

Mr Erskine, in the passage cited at the bar and quoted in the Lord Ordinary's note, states what is really an exception to or qualification of the general rule, and he states the reason of it, namely, that when the legacy is bequeathed to an individual and his executors, the executors take not as succeeding to the nominatim legatee but as conditional institutes by the direct and expressed will of the testator. That is quite a reasonable exception or qualification, because the natural way of bequeathing a legacy, properly so called, is to bequeath it *simpliciter* to the individual; and if the testator adds, "and his executors," or, what would be the same thing, "and his heirs," the fair inference is that he had extended his personal favour to these heirs or executors, and this inference has been so often given effect to that, although originally exceptional, it may now be said to be equally well established with the more general rule laid down by Lord Stair.

It is not, however, quite safe to regard the rules applicable to proper legacies, which are made a burden on the heritable or moveable succession, as equally applicable to a dispositive clause either of heritable or moveable estate. It may be either more or less difficult in the one case than in the other to construe the words "heirs and assignees" as importing a conditional institution. I do not go into that question. All I say is, that I am not prepared to concur in the Lord Ordinary's remark that there is no room for distinction between the language of a legacy and the language of a dispositive clause in a *mortis causa* deed. The last is the case we have to deal with here, and, in dealing with it, I go entirely upon two things,—in the first place, that this is a deed granted in implement of a natural obligation, and, in that respect, more analogous to deeds of provision by a parent in favour of a child than to any other class of deeds; and, in the second place, that, in its very terms, it imports a provision for the wife in the event of her survivance only.

In the case of Russel, 10th March 1769, M. 6372, a father granted a bond of provision in favour of his second son David, his heirs, executors, and assignees, payable at the first term after the death of the granter. David died before his father, and his sister Marion claimed the provision, but the successful argument was,—"Bonds of provision are granted in implement of the natural obligation, and as that ceaseth by the death of the child they are understood to fall." The observation was made that if David had left a child there might have been a *conjectura pietatis* in favour of that child (Hailes, p. 288), and this remark was given effect to in the subsequent case of Wood v. Aitchison, 26th June 1789, M. 13,043.

The law thus applicable to provisions to children has been long quite settled. Heirs and assignees are held to mean heirs and assignees of the child if the

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implied condition of survivance is implemented, but not otherwise. The provision is held to have been made from affection for the particular child, and to provide for the maintenance of that child after the death of the father. Much of the same reasoning is applicable to provisions for a widow. But, in the present case, it is not necessary to resort to presumptions, for the terms of the deed read in connection with the two deeds to which it refers, make the testator's meaning unmistakeable. All the provisions conferred by the marriage-contract between the testator and his wife, and all the provisions conferred on her in their daughter's contract of marriage, were expressly made conditional upon her survivance of her husband; and when the testator narrates these provisions, and his wish to provide farther for her, over and above these provisions, and then says, "therefore" he conveys to her his means and estate, so far as not already conveyed to his daughter, I cannot doubt that he meant the additional provisions to be equally conditional with the provisions to which they were added. The appointment of his wife to be his sole executrix points in the same direction. Of course a man may convey his means and estate by a *mortis causa* deed to his wife and her heirs, intending the heirs to be conditional institutes, just as he may convey them to anybody else. But here I think the testator neither meant to do so, nor actually did so.

The case of Boston, M. 8099, was altogether different. The conveyance by the testator in that case was in favour of his brother John, his heirs and assignees. That was not a conveyance in implement of what the law regards as a natural obligation. John married and had a son Alexander, who survived his father for several years in the lifetime of the testator, who nevertheless left the deed uncancelled and unrevoked, and the Court (altering the judgment of the Lord Ordinary) "found the disposition effectual to the heir of John." I have no fault to find with that decision. I rather think I should have concurred in it. But it is altogether different from the present case, in regard to which I have no hesitation in concurring in the result arrived at by the Lord Ordinary.

LORD ARDMILLAN concurred.

LORD MURE.—I also concur in the result which the Lord Ordinary has arrived at, and I do so upon the second ground which he has explained in the note to his interlocutor, viz. that as this is a *mortis causa* deed the words of the dispositive clause must be construed with reference to the intention of the testator. The question is, what is the meaning of the words "her heirs and assignees whomsoever" under the deed of April 1866? Do they place these parties in the position of conditional institutes, or are they merely substitutes? And the intention in this respect must, I apprehend, be gathered from the whole context of the deed, and not from the dispositive clause alone, especially when, as in this case, a special object and purpose is set out in the introductory narrative, which proceeds as follows:—"Considering that I have already fully provided for my daughter, ... and that it is my wish to provide farther for my wife, Mrs Helen Coats or Todd, in the event of her surviving me, over and above the provisions already conceived in her favour in an antenuptial contract of marriage between me and her, and in the foresaid marriage-contract of my said daughter,—Therefore I do hereby dispone, assign, and convey," &c. So that in construing the dispositive clause of this deed we are necessarily thrown back upon the narrative, in order to ascertain what the testator intended, and what

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had been already done in the marriage-contracts; and from the passages read by Lord Deas from these contracts it appears that all of the provisions in Mrs Todd's favour were made conditional upon the event of her survivance. Having regard, therefore, as well to the qualifying words of the deed, "in the event of her surviving me," as to the general object of the testator, it appears to me that there is here what is equivalent to an express declaration of intention that this provision was to be of the same description as those in the marriage-contract, and that the disposition of the estate was to be conditional upon the survivance of the wife, and only to take effect in that event, in supplement of provisions already made on her behalf.

I do not, therefore, think that in this case the words "heirs and assignees" must necessarily be construed as importing a conditional institution; for if they were so construed the result would be to make the testator do a different thing from what he has said in this deed that he intended to do.

In adhering to this judgment I do not think we can be said to go against the decision in the case of Boston, which was pronounced when the weight of judicial authority upon the bench was very great. But we have no report of the opinions of the Judges, and there was nothing, in my apprehension, in the words of the deed in that case similar to what occur here, and which appear to me to lead to a clear conclusion that it was not the testator's intention to make his wife's heirs and assignees conditional institutes.

LORD PRESIDENT.—As I concur with your Lordships, I should hardly have thought it necessary to offer any observations, but this is a case of considerable importance to the law, and I think it desirable to make it as clear as I can upon what grounds we arrive at the same conclusion as the Lord Ordinary, because I confess I cannot concur with some of the reasons and of the legal propositions contained in his Lordship's note.

I think the true construction of this deed is that the beneficial interest conferred upon Mrs Todd was contingent on her survivance. The dispositive clause is conceived in general, and I think I may say, common terms. It is a disposition to Mrs Todd, and "her heirs and assignees whomsoever," of the testator's whole means and estate, heritable and moveable. In the general case, that is an out and out conveyance, not only to the disponee, but, failing the disponee, to his or her heirs. The expression "heirs and assignees whomsoever" is very common in our conveyancing, but it certainly does not bear the same meaning in every kind of deed. In a disposition proceeding on a sale the conveyance is always to the disponee, his heirs and assignees whomsoever, but the meaning is nothing more than would have been imported by a disposition to the purchaser himself. The words are mere surplusage and matter of style. But it is otherwise where these words follow the name of the disponee in a *mortis causa* disposition, either of heritage, or of a mixed succession, or of moveables. The general rule is that, failing the disponee, his heirs will take. One suggestion has been made in the way of construing these words and taking off the presumption which arises from the meaning which they usually bear which I cannot adopt, namely, that the addition of the words "and assignees," rather takes off from the effect of naming heirs. But there is nothing inconsistent in a conveyance to a person and his heirs if he predeceases, and his assignees if he does not predecease and assigns his right. And so it has happened, that in a great number of cases where the right of the heirs has been sustained the words

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"and assignees" were adjected, and a competition arose between the assignees to whom the legatee had assigned his right before it vested, and the heir-at-law, and in all these the heir-at-law was preferred, simply because the party who had assigned had no power to do so. But that only shews that the addition of the word "assignees" does not militate against the right of the heir, failing the original disponee.

But while it is a general rule in construing the words "heirs and assignees whomsoever" in deeds of this description that, failing the disponee, the heir takes, that is only a general rule.

If the deed itself in its other parts, or the circumstances of the testator as disclosed in the deed, and other legitimate evidence, or the nature of the provision made, or the character of the relation in which the testator stands to the beneficiary shew a contrary intention, then we must construe these words differently.

Now, in this case, we are bound to take into consideration that the party intended to be benefited was the testator's wife, and we know it is a general rule that provisions in favour of wives to take effect after death are personal to the beneficiaries, and take effect only in the event of their survivance. It is also established here, by competent and legal evidence, that in previous provisions in Mrs Todd's favour everything depended on her survivance. The provisions contained in her own marriage-contract, and equally those in her favour contained in her daughter's marriage-contract, were only to take effect in the event of her becoming Mr Todd's widow, and there is an express declaration in the inductive clause of this deed that it is the testator's desire and purpose that the new provisions should be supplementary to those already made. It is true that he says that he is desirous to settle his affairs. That intention might account for more than a mere provision to his wife. But when he proceeds to say that having fully provided for his daughter he wishes further to provide for his wife, it is rather indicated that that was the only purpose of the deed. Then come the important words, "in the event of her surviving me, over and above the provisions already conceived in her favour in an antenuptial contract of marriage between me and her, and in the foresaid marriage-contract of my said daughter."

Now, I am far from saying that the inductive cause as expressed in the narrative, in other words, the motive as expressed in the narrative, and the dispositive clause, must always be commensurate. We know that that is not so in many deeds. But still, *in dubio*, it is quite fair to refer back to an expression of intention in the narrative, for the purpose of seeing what is probably meant by the words used in the dispositive clause.

If the words in the dispositive clause of this deed were in all cases *voces signatæ*, then I should say, both on principle and authority, that nothing could derogate from their effect except an implication so strong from other parts of the deed as to amount to express direction. But I do not think that these words in a deed of this description have a fixed technical meaning.

I do not attach much importance to the use of the word "therefore," because, if a testator says "considering that I have made such and such provisions, I hereby convey so and so," that is just equivalent to saying "therefore I convey." The word "therefore" does not connect the dispositive clause more closely than it would have been connected without it. I think, with Lord Deas, that the circumstance of this being a provision to a wife brings this case nearly within

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the principle of cases of bonds of provision to children. The object is very much of the same character. It is not to confer the succession on either a stranger or a member of the testator's family for the purpose of making an exhaustive settlement. The object is rather to make a suitable provision for a particular individual, and though the deed does contain a conveyance of the testator's entire means and estate we know that the great bulk of his estate was the property of Glenduffhill, otherwise settled, and that what he had beyond that was not very great.

The only respect in which the provision made by this deed differs from former provisions made in favour of the wife is, that the former provisions were only for her liferent, whereas this one is given absolutely.

And it rather seems to me that it is this difference which led the testator to use the words "heirs and assignees whomsoever," for these words are very often used, and in cases of a disposition of heritage by a seller to a purchaser are invariably used, for the purpose of expressing somewhat emphatically that the conveyance is absolute.

On these grounds I come to the same conclusion as the Lord Ordinary, but I think it will be necessary to recall his Lordship's interlocutor, for I certainly cannot concur in some of the grounds upon which he has rested his judgment.

THIS interlocutor was pronounced:—"Vary the said interlocutor by deleting the words 'evacuated by her predecease,' and substituting in place of them the words 'conditional on her surviving her husband'; *Quoad ultra* adhere," &c.

DUNCAN & BLACK, W.S.—DRUMMOND & REID, W.S.—Agents.

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THE CALEDONIAN RAILWAY COMPANY, Complainers.—*Sol.-Gen. Watson—R. Johnstone.*
THOMAS WATT AND MANDATARY, Respondents.—*D.-F. Clark—Balfour—J. P. B. Robertson.*
THOMAS BUCHAN AND ANOTHER, Respondents.

Superior and Vassal—Irritancy ob non solutum canonem—Railway—Compensation—Property—Lands Clauses Act (8 *Vict. c.* 19)—*Railway Clauses Act* (8 *and* 9 *Vict. c.* 33)—*Bankruptcy—Trustee—Real and Personal—Assignation.*—The proprietor of a piece of land bounded by the sea flood brought a statutory claim of compensation against a railway company on the ground that the land, which had been used for shipbuilding, had been injuriously affected by the formation of the railway upon the shore, whereby access to the sea was cut off. When the railway was formed the land belonged to a vassal of the claimant, paying a feu-duty of £150, who had been sequestrated. The trustee in the vassal's sequestration did not take up the feu, and the superior subsequently obtained decree of irritancy of the feu *ob non solutum canonem*. The trustee, on condition that the superior made no claim for feu-duties, assigned to the superior any claim of compensation competent to him. *Held* that the proprietor had no title to insist in the claim (1) in virtue of the decree of irritancy, because the claim of damages, if any, was personal to the vassal, and was vested in the trustee, or (2) in virtue of the assignation, as the trustee had no power to grant it.

Question, whether a claim for compensation on account of the value of land being injuriously affected by the operations of a railway cutting off its access from the sea was competent under the Lands Clauses and Railway Clauses Acts, either to the proprietor of the *dominium utile*, or to the superior for his interest.

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1st Division.
Ld. Mackenzie.
B.

In December 1873 Thomas Watt of New York intimated to the Caledonian Railway Company a claim for £7500, compensation under the Lands Clauses (Scotland) Act, 1845,[1] and the Railway Clauses Consolidation (Scotland) Act, 1845,[2] for injury done by the formation of the Dundee and Perth Railway to a piece of ground near Dundee, bounded by the sea flood, of which he was proprietor. The claim bore that the ground was "injuriously affected by reason of the formation and construction of the said railway along or over part of the shore of the river Tay *ex adverso* of the subjects above described, thereby depriving the same of their frontage to and access and egress by the sea and sea-shore, and rendering the same valueless for shipbuilding purposes, for which, previous to the construction of said railway, they were used, or for any other purpose requiring a sea frontage."

Watt named Mr T. Buchan as his arbiter.

The railway company named an arbiter under protest, and brought this suspension, praying for interdict against Watt and the arbiters from proceeding with the reference.

They pleaded, *inter alia ;*—1. The complainers are entitled to the interdict craved, in respect (1) the respondent, Mr Watt, has set forth in his said claim, and has, no sufficient title to insist therein.

The nature of Watt's title to claim compensation, as set forth by him, and the state of the facts, about which there were no dispute, was as follows :—

Watt became proprietor of the superiority of the subject by disposition from his grandfather in 1839. At that time John Calman was proprietor of the *dominium utile*, paying a feu-duty of £150. Calman was sequestrated in 1843, after which no feu-duty was paid. No title to the property was made up by the trustee in his sequestration.

In 1853 Watt obtained declarator of irritancy of the feu *ob non solutum canonem*, and in April 1873 the trustee on Calman's estate, with concurrence of the commissioners, assigned to Watt the compensation claims, whatever these might be, competent to him as trustee, against the railway company, on condition that Watt should relieve the estate of any claims for feu-duties or otherwise competent to him.

The Dundee and Perth Railway Act was passed in 1845, and the railway was opened in 1847.

The Lord Ordinary, on 13th January 1875, pronounced this interlocutor :—"Sustains the complainers' plea, that the respondent, Thomas Watt, has not set forth in his answers any sufficient title to insist in the claim for compensation against the complainers set forth in the closed record : Therefore sustains the reasons of suspension, suspends, prohibits, interdicts, and discharges in terms of the note of suspension and interdict : Declares the interdict formerly granted perpetual, and decerns."*

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[1] 8 Vict. c. 19. [2] 8 and 9 Vict. c. 33.

* "Note.—(After stating the facts)—The claim to compensation for any injury done to Calman's feu-subjects by the construction of the Dundee and Perth Railway vested in the party then interested in these lands in or prior to 1847. The party so interested was William Myles, the trustee on Calman's sequestrated estate. By the 'Bankruptcy (Scotland) Act, 1856,' section 82, the trustee is bound to 'manage, realise, and recover the estate belonging to the bankrupt, wherever situated, and convert the same into money,' according to the directions of the creditors, and, if no such directions are given, with the advice of the commissioners. By the 115th section of that statute it is declared competent to the trustee, with concurrence of a majority of the creditors, and of

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Watt reclaimed, and argued;—1. Irrespective of the assignation, he had (1) a claim to compensation as proprietor of the whole subject, by virtue of the decree of declarator. The irritancy was retroactive. The superior could not sue for past feu-duties. As it was retroactive against him it ought also to be so in his favour. When the feu-incumbrance was worked off by the decree he turned out to be the true owner. The trustee was never the owner, and only the true owner could sue. And it was not a personal debt, such as could have been sued for by an executor. (2) At all events, there was injury to Watt as superior. The ground no longer yielded him £150. The claim, as stated, included all claims of compensation competent to Watt as owner of the ground, though his claim for injury to the superiority was not separately stated. Supposing

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the heritable creditors, if any, and of the Accountant in Bankruptcy, 'to sell the heritable estate by private bargain, on such terms and conditions regarding price and otherwise as the trustee, with concurrence of those parties, may fix;' and by the 136th section it is provided that 'if on the lapse of twelve months from the date of the deliverance actually awarding sequestration it shall appear to the trustee and commissioners expedient to sell the heritable or moveable estates not disposed of, and any interest which the creditors have in the outstanding debts and consigned dividends, they shall fix a day for holding a meeting of the creditors, to take the same into consideration; and the trustee, besides advertising the same in the "Gazette," shall, fourteen days before the day appointed, send by post to each creditor claiming on the estate a notice of the time and place of the meeting, with a valuation of the estates, and of the outstanding and the consigned dividends; and if three-fourths in value of the creditors assembled at the meeting shall decide in favour of a sale, in whole or in lots, the trustee shall cause the estates, debts, and dividends to be sold by auction, after notice thereof, published at least one month previous to the sale, once in the "Gazette," and in such other newspapers as the creditors at the meeting shall appoint.'

"Mr Myles, as trustee on Calman's sequestrated estate, did not comply with any of the statutory directions, but entirely disregarded them, and granted, with concurrence of the commissioners on the estate, the above-mentioned assignation of 19th April 1873, in favour of the respondent. That assignation is a gratuitous deed. The obligation thereby imposed upon the respondent, Thomas Watt, as a condition of the assignation, that he should free and relieve the sequestrated estate of any claims for feu-duties, or otherwise, competent to him, against the same in any manner of way, does not make the deed onerous, because the superior, having taken decree of irritancy *ob non solutum canonem*, had no claim for payment of any feu-duties in arrear. It is not averred, and it does not appear, that he had any other claims against the sequestrated estate. If there was any claim for compensation (which is now said to amount to £7500) competent to the trustee against the Dundee and Perth Railway Company, or against the complainers as now in right of that company, it was the duty of the trustee to recover the same for behoof of the creditors in the sequestration, and he was not entitled gratuitously to assign such claim. He was not even entitled to sell the same, except in the way and manner pointed out in the 136th section of the Bankruptcy Act. A private onerous sale by the trustee and commissioners of a debt forming part of the sequestrated estate has been held illegal and ineffectual (Crichton v. Bell and Gillon, 11 Shaw, 781; Robertson v. Adam, 19 D. 502).

"The Lord Ordinary is therefore of opinion that the assignation by the trustee on Calman's sequestrated estate does not confer any title upon the respondent under which he can insist in his claim of £7500 for compensation against the complainers. He is also of opinion that the respondent, Thomas Watt, did not acquire any such title, in respect of the decree of declarator *ob non solutum canonem* obtained in 1853, or of the title in his favour following thereon."

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land had been taken, there was no doubt that the superior was entitled to compensation, and it made no difference that the ground was only "injuriously affected."[1] 2. The assignation was not an improper act on the part of the trustee, because it did not injure the bankrupt estate. The claim could not have been taken up for the bankrupt estate without incurring responsibility. Therefore the assignation was not void; and, assuming that the claim was personal and passed to the trustee the assignation gave Watt a formal title to it.

The complainers argued;—It was not admitted that operations of the kind in question founded any claim of damage.[2] But if there was a claim it was personal and was vested in the trustee.[3] The decree of irritancy could not annul that personal right belonging to the vassal, and the trustee had no power by his renunciation to vest in any third person a right which passed to him by the legal assignation of sequestration. The case of Heron v. Espie established the principle that such claims became personal as soon as they emerged. The proprietor could discharge such a claim by receipt, or convey it by assignation. It was attachable by arrestment, and would have been carried by a will.

At advising,—

LORD PRESIDENT.—This is a suspension and interdict by the Caledonian Railway Company for the purpose of stopping the respondent from proceeding with a claim of compensation before certain arbiters under the Railway and Lands Clauses Consolidation Acts.

The claim is for damage done to property near Dundee by the construction of the Dundee and Perth Railway. The railway was completed and opened in 1847, so that the alleged damage was sustained upwards of twenty-six years ago, and this is apparently the first time that any demand for compensation has been made. That, however, would not be in itself a sufficient reason for interfering with the respondent in prosecuting his claim if the proceeding is open to no other objection. The property is described in the claim as being ground "injuriously affected by reason of the formation and construction of the said railway along or over part of the shore of the river Tay *ex adverso* of the subjects above described, thereby depriving the same of their frontage to and access and egress by the sea and sea-shore, and rendering the same valueless for shipbuilding purposes, for which, previous to the construction of said railway, they were used, or for any other purpose requiring a sea frontage."

It is apparent from this statement, and from the claim otherwise, that no part of the property was taken by the company for the purposes of their works. The claim is in respect of damage to property injuriously affected. The competency of such a claim might raise a point of some difficulty, which it is not necessary at present to consider, because the only point raised by this reclaiming note is, whether, assuming such a claim to be competent to the owner of the property, the respondent is in the position of the owner who has sustained the damage, and, as such, is entitled to maintain the claim.

The first ground stated by the railway company in support of the suspension is, that the respondent "has set forth in his said claim, and has, no sufficient title to insist therein." The title set forth by the respondent is this,—He says

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[1] 8 Vict. c. 19, secs. 107, *et seq.*; 8 and 9 Vict. c. 33, secs. 6, 16.
[2] Ogilvy v. Caledonian Railway Co., March 30, 1856, 2 M'Q. 229.
[3] Heron v. Espie, June 3, 1856, 18 D. 917, 28 Scot. Jur. 420.

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that he is the heritable proprietor of the subject, in virtue of a disposition and settlement by his grandfather, conveying to him specially the *dominium directum* of the subject, the owner of the *dominium utile* being one John Calman, a ship-builder in Dundee, and the conveyance of the *dominium directum* giving to the claimant the right only to receive a feu-duty of £150, payable out of the subject by Calman. The claimant farther produces an instrument of sasine following on that disposition, and two other instruments, the first, a decree of declarator of irritancy *ob non solutum canonem* at his instance against John Calman, the feuar, dated 8th November 1853, and the other, an assignation to the claimant by the trustee on Calman's sequestrated estate, of any right or interest which he had in the claim now sought to be prosecuted. Now, it is necessary to keep the dates in view. The feu-right was constituted in 1838. Calman, the feuar, was sequestrated in 1843 before the railway was formed. The injury must have been done between 1845, the date of the Railway Act, and 1847, when the railway was opened. Let us assume that the injury was done in 1846. Now, at that time the feu still remained a separate estate altogether, independent of the *dominium directum*. No doubt the feuar was sequestrated, and not in a condition, we may suppose, to pay the feu-duty. But whether he was in arrear or not, there was no proceeding by the superior against him. The trustee in the sequestration naturally in the cirumstances did not take up the feu. The superior sometime afterwards, finding that the vassal was bankrupt, and that the trustee would not take up the feu, proceeded to bring an action of irritancy, and obtained decree on 8th November 1853. Now, it is to be observed that, previous to 1853, there was nothing in the person of the claimant or his predecessor except the *dominium directum*, and consequently the right to levy the feu-duty. The effect of the decree of declarator was to extinguish the feu, and so restore matters, in so far as they could be restored, to the same condition in which they were before the feu-right was given out. The *plenum dominium* was vested in the party holding previously the *dominium directum*.

Now, it is maintained that the consequence of that decree is, that the claim which had emerged to the feuar, or the trustee in his sequestration, in consequence of the operations of the railway, became vested in the superior. I cannot assent to that proposition. It seems to me that the claim, if there was one, which opened to the bankrupt in 1846, and passed to the trustee if he chose to take it up, was a claim for compensation in respect of injury done to the bankrupt's property. It was not a claim to have the property restored to its original condition. That was physically impossible. Therefore, there came in place of that a personal claim of damages,—a claim personal to the individual who happened to be owner of the estate at the time. If a person in that position sells the estate, he does not sell the claim. He may make it the subject of special assignation, but the two rights are separate and distinct. The property is heritable, and, as such, can only be conveyed by disposition in common form. The claim is personal, and may be conveyed by assignation and sold separately from the property. In like manner, when a judicial transference of the estate takes place, for example, an adjudication, it will not cover the personal claim, and will carry nothing but the heritable estate. If that be so, will it make any difference that an involuntary transfer has taken place, not following upon the diligence of creditors, but by some other means? Suppose the deteriorated estate is taken by the operation of some other Act of Parliament, would the promoters get anything but the ground? I apprehend not.

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They would not get the claim, because it is no part of the estate. Well, if the superior exercises his statutory right of taking decree of irritancy and gets back the estate, or, in other words, extinguishes the feu-right, that is, the real right which exists in the vassal, he cannot get anything except the *dominium utile* as it stands at the date of the decree. It is in vain to say that the superior takes back the estate which he gave the vassal. He can only take back what remains of it. Suppose the minerals on the estate had been wrought out he would have no claim for them, or even if money was owing to the vassal for minerals which had been wrought out the decree of irritancy would not carry that debt. In short, the superior takes back the *dominium utile* just as it stands, deteriorated it may be since the creation of the feu by the act of the vassal, the operation of law, or the effect of physical forces. That being so, the claimant did not get right to the claim of damages by the decree of declarator. But if he, as superior, acquired no right to the claim of damage, in whose person was it, always supposing it has any real existence? It belonged to the trustee in the sequestration. The trustee has conveyed it to the claimant by assignation. The Lord Ordinary has held that he was not entitled to do so, and that the assignation is void. In that conclusion I agree. If this was a valuable right the trustee had no right to dispose of it gratuitously, and so I think the claimant's contention is just as ill founded on that ground as it is upon the other. That seems to establish that, in so far as the alleged damage was done to the *dominium utile*, or, as the claimant would represent it, the *plenum dominium* as vested in his person, it is clear that he cannot maintain his claim.

It has been suggested, however, that he may have a claim in respect of the feu-duty, because if the ground is so deteriorated that it cannot be used for shipbuilding or other purposes which require access to the sea—then the security of the superior is diminished, if not altogether taken away, and I am not prepared to say that, assuming this kind of injury to be a proper subject for a statutory claim of compensation, the superior may not make such a claim as well as the vassal. But then we have no such claim before us. If we refuse this interdict the arbitration goes on, and it can only proceed on this claim. We have no power to amend it or alter it. It is a statutory claim, and must be disposed of by the arbiters as it stands, if the proceeding goes on. Therefore, this not being a claim for damage done to the superior, but a claim which I do not think belongs to the respondent at all, for damages to the vassal's estate, I agree with the judgment of the Lord Ordinary.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT adhered.

HOPE, MACKAY, & MANN, W.S.—H. & A. INGLIS, W.S.—Agents.

PETER BEATTIE (Inspector of Barony Parish), Pursuer.—*Burnet—R. V. Campbell.*
GEORGE GREIG (Inspector of City Parish, Edinburgh), Defender.—*Sol.-Gen. Watson—Black.*

No. 156.
July 9, 1875.
Beattie v. Greig.

1ST DIVISION. Lord Shand. B.

Poor—Poor-Law Amendment Act, 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 71—*Settlement—Desertion—Notice.*—Mary Goldie or Rivers, a native of Edinburgh City Parish, wife of John Rivers, a native of England, became chargeable as a pauper to Barony Parish on 5th February 1869, and received relief from that parish with short intervals till her death on 18th November 1871. Notice was given by the Barony Parish on 15th April 1869 to the Edinburgh inspector, who did not admit the claim, and a correspondence was kept up from time to time till the pauper's death. When she became chargeable she was deserted by her husband, but he came back in May 1869, and lived with her till his death on 19th January 1870. Notice was again given to Edinburgh on 24th August 1870.

In an action by the inspector of Barony Parish against the inspector of Edinburgh, as the parish of the pauper's birth, for repayment of the amount of her aliment during the whole time of her chargeability, *held* (1) that Edinburgh was liable for the period from February 1869 to May 1869, the pauper being at that time the deserted wife of a man who had no settlement in Scotland; (2) that Edinburgh was not liable for the period from May 1869 to January 1870, when the husband was at home; (3) that the pauper having ceased to be chargeable to Edinburgh on the return of her husband a fresh notice was necessary upon his death, and Edinburgh was not liable from the date of his death till 24th August 1870, the date of the second notice; (4) that Edinburgh was liable for the period from 24th August 1870 till the pauper's death.

MACKENZIE, INNES, & LOGAN, W.S.—D. CURROR, S.S.C.—Agents.

MRS JANE LORD OR BROCKIE AND ANOTHER, Petitioners.—*Burnet.*

No. 157.
July 10, 1875.
Brockie.

Trust—Trusts (Scotland) Act, 1867, 30 *and* 31 *Vict., c.* 97, *sec.* 12—*Appointment of New Trustees.*—The Court will not appoint new trustees under an English trust, even where part of the trust-estate consists of heritable property in Scotland.

2D DIVISION. Lord Young. R.

IN 1850 the late Thomas Brockie, wine and spirit merchant, Oldham, executed an indenture in the English form by which he conveyed in trust to two persons therein named certain heritable subjects in Scotland, and two policies of insurance on his life.

The persons named as trustees accepted the trust, and the conveyance of the policies of insurance was duly intimated to the insurance companies, but no title was made up by the trustees to the heritable estate.

Mr Brockie died in October 1874 a domiciled Englishman, having survived both the trustees.

The present petition was presented by Mr Brockie's widow and eldest son, two of the beneficiaries under the indenture, for appointment of new trustees under sec. 12 of the Trusts (Scotland) Act, 1867. The petitioners suggested two Englishmen as trustees. The prayer of the petition was "to appoint the said Joseph Hargreaves and Clement Wrigley, and the survivor of them, or such other persons as your Lordships may think fit, to be trustees under the said deed of trust made and granted by the said Thomas Brockie, with all the powers incident to that office, and with power to them to assume trustees in terms of the said deed of settlement;

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and further, to grant warrant to complete a title in favour of the trustees to be so appointed to the moveable estate specified in the inventory annexed, amounting to £999, 19s. or thereby, and to all bonuses and other sums payable under the policies of assurance mentioned in said inventory; or otherwise to do in the premises as to your Lordships shall seem proper."

Authority was not craved to make up titles to the heritable estate in the persons of the trustees to be appointed, because Mr Brockie was not feudally vested in the subjects.

The Lord Ordinary, on 3d July 1875, refused the prayer of the petition.*

The petitioners reclaimed.

It was stated for them that similar applications had been granted in the Outer-House, and reference was made to the case of Hall,[1] where it was said the application was refused on special grounds.

LORD JUSTICE-CLERK.—This is beyond question an English trust. The person who made it was a domiciled Englishman. No doubt, the trust included heritable estate in Scotland, but the administrators appointed are English administrators. The question is whether the Scotch Trust Act of 1867 is applicable. I am clearly of opinion that it is not. If we were to hold that it was applicable we should be conferring on English trustees powers which it is quite possible might be inconsistent with the law of England, under which they are bound to administer. The consequence would be either that the trustees appointed by us would be bound to administer according to the law of Scotland, and perhaps contrary to the provisions of the English law, or we should be appointing trustees who would not be bound to carry out the provisions of the Act under which they were appointed.

* "NOTE.—The indenture of 14th November 1850 is an English deed, the meaning and legal effect of which this Court is incompetent to determine without the aid of an English Court or of counsel learned in English law. Assuming that a trust is thereby well constituted, and that there are interests thereby created which require the protection of some judicial interposition to supply trust machinery in lieu of that which has failed according to the representation in the petition, I am of opinion that this is not the Court to resort to for that purpose. It is an English trust created by an English deed for behoof of English beneficiaries, and it is for the English Court having jurisdiction in the matter to afford any remedy which the circumstances may require. This Court may have to determine whether or not the indenture is efficacious to carry real property in Scotland, but under this petition the only question is about repairing the machinery of the trust, which is said to have broken down, and it appears to me that this is a question for the determination of the proper Court in England. With respect to any property in Scotland which the deed may be held effectually to carry we shall certainly recognise the validity of any appointment which the English Court having jurisdiction in the matter of the trust may see fit to make. In the case of a Scotch trust we should not hesitate to supply a failure of trustees in circumstances which seemed to us to require that this should be done, although part or all of the property affected by the trust happened to be in England, and I think it improbable that an English Court would interfere or hesitate about leaving the matter to our determination. By interfering in this case we might do great injustice, and an appointment by us might be disregarded by the Court in England which has jurisdiction in the trust, and is undoubtedly competent to make any appointment that may be required."

[1] Hall and Others, petitioners, March 13, 1869, 7 Macph. 667, 41 Scot. Jur. 357, see note of Lord Barcaple in reporting the case.

It may be matter of regret that we cannot make the appointment craved, but we have no alternative. No. 157. July 10, 1875. Brockie.

LORD NEAVES, LORD ORMIDALE, and LORD GIFFORD concurred.

THE COURT adhered.

MASON & SMITH, S.S.C.—Agents.

CAPTAIN H. YOUNG.—*Balfour.* No. 158.

THE COMMISSIONERS OF INLAND REVENUE.—*Sol.-Gen. Watson—Rutherfurd.*

July 10, 1875. Young v. Commissioners of Inland Revenue.

Income-Tax, liability to be Assessed for—Master Mariner—Property-Tax Act, 1842, 5 *and* 6 *Vict. c.* 35, *sec.* 1, *schedule* (*D*), *and sec* 39.—*Held* that the master of a merchant vessel trading between Glasgow, the Mediterranean, and New York, who was absent from the country for more than nine months in the year, and was only resident in it during the remainder for short periods of two or three weeks at a time, but whose wife and family resided in Glasgow in a house of which he was tenant, and in which he resided when on shore, was resident in Great Britain in the sense of the Property-Tax Act, 1842, schedule D, and was liable to be assessed for income-tax on his salary as master.

1ST DIVISION. B.

CAPTAIN H. YOUNG, master of the steamship "Olympia," belonging to Messrs Henderson Brothers of Glasgow, appealed to the Commissioners of Inland Revenue against an assessment for the year 1874-75 made upon him under schedule D of the Income-Tax Act (5 and 6 Vict. c. 35, sec. 1), in respect of his salary as master mariner, on the ground that he had not been resident within Great Britain, in the sense of that schedule, during the year of assessment.*

The Commissioners were of opinion that the appellant was assessable, and confirmed the assessment.

The appellant craved a case for the opinion of the Court under the provisions of 37 Vict. c. 16 (The Customs and Inland Revenue Act, 1874), secs. 8, 9, and 10, which was accordingly stated by the Commissioners.

The case set forth that the vessel of which the appellant was master traded between Glasgow, the Mediterranean, and New York, and that during the year of assessment he had been less than three months in Great Britain, for periods of two or three weeks at a time. He admitted, however, that he was tenant of a house in Glasgow, which was occupied by his wife and family during his absence, and by himself when in this country.

Appearance was made for the Commissioners of Inland Revenue.

Argued for Captain Young;—By the term "residing in Great Britain," used in schedule D, was implied a reasonable amount of personal residence. There were no direct decisions on the point, but the cases which had occurred under the Poor-Law Acts were analogous, and supported the principle that actual and not constructive residence must be regarded.[1]

* Sec. 1 enacted, that from and after 5th April 1842 duties should be levied, *inter alia*, under schedule D, ... "upon the annual profit or gain arising or accruing to any person residing in Great Britain from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in Great Britain or elsewhere, there shall be charged yearly, for every twenty shillings of the amount of such profits or gains, the sum of four pence."

[1] Hutchison v. Fraser, Feb. 11, 1858, 20 D. 545, 30 Scot. Jur. 294; Aberdeen Infirmary v. Watt, Dec. 15, 1858, 21 D. 117, 31 Scot. Jur. 91; M'Gregor v. Watson, March 7, 1860, 22 D. 965, 32 Scot. Jur. 410; Greig v. Miles and Simpson, July 19, 1867, 5 Macph. 1132, 39 Scot. Jur. 617; Moncrieff v. Ross, Jan. 5, 1869, 7 Macph. 331, 41 Scot. Jur. 196; Jackson v. Robertson, Jan. 7, 1874, *ante*, vol. i. p. 342.

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Argued for the Commissioners of Inland Revenue;—The cases referred to under the Poor-Law Acts dealt with residence as affecting domicile. The present was a question of residence as involving liability to taxation. In that view the appellant must be looked upon as merely a temporary absentee, and, therefore, notwithstanding such temporary absence, chargeable under schedule D, and the 39th section of the Act of 1842.* Though there were no decisions directly bearing on the point in Scotland, the Court of Exchequer in England had, in a case under the old Property-Tax Act, 46 Geo. III. c. 65, pronounced a decision[1] which supported this view.

LORD PRESIDENT.—This assessment is laid on under schedule D of the Property-Tax Act, 1842, "upon the annual profits or gains arising or accruing to any person residing in Great Britain, from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in Great Britain or elsewhere," and the only question is, whether the person assessed is resident within Great Britain.

There can be no doubt that his case is in every other respect within the terms of schedule D. He makes an annual gain in the shape of salary by his employment or vocation of master mariner, and it does not matter whether that employment or vocation is carried on in Great Britain or elsewhere.

Now, while there are many persons residing in Great Britain who never leave it, and many more who do not leave it frequently or for long periods, there are also many who are constantly on the move, leaving and returning. This latter class is increasing every day with the activity and restlessness of the population. Therefore I cannot think that anything like continuous residence is contemplated by the statute. The decisions under the poor-law which were cited to us have therefore no application. I should rather imagine that if a man has his ordinary residence in this country, it does not matter whether he is absent for a longer or shorter period during the year. That depends upon his occupation, tastes, and habits. Some people are engaged in such business as takes them constantly away from home,—for instance, the class to which the appellant belongs, and which is now a very extensive one. The question is therefore of general importance.

The appellant is master of a trading vessel which hails from Glasgow. When not at sea he lives at Glasgow, and when at sea he is represented at Glasgow by his wife and family. That he has in the ordinary meaning of the words a residence in Glasgow is beyond all doubt. It is equally clear on the facts stated that he has no other residence, for a sailing-ship on the high seas, or in a foreign or colonial port, cannot be recognised as a residence. I think what is

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* 5 and 6 Vict. c. 35 (Property-Tax Act, 1842), sec. 39, enacts "That any subject of Her Majesty whose ordinary residence shall have been in Great Britain, and who shall have departed from Great Britain and gone into any parts beyond the seas, for the purpose only of occasional residence, at the time of the execution of this Act, shall be deemed, notwithstanding such temporary absence, a person chargeable to the duties granted by the Act as a person actually residing in Great Britain, and shall be assessed and charged accordingly (in manner hereinafter directed) upon the whole amount of his profit or gains, whether the same shall arise from property in Great Britain or elsewhere, or from any allowance, annuity, or stipend (except as herein is excepted), or from any profession, employment, trade, or vocation in Great Britain or elsewhere."

[1] Attorney-General v. Coote, June 13, 1817, 4 Price, 183.

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meant by the statute is better expressed by "dwelling-place" than by "residence." His only dwelling-place is Glasgow, where he dwells when he is at home, and where his wife and family dwell when he is at sea.

The 39th section of the Act of 1842 was referred to. It enacts,—(His Lordship read the section as quoted, *supra*, p. 926, note). A doubt has been raised whether that provision applies to the present case,—whether a man who trades between Glasgow and New York can be said to have "departed from Great Britain and gone into any parts beyond the seas, for the purpose only of occasional residence." But, supposing he cannot, the terms of the section are still important. They shew that the Legislature recognises that the continuity of ordinary residence may be broken by the person going elsewhere, for the purpose of occasional residence, yet nevertheless retaining his actual residence in Great Britain. This throws a great deal of light upon the provisions in schedule D. I entertain, therefore, no doubt that this man's ordinary residence in this country fixes his liability for income-tax, though his absences in any one year may be of very considerable duration, provided they are not distributed in such a way that his residence in any other particular country is actually longer than his residence in Great Britain. The duration of the appellant's absences is accidental and fluctuating; it varies with the fluctuations of trade, and his absence may be for a very long time, and yet be only temporary, for it is in the prosecution of a purpose of a temporary character.

I was much struck with the case to which Lord Ardmillan drew our attention,[1] where a citation by leaving a copy of the warrant with the person's father "within his said father's dwelling-house in Newburgh, with whom he lives and resides when not at sea, to be given to him, because I could not find himself personally," was sustained as a good citation. Lord Jeffrey says,—"The addition here, 'when not at sea,' just means that his father's house is where he lives and resides when not absent on business. There are many men whose business is peripatetic. They are less in the bosom of their families than more fortunate men, but they have a residence." And Lord Mackenzie says,—"Every sailor has a residence on land. We have no persons who are born and live and die on the water. The execution just certifies that he is a sailor, and has a residence on land with his father." That case appears to me to have much more bearing on the present than the cases about residential settlement under the poor-law. The appellant, as I think, though a sailor in active employment, has his residence in Glasgow, and is therefore liable in income-tax under the provisions of schedule D.

LORD DEAS.—This assessment is laid on under the clause in schedule D of the Property-Tax Act of 1842 which your Lordship has read. It is certainly an important question whether this appellant, and others in a like position, are resident in Great Britain in the sense of that enactment. A second question has also been raised, whether, if the appellant does come under the clause in schedule D, there is anything in section 39 of the Act to take him out of it.

In considering these questions I look exclusively at the statute. All the argument which was submitted to us by both parties on the Poor-Law Act was, in my opinion, only calculated to mislead. As one of your Lordships remarked, the Poor-Law Act was not passed for the purpose of levying a tax, but for the

[1] Brown v. M'Callum, Feb. 14, 1845, 7 D. 423, 17 Scot. Jur. 217.

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purpose of providing a maintenance for the poor. We are dealing here with a statute which lays a tax upon the whole nation, so far as wealthy enough to fall within its scope. Now, though an Act imposing a tax upon a particular class of individuals is to be strictly construed, an Act like the present, which aims at equality of taxation, is to be construed in favour of general liability rather than against it.

I do not see how it can reasonably be doubted that this appellant is resident in Great Britain in the sense of the statute. I think it equally clear that there is nothing in the 39th section to exempt him. He can, so far as I can see, derive no benefit from the terms of that section. If it throws any light at all on the question it rather favours the view of the Crown, by shewing that the Legislature contemplated that there might be temporary absence without involving the cessation of ordinary residence.

I am, therefore, of opinion with your Lordship that the deliverance of the Commissioners is right.

LORD ARDMILLAN and LORD MURE concurred.

THE COURT affirmed the determination of the Commissioners.

D. CROLE, SOLICITOR OF INLAND REVENUE.—Agent.

No. 159.
July 10, 1875.
Cadzow v. Lockhart.

WILLIAM CADZOW, Pursuer.—*Balfour—Mackintosh.*
SIR SIMON MACDONALD LOCKHART, Defender.—*Adam.*

Process—Jury Trial—Evidence Act, 1866 (29 *and* 30 *Vict. c.* 112), *sec.* 4—*Reparation—Damages—Game.*—Where by the lease of a farm, under which the game was reserved to the landlord, it was "expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares, or rabbits, during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm," *held*, in an action of reparation for damage by rabbits, that, in view of the difficulties of construction which must arise upon this clause at the trial, the case was unsuited to be sent to a jury, and that this was sufficient cause why the proof should proceed before a Lord Ordinary under the Evidence Act, 1866, but the Lord Ordinary's interlocutor allowing a proof altered, by adding the words "before answer."

1ST DIVISION. Lord Shand. B.

THE pursuer, William Cadzow, was tenant under the defender, Sir S. Macdonald Lockhart, Bart., of Lee and Carnwath, of the farms of East and West Nemphlar.

The lease of East Nemphlar was entered into in 1858, and that of West Nemphlar in 1864. The former was understood between the parties to be for nineteen years, though, having been entered into during the pupillarity of the then proprietor of the estate, it was nominally only for one year. The latter was for seventeen years.

Both leases contained a clause of reservation in these terms:—"Reserving also to the proprietor and his foresaids the sole right to the whole game and fish of every kind within the lands hereby let, with full power to himself and to those having his permission to hunt, shoot, or fish and sport on the farm without liability in damages; and the tenant shall be bound to preserve the game of all kinds to the utmost of his power, to interrupt poachers and unqualified persons, and to give information of them to the proprietor and his foresaids, or those acting for him or them; and it is hereby expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares, or

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rabbits during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm."

The pursuer, on the allegation that there had been a great increase in the rabbits on the farms since the succession of the defender to the estate in May 1870, and particularly that a waste stripe of ground lying between the farms and the river Clyde had been turned into a rabbit-warren, and that he had suffered loss, injury, and damage thereby during the five years from Whitsunday 1870 to Whitsunday 1875 to the extent of not less than £120 a-year, raised this action of damages against the defender, concluding for £600.

The pursuer pleaded;—The pursuer having suffered loss, injury, and damage to the extent sued for from the undue increase of rabbits on his farms, and on the adjacent ground belonging to the defender, as condescended on, he is entitled to decree in terms of the conclusions of the summons.

The defender pleaded, *inter alia*;—(2) The defender is entitled to be assoilzied, in respect that all claims of damages are excluded by the pursuer's leases.

The Lord Ordinary, on 29th June 1875, pronounced this interlocutor:—"Allows to the pursuer a proof of his averments, and to the defender a conjunct probation: Grants diligence against witnesses accordingly," &c.

The pursuer reclaimed, and argued;—The case should have been sent to a jury. It was a claim of damage to crops by rabbits. It was therefore one of the enumerated causes under the Judicature Act of 1825.[1] It did not fall under the exceptions contained in the clause of relaxation in the Act of 1850.[2] It must necessarily have been sent to a jury prior to the passing of the Evidence Act of 1866.[3] Under that Act consent of parties or special cause shewn were the only grounds on which such a cause could be sent to proof before a Judge. There was no consent of parties. Nor was there any special cause shewn. It was the common case of game damage. The pursuer required to establish increase since the lease was entered into—that the increase was material, and that it brought the total stock of rabbits up to what was unreasonable. If there was any peculiarity in the case arising from the clause of reservation the Judge would give his directions to the jury at the trial. There was nothing in that clause which should render the case more unmanageable for jury trial than any other.[4]

Argued for the defender;—The Lord Ordinary was right in refusing the pursuer a jury trial, though he should have qualified his interlocutor by making it before answer. The defender's plea that all claim for damages was excluded by the terms of the leases was eminently prejudicial, and had not been disposed of. Moreover, the existence of that plea and of the clause of reservation in the lease on which it was founded was sufficient special cause to warrant the Court refusing a jury trial. The clause of reservation took the case quite out of the ordinary rule. Very difficult questions of construction must necessarily arise upon it, and thus rendered the case unsuitable for jury trial.

LORD PRESIDENT.—I think the defender in this case has shewn good cause

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[1] 6 Geo. IV. c. 120, sec. 28.
[2] 13 and 14 Vict. c. 36, sec. 49.
[3] 29 and 30 Vict. c. 112, sec. 4.
[4] Morton v. Graham, Nov. 30, 1867, 6 Macph. 71, 40 Scot. Jur. 37; Syme v. Earl of Moray, Jan. 14, 1868, 6 Macph. 217, 40 Scot. Jur. 133.

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why the proof should proceed before the Lord Ordinary under the Evidence Act of 1866, rather than that the case should be sent to trial before a jury.

The terms of the clause of reservation of game in the lease are very peculiar, and delicate questions of law may probably arise as to what is the kind of proof rendered necessary thereby in order to enable the tenant to get the better of that clause. The result of the case will clearly depend on the construction which the Court may put upon the clause. The Lord Ordinary has declined—and I think rightly declined—to give any opinion upon that question of construction until the proof is before him. At least that is the real meaning of his interlocutor allowing proof,—though he neither disposes of the prejudicial pleas, nor reserves them by making the proof before answer, and in that respect his interlocutor must be corrected. Now, the course which the Lord Ordinary has taken has this advantage, that the parties will be able to bring his judgment on the construction of this clause before us for review by the ordinary method of reclaiming note, whereas, had he sent the case to a jury, the only means of obtaining such review would be by a bill of exception.

But there is this further consideration, that there would be extreme difficulty in adjusting issues here. The issue allowed in Syme's case clearly would not do. We could not give it without previously deciding on the construction of the clause in favour of the tenant. The issue in that case was just the ordinary issue applicable to a case where there are no specialties such as there are here.

I am therefore of opinion that the Lord Ordinary's interlocutor should be adhered to, adding the words "before answer."

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Vary the interlocutor by adding the words 'before answer' after the words 'to the pursuer a proof'; and, *quoad ultra*, adhere to the interlocutor, and refuse the reclaiming note, reserving expenses."

J. & R. D. ROSS, W.S.—HECTOR F. M'LEAN, W.S.—Agents.

No. 160.

July 13, 1875.
Mitchell v. Macfarlane.

WILLIAM MITCHELL, Pursuer.—*Harper.*
AGNES MACFARLANE, Defender.—*Brand.*

Cessio—Condition—Future Earnings.—Held that a person incarcerated for failure to pay a sum of damages awarded for seduction, breach of promise of marriage, and aliment, who was not possessed of any property, but had been earning 27s. a-week before his incarceration, was not entitled to the benefit of *cessio*, except upon condition of granting an obligation to pay weekly to the incarcerating creditor a portion of his wages, which fixed at one-sixth.

2D DIVISION. R.

IN May 1874 Agnes Macfarlane raised an action of damages against William Mitchell, a diver, for breach of promise of marriage and seduction, and also for aliment. Before the proof was taken a tender was made by Mitchell of twenty-five guineas and expenses. The offer was accepted and decree was given for these sums.

Upon this decree Mitchell was incarcerated by Macfarlane on or about 10th March 1875.

Mitchell then raised the present process of *cessio*. Decree of *cessio* was opposed by the incarcerating creditor, except upon condition of Mitchell undertaking to give up a portion of his future earnings.

The Court remitted to the Sheriff of Midlothian to take Mitchell's

examination. The following facts were brought out by the examination:— Mitchell had seduced Macfarlane, who bore a child to him, and he had afterwards married another woman; the child had since died; Mitchell's wages, when he was last working, were 27s. a-week; but he had sometimes earned higher wages; he had never paid any part of the sum due to Macfarlane, nor contributed to the aliment of the child; he was not possessed of any funds. No. 160. July 13, 1875. Mitchell v. Macfarlane.

The undernoted cases were cited for Macfarlane.[1]

Mitchell having declined to come under any obligation with respect to his future earnings, the Court, on 2d June 1875, pronounced this interlocutor:—"In respect the pursuer declines to come under an obligation to make provision for payment of any part of his debt to the incarcerating creditor out of his future earnings finds that the pursuer is not entitled *in hoc statu* to the benefit of the process of *cessio bonorum*."

Upon 13th July 1875 Mitchell renewed his application, stating that he was willing to come under an obligation to pay to the incarcerating creditor such a proportion of his wages as the Court should think proper.

THE COURT pronounced this interlocutor:—"Having resumed consideration of the cause, in respect the pursuer is now willing to come under an obligation to pay to the incarcerating creditor weekly out of his wages one-sixth part thereof, find him, upon granting said obligation, entitled to the benefit of the process of *cessio bonorum*, and appoint him to appear at the bar to make oath in terms of the statute, and grant warrant to the keeper of the prison to bring the pursuer before the Court for that purpose."

J. & A. PEDDIE, W.S.—W. S. STUART, S.S.C.—Agents.

JAMES GORDON OSWALD, Petitioner.—*D.-F. Clark—Thoms.* No. 161.

Entail—Application of Consigned Money—Lands Clauses Consolidation Act, 1845, *sec.* 67.—In an application by an heir of entail in possession of an entailed estate in the neighbourhood of Glasgow to apply money consigned under the Lands Clauses Act in the purchase of other lands to be entailed, the purchase of a Highland sporting estate in Inverness-shire *authorised in the circumstances*, and the value (1) of the mansion-house, (2) of timber necessary for the protection and amenity of the mansion-house, and (3) of the shootings and fishings, *allowed* to be paid out of the consigned money, but the value (4) of other houses not required for purposes of agriculture, and (5) of the other timber on the estate, *disallowed*. July 13, 1875. Oswald.

THIS was a petition at the instance of James Gordon Oswald, heir of entail in possession of the estate of Scotstoun and others, situate on the north bank of the Clyde, near Partick, partly in the county of Renfrew and partly in the county of Lanark, to uplift and apply consigned money, the price of portions of that estate taken under their respective Acts by the North British Railway Company and the Clyde Navigation Trustees, in the purchase of other lands, to be entailed in the same way as the lands of Scotstoun.* 1ST DIVISION. Ld. Curriehill. M.

[1] Russell v. Wood, March 11, 1834, 12 S. 543; Kerr v. Anderson, May 16, 1837, 15 S. 928, 9 Scot. Jur. 434

* The Lands Clauses Consolidation (Scotland) Act, 1845, 8 Vict. c. 19, sec. 67, enacts that consigned money, the price of entailed lands, may be applied, *inter alia*, "in the purchase of other lands, to be conveyed, limited, and settled upon the same heirs, and the like trusts and purposes, and in the same manner as the lands in respect of which such money shall have been paid stood settled."

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The petitioner, in respect that from the vicinity of the estate of Scotstoun to Glasgow, and the erection upon it of manufacturing and other public works, it had lost its residential character, proposed to purchase the estate of Aigas, situate four miles from Beauly, in Inverness-shire, and asked the authority of the Court to complete a conditional agreement for its purchase for £19,000, which he had entered into with Mrs Chisholm-Batten, the proprietrix, and her husband. The total amount of the consigned money was £19,765, 12s. 6d.

The Lord Ordinary, on 20th February 1875, remitted to Mr R. B. Ranken, W.S., and Mr William Grant, factor to the Earl of Seafield, Glen-Urquhart, to inquire and to report.

Mr Grant reported the value of the estate of Aigas as £19,194, made up as follows:—

1. Land and farm buildings,		£12,884	0 0
2. Mansion-house,		660	0 0
3. Drumnaleac Cottage (about three-quarters of a mile distant from the mansion-house, and suitable for a shooting-lodge,	£500 0 0		
School-house,	200 0 0		
Saw-mill,	50 0 0		
		750	0 0
4. Timber (whereof was necessary for the shelter and amenity of the mansion-house, valued separately, say £400 to £500),		3000	0 0
5. Shootings and fishings,		4000	0 0
		£21,294	0 0
Deducting public burdens, £60 a-year at thirty-five years' purchase,		2,100	0 0
		£19,194	0 0

Mr Ranken in his report drew the attention of the Court to the distance of the estate of Aigas from the original entailed estate of Scotstoun, and to the questions (1) whether the value of the mansion-house, (2) whether the value of the other houses, not required for agricultural purposes,[1] viz. Drumnaleac Cottage, the school-house, and the saw-mill, (3) whether the value of the timber,[2] and (4) whether the value of the shootings and fishings, could be allowed as proper applications of the consigned money in the interest of succeeding heirs of entail.

The Lord Ordinary reported the petition to the First Division.

The petitioner intimated that he was prepared to provide out of his own private funds for the value of any of the items mentioned by the reporter which the Court should think it proper to disallow.

Lord President.—This is an application at the instance of an heir of entail in possession to have consigned money uplifted and applied in terms of the 67th section of the Lands Clauses Consolidation Act, "in the purchase of other lands to be conveyed, limited, and settled upon the same heirs, and the like trusts and purposes, and in the same manner as the lands in respect of which such money shall have been paid stood settled."

Now, the entailed estate is situated on the banks of the Clyde, partly in the county of Lanark and partly in the county of Renfrew, while the lands which

[1] Duke of Hamilton, Petitioner, June 12, 1858, 20 D. 1134, 30 Scot. Jur. 669.
[2] Boyd v. Boyd, March 2, 1870, 8 Macph. 637, 42 Scot. Jur. 340.

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it is proposed to purchase are situated in the county of Inverness, and the first objection which is suggested by the Lord Ordinary is that the lands proposed to be purchased are situated at too great a distance from the original entailed estate. I do not, however, see any great difficulty in this. The 67th section does not limit the petitioner to the purchase of lands adjoining the entailed estate, and in the absence of any limiting words in the statute I do not think we are entitled to listen to this objection.

The other points raised are of more importance, and require more careful attention.

The value of the estate proposed to be purchased is stated by Mr Grant, to whom a remit was made by the Lord Ordinary, at £19,194. The price actually agreed to be paid for the estate, subject to our approval, is £19,000. Either sum almost exhausts the consigned money. But there is included, according to the valuation of the reporter, £660 as the value of the mansion-house, £750 as the value of other houses on the estate not required for agricultural purposes, £3000 as the value of growing timber on the estate, and £4000 as the value of the shootings and fishings.

The question is, whether in regard to these items the purchase is such as ought to be authorised in the interest of succeeding heirs of entail, or whether, if he still wishes the purchase to be completed, the petitioner must not furnish funds out of his own pocket to meet the cost of these items, or at least of some of them.

With regard to the mansion-house, I do not think that there can be any difficulty in holding that it is a good part of the investment of the consigned money.

With regard to the other houses, I am equally clear, on the authority of the case of the Duke of Hamilton, that they are not a good part of that investment.

With regard to the timber, again, though there seems to be a considerable quantity of it, there may not be more than is suitable for shelter and for the amenity of the estate. But then it is part of the subject which the heir of entail in possession can at any time cut down and carry off, and it cannot therefore be considered as a proper investment of the consigned money in the interest of the succeeding heirs. If there can be shewn to be any part of the timber which the heir of entail would not be entitled to cut down, that may stand in a different position. We are told by the reporter, that to the extent of £400 or £500 the timber is such as is necessary for the protection and amenity of the mansion-house, and it is contended, on the authority of the case of Boyd, that in so far as it is necessary for that purpose it is not within the right of the heir of entail in possession to cut it down, and that therefore to that extent it is a good part of the investment of the consigned money. The case of Boyd was attended with considerable difficulty, but the Court there arrived at the conclusion that the right of the heir of entail to cut down timber was not so extensive and uncontrolled as to entitle him, or his creditors in his right, to cut down what was necessary for the protection and beautification of the mansion-house. Following that case, we may, I think, allow the minimum sum stated by the reporter to be taken out of the consigned money, as being a good charge against the succeeding heirs of entail. The remainder must be provided by the petitioner himself.

Lastly, there is the matter of the shootings and fishings. The fishings, I think, need hardly have been mentioned. They are not, in the circumstances,

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separate from the shootings. They may have a slight effect in enhancing the value of the shootings, but they have no separate value of their own. I take the £4000 mentioned by the reporter as the value of the shootings alone. Now, if this is not to be taken as a part of the value of the estate in a question with succeeding heirs, I confess I do not think this estate should be purchased at all. The purchase proposed is just the purchase of a Highland sporting estate—a perfectly legitimate object in the present case. That the shooting rental is a recognised part of the ordinary rental of a Highland estate is now beyond doubt, and in questions between heirs of entail and parties in right of provisions out of the estate the shooting value of the estate is invariably taken *in computo*, whether let or not. Therefore, in a question like the present, the shooting rental of the estate is just as good a part of the annual value of the estate as the agricultural rental. It may be that the shooting rental is a little more precarious than the agricultural rental, but it is none the less recognised as part of the annual value. I am, therefore, of opinion that the £4000 is a perfectly good representative of value in a question with succeeding heirs.

On the whole matter, therefore, I think that the Lord Ordinary should require the petitioner to provide £750 for the houses, and £2600 towards the price of the timber, out of his own private funds, and that on that being done he may authorise the application of part of the consigned money to the rest of the purchase.

Lord Deas.—The only point on which I have any doubt is with regard to the houses other than the mansion-house. I do not think that the case of the Duke of Hamilton supports any general rule that the value of houses not necessary for purposes of agriculture must be disallowed. In that case it is stated that "the houses were the buildings connected with the mill, the machinery of which belonged to the tenant, and the cottage was where the tenant of the mill resided." Now, a portion of the buildings here may, I think, fairly be looked upon as in a different position. The reporter mentions that Drumnaleac Cottage, on which a value of £500 is put, has "a coach-house and stable, quite new, attached," while nothing is said as to the mansion-house having a stable. It is a very reasonable thing that the mansion-house, on a property such as this, should have a stable and other offices, and if there are none attached to it then I think the value of the stable, &c. belonging to Drumnaleac Cottage might fairly be allowed.

On the other points I entirely concur in your Lordship's opinion.

Lord Ardmillan and Lord Mure concurred.

This interlocutor was pronounced:—"Find that the estate of Aigas in the proceedings mentioned is a competent and proper investment of the consigned money, or so much thereof as may be necessary: Find that the value of the mansion-house (£660), and of the shootings (£4000), may be stated as part of the price to be paid out of the consigned money: Find that the value of the timber, to the extent of £2600, and the value of houses other than the mansion-house, are not to be stated as part of the price to be paid out of the consigned money; and remit to the Lord Ordinary to proceed further as shall be just and consistent with these findings."

R. & J. A. Haldane, W.S.—Agents.

PETER ROBERTSON, Pursuer and Appellant—*Lancaster.*
THE EARL OF DUDLEY, Defender and Respondent.—*Balfour—Keir.*

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July 13, 1875.
Robertson v. Earl of Dudley.

Process—Sheriff—Appeal for Jury Trial—Statutes 6 *Geo. IV. c.* 120, *sec.* 40, *and* 30 *and* 31 *Vict. c.* 100, *sec.* 73.—Where an interlocutor in the Sheriff-court sustained the plea of the triennial prescription *quoad* a part of the claim under a summons and allowed a proof *prout de jure quoad* the rest,—

Held (1) that appeal for jury trial was competent; (2) that appeal being competent, the whole case was removed to the Court of Session, and that it was competent for that Court to review the part of the Sheriff's interlocutor sustaining the plea of prescription.

Observation (*per* Lord President) on Hamilton v. Henderson, June 10, 1837, 15 S. 1105, 9 Scot. Jur. 529.

Proof—Business-books—Commission and Diligence—Competency.—Circumstances under which, in a question between a landlord and tenant as to whether certain services were to be rendered by the tenant in addition to the rent stipulated, the Court allowed the landlord a diligence to recover the books kept by the tenant in relation to the business of the farm, with a view of shewing the actual profit realised by him during his occupancy.

THIS action was raised in the Sheriff-court of Argyllshire in April 1875 by Peter Robertson, late sub-tenant of the farm of Clashgour, which formed part of the Black Mount deer forest, against the Earl of Dudley, tenant of the forest. 1ST DIVISION. Sheriff of Argyllshire. M.

The summons concluded (2) for £336, for the keep of eight cows, kept for the defender on the farm of Clashgour during the pursuer's sub-tenancy, from Whitsunday 1867 to Whitsunday 1874; (3) for £112, as the keep of two horses under the same circumstances; and (4) for £700, as the wages due to the pursuer as head keeper to the defender at the forest lodge for seven years, from Whitsunday 1867 to Whitsunday 1874, at £100 a-year. Periodical interest was also claimed on each of these sums.

The Earl of Dudley denied that he was owing the pursuer the sums contained in the 2d, 3d, and 4th conclusions of the summons, and explained, *inter alia*, that prior to Whitsunday 1867 the pursuer had acted as his head keeper at a wage of £100 a-year; that when at Whitsunday 1867 he became sub-tenant of the farm of Clashgour his services as head keeper, which were to be continued, were taken into account in fixing the rent to be paid, which was diminished by the amount of his wages accordingly.

Besides stating pleas on the merits to the last three conclusions of the summons, he also stated this special plea as to the fourth conclusion,—(4) In any view, the claim for wages prior to Whitsunday 1872 is prescribed.

The Sheriff-substitute (Sir G. Home), on 28th April 1875, pronounced this interlocutor:—"Allows the pursuer a proof *habili modo* of his averments that his wages up to Whitsunday 1872 are still resting owing: Allows him a proof *prout de jure* of the other averments contained in the fourth head of the summons, and of those contained in the 2d and 3d heads of the same: Allows the defender a proof of his averments, and to the pursuer a conjunct probation," &c.*

The pursuer appealed to the Court of Session for jury trial.

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* "NOTE.—The pursuer's wages previous to Whitsunday 1872 are clearly prescribed, and he is therefore limited to proof, so far as regards them, by the defender's writ or oath. On the other points there seems to the Seheriff-substitute no doubt that a proof is necessary."

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Issues were appointed to be lodged for the trial of the case. When the case came before the Court for approval of the issues it was argued for the pursuer and appellant;—The interlocutor of the Sheriff-substitute, so far as it limited his proof as to his claim for wages prior to Whitsunday 1872 to writ or oath of the defender, should be recalled, and the whole case should be sent to a jury. The employment of the pursuer by the defender being admitted, and no averment of payment being made, but only of an arrangement in lieu of payment, prescription did not apply, and the arrangement must be proved.[1]

Argued for the defender and respondent;—The appeal was incompetent. Where a plea of prescription was sustained and proof was limited to writ or oath, it was incompetent to advocate,[2] and equally incompetent to appeal for jury trial. Though there could be no doubt that the plea of the triennial prescription did apply, and that the Sheriff's judgment limiting the proof was sound, it was not open to the Court to consider that point, for no appeal was allowed on points of law against an interlocutor allowing a proof. As the Sheriff's deliverance on that point must stand, the case could not be brought to the Court of Session for jury trial, for it was not competent to have part of the case referred to writ or oath in the Sheriff-court and part sent to a jury in the Court of Session.

Farther, even if the Court were of opinion that appeal under the 40th section of the Judicature Act was competent, trial by jury was not imperative, and the case, being unsuited for a jury, should be sent to proof before a Judge.[3]

Replied for the appellant;—The appeal was competent. Even assuming that the Sheriff was right in sustaining the plea of prescription, it was no objection to an appeal for jury trial that part only of the case could be sent to a jury.[4] But appeal for jury trial brought the whole of a case into the Court of Session, and it was open to the Court before sending a case to a jury to consider whether there had been, as already argued, any undue limitation of proof in the inferior Court.

If the appeal was competent there could be no doubt that the case was well suited for jury trial, and no reason had been stated for a departure from ordinary rule.

At advising,—

LORD PRESIDENT.—This is an appeal under the 40th section of the Judicature Act, and the 73d section of the Court of Session Act of 1868, and it stands in a somewhat peculiar position.

The summons contains several conclusions, the fourth and last of which is for £700, as the wages due to the pursuer as head gamekeeper to the defender for seven years from 15th May 1867 to 15th May 1874.

Now, as regards this conclusion, a plea was taken in the inferior Court founded on the statute of 1579, introducing the triennial prescription, and, accordingly,

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[1] Shepherd v. Meldrum and Duncan, Jan. 23, 1812, Hume, 394; M'Naughton v. M'Naughton, July 1, 1813, Hume, 396; Anderson v. Halley, June 11, 1847, 9 D. 1222, 19 Scot. Jur. 532.

[2] Hamilton v. Henderson, June 10, 1837, 15 S. 1105, 9 Scot. Jur. 529; Primrose v. Mackenzie, Nov. 18, 1859, 22 D. 1, 32 Scot. Jur. 2.

[3] Sands v. Meffan, Jan. 20, 1829, 7 S. 290, 1 Scot. Jur. 18; Dennistoun v. Rainey, Knox, and Co., May 16, 1871, 9 Macph. 739, 43 Scot. Jur. 408; Chisholm v. Marshall, Jan. 17, 1874, *ante*, vol. i. 388; Laidlaw and Sons v. Wilson and Armstrong, Nov. 24, 1874, *supra*, p. 148.

[4] Stewart v. Rutherfurd, July 19, 1862, 24 D. 1442, 34 Scot. Jur. 713.

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the interlocutor of the Sheriff-substitute of 28th April 1875 is thus expressed,— "Allows the pursuer a proof *habili modo* of his averments, that his wages up to Whitsunday 1872 are still resting owing: Allows him a proof *prout de jure* of the other averments contained in the fourth head of the summons, and of those contained in the second and third heads of the same," &c. Though the Sheriff-substitute does not in proper form sustain the plea of prescription, there can be no doubt of what his meaning was in pronouncing this interlocutor. He meant to limit the pursuer's proof to writ or oath of the defender, so far as the claim for wages up to Whitsunday 1872 was concerned.

The respondent in this appeal, who is also the defender in the inferior Court, objects to this appeal for jury trial as incompetent, because there is here an interlocutor which only in part allows a proof *prout de jure*, and in part a proof by writ on oath. Reference has been made to the case of Hamilton v. Henderson, decided so far back as June 10, 1837,[1] and to another subsequent case of Primrose v. Mackenzie, decided on November 18, 1859.[2] The latter case seems, however, hardly an authority, because the advocator at once, on the case of Hamilton v. Henderson being referred to, gave up the point. But without questioning the soundness of the decision in Hamilton v. Henderson, the case is open to the observation that the advocator there, admitting that the Sheriff's interlocutor limited him to proof by writ or oath as to the whole cause, nevertheless pleaded that there were no good grounds for such limitation, and that he was entitled to an allowance of proof *prout de jure*. One would have reasonably thought that if the advocator could have shewn that prescription did not apply, and that the Sheriff was therefore wrong in limiting the proof, that would have entitled him to go on with his advocation for jury trial. But then it must be remembered that at the date of Hamilton v. Henderson there existed another remedy for such a state of matters. The provisions of 50 Geo. III., c. 121, gave the party aggrieved by a limitation of proof in the Sheriff-court a right to advocate on any legal objection that he could state. Therefore the case of Hamilton v. Henderson proceeded rather on the footing that the advocator had mistaken his remedy. He should have advocated under the Act of 50 Geo. III., c. 121, and then having had the Sheriff's interlocutor set right, he would have had his advocation for jury trial under 6 Geo. IV., c. 120. But it is important to observe that under the present system of Sheriff-court procedure it is incompetent to advocate or now to appeal on a legal objection to the mode of proof allowed. Therefore, where a party thinks that the Sheriff has limited unduly the proof allowed, he has no longer a remedy, unless he is entitled to bring his appeal under the 40th section of the Judicature Act, as amended by the Court of Session Act of 1868, and plead his objection here. He would otherwise be tied up to go on and make his reference to oath in the inferior Court, and then when he came here to appeal against the final judgment he would be too late to raise his objection to the mode of proof with effect. If, therefore, the question arose again in a simple form we should require to consider whether the case of Hamilton v. Henderson was applicable to the altered state of the law.

But the case of Hamilton v. Henderson is for other reasons not applicable to the present case. This is not an interlocutor limiting proof to writ or oath, except as regards a portion of the demand. Assuming the Sheriff-substitute right in that partial limitation, or that his deliverance on that point cannot be brought

[1] 15 S. 1105, 9 Scot. Jur. 529.

[2] 22 D. 1, 32 Scot. Jur. 2.

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under review, there still remains the question whether, in respect of the proof at large allowed as to the rest of the case, the pursuer is not in a position to appeal for jury trial. I think that he is. To make appeal for jury trial competent it is not necessary that the whole case be sent to a jury, or that the whole case be fitted to go to a jury. For instance, one portion of a case may depend entirely on a question of law and not on fact at all,—or one portion may depend on an intricate state of accounts, of all matters the very last to lay before a jury. In short, one cannot shut one's eyes to the fact that a case may consist of different and separable parts, and if one of them is fitted to be tried by jury, surely it is not to be supposed that it was the intention of the Legislature to exclude entirely that part of the case from the benefit of appeal for jury trial merely because another part of the case is unsuited to be tried by a jury. Therefore, though the Sheriff-substitute may have been quite right in limiting the proof as he did, it is quite competent for us to entertain this appeal.

In the case of Stewart v. Rutherfurd, July 19, 1862, 24 D. 1442, the question was raised whether advocation for jury trial was competent, in respect that only a part of the case could be sent to a jury. Lord Kinloch, before whom the case came as Ordinary, found the advocation nevertheless competent, and that judgment was affirmed, without even calling on counsel for the advocator. That seems to me to decide that the fact that one part of the case cannot be sent to a jury is no reason for refusing altogether an appeal for jury trial.

I am, therefore, against this objection to the competency of this appeal.

But, then, the question remains, what is the next step to be taken. If we were to abide strictly by the judgment in Hamilton v. Henderson we should have to say that we could not entertain the question whether the Sheriff has rightly limited the proof in respect of the plea of prescription or not. The Act 50 Geo. III., c. 121, has been repealed, and there cannot now be an appeal on a point of law against an interlocutor allowing a proof. I do not, however, think that we are bound to deal so strictly with the matter. Although the appeal for jury trial is the only one now competent against an interlocutor allowing a proof, still it has the effect of removing the entire case into this Court. When a part of a case is brought here for trial by jury the rest necessarily follows it. It must therefore be within the competency of this Court to dispose of the whole points in the case, and amongst others, before sending part of the case to a jury, to decide whether the Sheriff was right in his limitation of proof as regards the rest.

But though it is thus competent for us to entertain and dispose of that point, I confess I do not feel the slightest doubt that the Sheriff was right. The statute of 1579 is clearly applicable, and he had simply no alternative but to sustain the plea founded on it.

The case is therefore in this position, that we must adhere to his interlocutor on this point, or perhaps we should rather vary it so as to put it in proper form, and leave the pursuer to proceed with his reference to oath here, the remainder of the case being sent to trial before a jury.

Lord Deas, Lord Ardmillan, and Lord Mure concurred.

The Court then pronounced this interlocutor:—"26th June 1875 . . . . Find that the claim for wages under the fourth conclusion of the summons, so far as regards the period prior to the term of Whitsunday 1872, falls under the operation of the statute 1579,

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c. 81, and can be proved only by the writ or oath of the defender: *Quoad ultra* appoint the pursuer to lodge amended issues by Wednesday next, the 30th current."

Amended issues were lodged by the pursuer in terms of this interlocutor, and were approved by the Court.

The trial of the case was fixed to take place at the summer sittings for jury trials.

The defender thereafter moved the Court for a commission and diligence to recover the documents mentioned in the following specification:—"All business-books, cash-books, day-books, journals, ledgers, bank-books, memoranda, note or other books, statements of profit or loss, bank and other accounts, balance-sheets, or other documents kept or made by or on behalf of the pursuer, that excerpts may be taken therefrom of all entries therein shewing or tending to shew the profits or losses made by the pursuer from the farm of Clashgour for the period from Whitsunday 1867 till Whitsunday 1874."

The pursuer objected, on the ground that the documents called for did not bear directly on the matter at issue in the case.

LORD PRESIDENT.—The question to be tried between the parties is whether the pursuer was sub-tenant of Clashgour under the defender on an arrangement for a yearly tenancy at a rate of £230, without any further consideration or condition, or whether, in addition to his rent, the pursuer was to give the defender his services as head keeper, and keep a certain number of cows and horses for him. It becomes a very important matter in trying that question to ascertain what was the true value of the farm of Clashgour at Whitsunday 1867, when the bargain between the parties was first made. If it should turn out that £230 was a fair rent as at that date the defender's case would almost certainly fail. If, on the other hand, it should turn out that £230 was an inadequate rent, that would be strongly in favour of the defender. We may naturally expect evidence of opinion to be led by both parties as to the value of the farm in 1867, and if, as is very probable, the evidence on that point is conflicting, reference to the books now sought to be recovered might contribute much to solve the difficulty. For if it should turn out that the profits of the farm, as shewn by these books during the years of the pursuer's tenancy,—and they give a very good average of Highland sheep farming,—were such as to give a good return to the tenant for his skill, industry, and outlay, and leave a margin over sufficient to cover his salary as gamekeeper and his claims for the keep of the defender's cows and horses, that would, in the eyes of a jury, appear to be an extremely important fact.

Therefore, though averse to allowing diligence for the recovery of books not bearing directly on the matter at issue in a case, I cannot help thinking that the production of the books here sought may materially assist the jury in coming to a just decision between the parties. I am therefore for granting the diligence.

THE COURT pronounced this interlocutor:—"13th July 1875 . . . . Having considered the motion for the defender, No. 28 of process, grant diligence at his instance against havers for recovery of the documents mentioned in the specification, as amended, thereto annexed, and grant commission," &c.

JOHN GILL, L.A.—GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—Agents.

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MRS JESSIE STEWART HOWAT or AULD, Pursuer.—*Sol.-Gen. Watson—J. C. Smith.*
JOHN CAMPBELL SHAIRP, Defender.—*D.-F. Clark—Lancaster.*

Reparation—Slander—Privilege—Illegal Retention of Offices.—A communication by the principal of a college to the patron of a professorial chair therein to the effect that the appointment of one of the candidates would be injurious to the interests of the university, is privileged.

S, Professor of Humanity in the United College of St Andrews, having been appointed to the office of principal of the college, intimated to the patron of the chair of Humanity his intention of resigning that chair at the end of the current session. The patron wrote to A, one of the candidates for the chair, intimating that he had "great pleasure in determining at once to appoint him to the chair," and requesting him to communicate with his (the patron's) agent "when the proper time arrived for completing the appointment." Thereupon S wrote a letter of remonstrance to the patron, stating that A had notoriously failed as a classical master, and that his appointment would be a heavy blow to the prosperity of the college, and concluding with a request to the patron, if it was still possible, to reconsider his resolution. S, at the request of a large majority of his colleagues, continued to retain the chair, along with the principalship, until A's death, a period of two years. The patron took no steps towards filling the chair by issuing a presentation in favour of A or any one else, and remained entirely neutral. After A's death, his widow and executrix raised an action of damages against S, founded on the defender's having illegally, as she maintained, retained the chair of Humanity after he had been appointed principal, and so prevented A from being presented to the chair, and also upon the slander of her husband alleged to be contained in the letter above mentioned. *Held*, after a proof before answer, (1) that A had no legal nor enforceable right to the chair of Humanity, but merely an expectation of being appointed, and therefore neither he nor his representative could found upon the alleged illegality of the retention of the chair by S as a ground of damage, (2) that the communication to the patron respecting A's qualifications was privileged, and that malice had not been proved.

Question, Whether, by the constitution of the United College of St Andrews the combination of the office of principal with a professorial chair was illegal.

Observations as to how far adverse criticisms on the qualifications of a candidate for a public office are actionable where no special privilege can be pleaded.

2D DIVISION.
Lord Gifford.
R.

SEQUEL of case reported *ante*, p. 191.

Upon 14th January 1875 this case was again put out for debate, when, after some discussion, the Court indicated an opinion that the law and the facts were inextricably involved in one another. This interlocutor was pronounced:—"The Lords having further heard counsel in the cause, in respect the parties express their willingness that the Court shall determine the mode in which the facts shall be ascertained, before answer allow to both parties a proof of their respective averments, and allow the pursuer to add the word 'maliciously' to the 8th article of her condescendence, the proof to be taken before one of the Judges of this Division of the Court, and continue the reservation of the question of expenses."

A proof was accordingly taken before the Lord Justice-Clerk, the result of which sufficiently appears from his Lordship's opinion, *infra*, p. 942.

The pursuer's pleas are stated on p. 194. The defender, besides the two preliminary pleas there quoted, stated the following pleas on the merits;—(3) The chair of Humanity never having been vacant, the action is unfounded. (4) The combination of the offices of principal and professor of Humanity in the person of the defender not having been

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illegal, and having been approved of by the United College, and by the Senatus of the University, cannot form any ground for liability in damages on his part. (5) The defender, not having slandered the late James Auld, is entitled to absolvitor. (6) Any statements made by the defender regarding Dr Auld's unfitness for the Latin chair were, in the circumstances condescended on, privileged. (7) The pursuer, having sustained no damage from the defender, has no right to insist in this action.

Argued for the pursuer;—There was no privilege, or, at all events, no such privilege as to cover the communication complained of.[1] Privilege had, in recent times, been extended to many cases where formerly it could not be pleaded, but with this extension the principle had been recognised that privilege must be kept within limits. In any view, malice had been proved, first, by the inconsistency of the statements complained of with the defender's own testimonials formerly given to Dr Auld; and, secondly, by the persistency with which he attacked Dr Auld, after being told by the Duke of Portland that he intended to present Dr Auld to the chair of Humanity so soon as it should become vacant.* Further, the unprecedented and illegal† combination of the offices of principal and professor, with the avowed object of excluding Dr Auld from the chair which had been promised to him, was not only in itself a ground of damages, but must be regarded as tending to instruct legal malice on the part of the defender in the question of slander.

Argued for the defender;—It was well settled that a communication made *bona fide* upon any subject in which the party communicating had an interest, or in reference to which he had a duty, was privileged if made to a person having a corresponding interest or duty, although it contained criminatory matter which, without that privilege, would be slanderous and actionable.[2] The defender was acting within the sphere of his duty as principal of the college, in a way in which he was bound, and was certainly entitled to act, when he recommended that a presentation should not be issued in favour of a person whom he thought unfit for the office. As for the statement complained of in regard to Dr Auld's use of testimonials, the defender made no charge of fraud against Dr Auld. He merely expressed an opinion on a point on which there might be an honest difference of opinion. As for malice, there was no evidence of the defender

[1] Milne v. Bauchope, July 19, 1867, 5 Macph. 1114, 39 Scot. Jur. 543.

* Several letters were written by the defender to the Duke of Portland and his commissioner after that of 17th March 1869 (quoted, p. 194, note), expressing the views of himself and his colleagues in regard to the proposed appointment of Dr Auld.

† The Act for uniting the two colleges of St Salvator and St Leonard in the University of St Andrews, 1747 (printed in vol. 3 of the evidence taken before the University Commission of 1826), which proceeds on the preamble of the inadequacy of the salaries of the professors in the two colleges and the expediency of uniting the revenues of the two colleges under one management, and uniting also the corresponding professorships, enacts, *inter alia*, that the United College "shall consist of the following members—that is to say, one Principal, one Professor of Greek, three Professors of Philosophy, . . . one Professor of Humanity, one Professor of Civil History, one Professor of Mathematics, and a Professor of Medicine."

Since the union of the colleges the principal had never, in point of fact, held a professorship.

[2] *Per* Lord Campbell in Harrison v. Bush, 1855, 5 Ellis and Blackburn, 344 (see p. 348); Laughton v. Bishop of Sodor and Man, Nov. 1872, L. R., 4 Privy Council App. 495 (see Sir R. Collier's Judgment, p. 504); Hart v. Gumpach, Nov. 1872, *ibid.* p. 439; Macbride v. Williams, Jan. 28, 1869, 7 Macph. 427, 41 Scot. Jur. 241; Starkie on Libel, 3d ed. p. 267, &c.

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being actuated by any motive other than a desire for the best interests of the university. On the contrary, his personal friendship to Dr Auld was shewn by the testimonials which he had formerly given him. It was said that these were inconsistent with the statement now complained of, but an important matter had occurred in the interval, viz., that the Commissioners on Scottish Burgh Schools had reported unfavourably of Dr Auld's teaching.

The illegality of the combination of the offices of principal and professor of Humanity was a mere assumption on the part of the pursuer. The object of the Act uniting the colleges was to combine inadequate salaries. There was to be not more than one Professor of Humanity, nor more than one Principal. But there was nothing to prevent the two offices being held by one person. But even if the combination was illegal, it could not give Dr Auld or his representatives any direct right of action against the defender. Dr Auld had no vested right to the chair. He had a mere promise of being appointed upon the occurrence of a vacancy. Take the analogous case of the lease of a farm being promised by a landlord to a new tenant upon the expiry of an existing lease: If the old tenant refused to remove, the person to whom the lease had been promised might, perhaps, have an action against the landlord, but he could have no right of action against the tenant in possession.

At advising,—

Lord Justice-Clerk.—When this very interesting and very important case was before us on the question of title we repelled the plea of want of title, in so far as it was pleaded as a bar to the action, and to no other effect; and before further answer we, of consent, allowed both parties a proof of their respective averments. The question which had mainly been argued in that former discussion was, how far the pursuer, as executrix and representative of her deceased husband, Dr Auld, had a title to maintain the claim of damages which is the foundation of this action. We held that the claim was not excluded in respect of the personal nature of the action, because, although it is a claim of damages founded on alleged slander, it sought compensation, not merely for loss of reputation and wounded feeling, but also for substantial loss on account of the exclusion of Dr Auld from the professorship of Humanity in the United Colleges of St Andrews, which is said to have been the result of the slander.

We have now the entire facts before us, and I think, on the whole, that the course which was adopted by the parties, and which we sanctioned, of taking this as a proof before one of ourselves, was the best course which could have been followed. I have now to express the opinion which I have formed upon these facts. The proof, though it is voluminous—I do not say too voluminous,—resolves into one or two very simple and indeed undisputed facts. Dr Auld was made the classical master in the Madras College, I think, about 1849. In the year 1861 some dissatisfaction appears to have arisen in St Andrews in regard to the mode in which his duties were discharged, or, at all events, in regard to the classical department in the college; and the trustees of the Madras College at that time came to the resolution to dismiss him. That intention, however, was not carried into effect. Some of the professors, including Principal Shairp, who was then Professor of Humanity in the United Colleges, and some other townsmen or citizens of St Andrews, interposed and signed a joint-remonstrance to the trustees, pointing out the great hardship that dismissing Dr Auld would be to himself, and saying many flattering and civil things in regard to

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his competency as a teacher and as a scholar. This attempt to dismiss Dr Auld was not renewed. In 1862 it appears from Mrs Auld's evidence that Dr Auld became a candidate for the head-mastership of the Ayr Academy, and in that year he obtained a variety of certificates from a number of very competent persons in regard to his qualifications, and among the rest, one from Principal Shairp. He did not succeed in obtaining that appointment. In 1866, when there was some expectation that Principal Shairp, who was then Professor of Humanity, would be removed to Glasgow, it appears that Dr Auld printed, or reprinted, these certificates or testimonials which he had received in 1862, but apparently they were not used at that time. In 1868 the Madras College was examined by Mr Sellar and Dr Harvey, as sub-commissioners under the Royal Education Commission which was at that time sitting, and the report of Dr Harvey, who specially examined the classical portion of the Madras College, was unquestionably couched in unfavourable terms.* And this brings us up to the point of the vacancy which gave rise to the whole of these proceedings. Principal Shairp was appointed to the office of Principal in 1868, and it was taken for granted by everyone that his appointment created a vacancy in the chair of Humanity, and accordingly Dr Auld, among others, became a candidate for the office, and sent to the patron, the Duke of Portland, a printed copy of the testimonials which he had received in 1862, and which he had printed in 1866, as indeed these printed testimonial themselves most distinctly bear. Principal Shairp communicated with the Duke of Portland, and undertook to teach the class to the end of the then session,—that is to say, the session ending in 1869; and intimated that it was his intention to demit his office at that time. The Duke of Portland resolved to appoint Dr Auld to the vacancy,† and at his special request that intention was publicly intimated, and, on that intention becoming known, Principal Shairp wrote the letter which contains the alleged slander,‡ dated on the 17th of March 1869, in which he remonstrated against the intention indicated by the patron, on the ground that Dr Auld had notoriously failed in the capacity of classical teacher in the Madras Institution, and that his department had been reported against by the Education Commission; and he also stated that if Dr Auld had used the testimonials granted in 1862 these were granted for a totally different purpose, and that Dr Auld had no right to use them as he did. Now, that is the alleged slander. What followed upon that was this—the Duke of Portland simply did nothing, but Principal Shairp, with the concurrence, and, he says, with the advice of his colleagues, although he had intimated his intention to demit the chair, resolved to hold it, and that for the express purpose of preventing the patron from presenting Dr Auld.§ And hold it he did, and continued either to teach it himself or to supply the teaching for a period of two years, until the death of Dr Auld on the 11th of August 1871, and then, and then only, did he resign the professorship.‖

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* See *ante*, p. 194, note.

† The Duke of Portland's letter to Dr Auld is quoted *ante*, p. 192.

‡ Quoted in full, *ante*, p. 193, note.

§ The minutes of meeting of the United College shewed that six of his eight colleagues requested Principal Shairp, "under existing circumstances," to give up his intention of resigning the chair of Humanity at the ensuing term, and still continue to teach the Humanity classes. Professors Flint and Macdonald did not concur in that request, and afterwards dissented.

‖ Dr Auld, upon receipt of the Duke of Portland's letter to him of 13th

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Now, that, I think, is a sufficient summary of the facts that have been proved in this case. And, in the outset, it is quite plain that one material part of the case, as originally stated, entirely fails. It was alleged, and that was one main element in the former argument, that the suit was not merely for reparation for wounded feelings, or for injury to character, but that the slander had culminated in a most serious patrimonial loss, and that the result of the slander was that Principal Shairp was allowed to retain this professorship to Dr Auld's injury, and that the patron was induced not to insist on his presentation in consequence of the representations that were made. That was an important element in the case, but it turns out that this was not the fact. The Duke of Portland did not withhold his hand from appointing Dr Auld in consequence of these representations. He says exactly the reverse. He says in his letters, and in those answers to questions, which are held in this case—and very properly held—to amount to his testimony, that he thought he was in no way called upon to interfere in that matter,—that as long as the principal did not demit his office he did not think that he was bound to contest the question of whether there was or was not a vacancy, and he did not intend to do so. But he also stated in the most distinct terms that the moment the office was vacant Dr Auld was the person that he intended to appoint, and that he would accordingly appoint him. And, therefore, the slander, whatever it was, was not slander which led to any action or inaction on the part of the patron, who simply held his hand because Principal Shairp had not resigned his office.

Now, that clears a very considerable portion of the ground in this action; for the real damage supposed to be suffered in consequence of the defender's representations vanishes from the case entirely, and it becomes one simply of slander, not accompanied, or said to be accompanied, by any specific patrimonial loss.

As to the defender's right to retain the chair of Humanity it is perhaps not necessary that we should express any decided opinion. But the question has been raised very clearly and distinctly, and my impression certainly is that by accepting the office of principal Mr Shairp necessarily vacated the chair of Humanity. If the patron had issued a presentation I cannot see that Principal Shairp could by possibility have excluded the presentee. I do not think he could have resisted his induction, and that all the more that he had voluntarily undertaken to the patron to demit his chair at the end of the then current session. I say nothing as to what arrangements might be made for temporary administration; and I say nothing as to what the powers of the patron might be,—either the patron of the office of principal or the patron of the chair of Humanity. These are matters that are not in question here. The arrangement upon which Principal Shairp held the chair of Humanity was not an act of

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March 1869, wrote on 19th March to Mr Stuart Grace, secretary to the trustees of the Madras College, resigning his appointment as classical master in the Madras College, as at Whitsunday following. Upon 2d April 1869 he wrote to Mr Grace withdrawing his resignation. The trustees intimated to Dr Auld that his resignation could not be withdrawn, and that they had resolved to take time to consider whether they would again appoint him, and the terms and conditions on which any such appointment should take place. Dr Auld replied that it was his intention to carry out his resolution of retiring at the Whitsunday following. The trustees appointed another gentleman to the post, and Dr Auld remained without employment till his death.

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temporary administration, and the patrons of the two chairs gave no consent whatever to the state of matters that existed at that time. The Crown did not interfere, and the Duke of Portland did not interfere, but it was left upon its own merits. The notion that in order to exclude a particular candidate the Principal could continue to hold this chair at his own hand, and to invert the admitted usage of the University from time immemorial, is one to which I should not wish to be supposed to give any sanction whatever. It is plain that if it had not been for the untimely death of Dr Auld this question might have arisen, and I cannot see any good ground upon which Principal Shairp could have maintained his position.

I have said this much because the question was directly raised, and I am unwilling to appear to sanction a course which I think has no foundation in the proper order of the University. But whether it was so is immaterial in this case, for Dr Auld had no vested right in the appointment. He had nothing but an indication from the patron of what he was to do when the chair should, in his opinion, become vacant,—an intention which he might change at any time, and which conferred no vested right whatever on Dr Auld.

This being so, the case resolves itself into a simple action of damages for defamation, brought by the executrix of the person said to be defamed, and the damages claimed consequently are not for special loss, but for injured feelings and reparation only. I do not say, if that had been the complexion of the action at first, whether I should have thought it clear that the right to sue did descend to an executor, for that was not the position in which the case was originally presented. But assuming that it did, the question now remains, whether the proof has established the claim. There are two grounds on which the alleged libel is said to be defamatory. The first is the allegation it contains that Dr Auld had notoriously failed as a teacher in the Madras College, and secondly, that Dr Auld had improperly used the testimonials which he had received from the defender and the other professors in the University in 1862. I do not go into the particular terms of the letter. It is rather sharp, and certainly unfriendly to Dr Auld, but the substance of the alleged slander rests on these two allegations, that he had notoriously failed as a teacher in the Madras Institution, and that he had made an improper use of the testimonials.

Now, I am not prepared to say that if this communication is not privileged it is not slanderous. I rather think that in the absence of allegation and proof of the truth of the matters stated by the defender it is slanderous, and is a sufficient ground of action. In reference to the first, viz., that Dr Auld had notoriously failed as classical master in the Madras College, I do not think that that has been proved, and I do not think that it is alleged to be proved. Dr Auld may not have been, and probably was not a very vigorous master, but there is a long interval between that and notorious failure; indeed, there are many instances of teachers who turned out in the end men of the greatest reputation, having their alternations of success and failure, and popularity and unpopularity, and I do not think, looking to the very respectable body of evidence that was adduced of Dr Auld's qualifications, that the allegation that he had notoriously failed was substantiated by proof, and, not being substantiated by proof, I think it was an imputation for which the defender would be liable, unless it is privileged.

Still less do I think that there was any ground whatever for the reflection made on Dr Auld's use of the testimonials; and I entirely demur to the view that seems to have been taken for the defender in this matter. It is quite plain

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to me that the defender wrote very hastily and without sufficient recollection of the facts in regard to which he was writing. He had confused in his mind between the testimonials or remonstrance addressed by himself and the other professors to the trustees of the Madras College in 1861, and the testimonials which were given when Dr Auld was or intended to be a candidate for the mastership of the Ayr Academy in 1862. In regard to these last testimonials it is plain on the face of them that they were not given for any such specific object as having weight with the trustees of the Madras College, which would have been absurd in itself, because the trustees of the Madras College had already got the remonstrance of the professors in their hands, and there is not the smallest indication that Dr Auld intended ever to use them for that purpose. I am perfectly satisfied that Dr Auld obtained them for the purpose of his candidature in 1862, which he intended to insist in; and, if I were to surmise, I should say that probably Dr Auld, finding his position uncomfortable in the Madras Institution, wished to have a general attestation of his qualifications, in case any place might become vacant to which he might aspire, and that his friends, the professors, were perfectly willing to aid and assist him in that object. I cannot for one moment admit that there is any usage analogous to a practice of trade by which a professor is to attest the qualifications of a man, as shewn in his public actings and teaching, for one purpose, and, without any special agreement with him, complain when that attestation of a fact is used for another purpose. A certificate of a man's qualifications for a particular office of course bears on its face its limited character. But a general attestation of a man's abilities or scholarship simply alleges the writer's belief in a fact. Dr Auld's scholarship, knowledge, and powers of teaching, as exhibited in the Madras College, were facts to which these testimonials were addressed; and, if the testimonials were true, the fact could not possibly be altered by his candidature for a professorship. When such general testimonials as these are given to a man, he is entitled to use them in every quarter and for any purpose for which he thinks they may be required or useful. No doubt there may be a special bargain made with him that he shall only use them for one purpose; but, to tell the truth, the fact of such a bargain or reservation would not very much commend itself to my mind.

But then the question arises, was this communication privileged? In other words, is the defender free from liability unless he be proved to have acted maliciously, or is it enough that he acted honestly and in good faith? I think there was privilege. Privilege consists in the right of a man to express his honest opinion on a matter in regard to which he has a duty or a right or an interest to speak to any other who has a corresponding duty or right or interest. Now, this is the law even in regard to matters of private concern. But a chair in one of our Universities is a matter of public concern, and a subject in which, indeed, any member of the community is entitled to take an interest. Much more has the Principal of the University a substantial right to speak his mind to the patron of the chair within his bounds when he knows or believes that an appointment prejudicial to its interests is likely to take place; and, in my opinion, this being a matter of public concern, the Principal, or the person at the head of the institution, must necessarily have—what I imagine persons with an inferior duty or interest must also have—a right to express an opinion in the proper quarter upon a matter in which the credit of the University is so largely concerned. I do not mean to say that

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I would hold out any very great encouragement to professors, or even to the Principal, to interfere in matters of patronage. I cannot say that there was a duty in the stricter sense to interfere. My impression rather is, looking to the nature of the controversy, that though Dr Auld's qualifications might not be of the highest, they were not of that nature that necessarily or imperatively called for a remonstrance of this description. But we have seen and known things of the same kind before. There was a very celebrated occurrence some thirty years ago in regard to a chair in the University of Oxford, which is fresh in the recollection of some of us, where the whole of the professors in the University of Oxford in a body remonstrated with the Crown against an appointment which had been proposed; and we know very well that the language used on that occasion was by no means measured, and that the length of time during which the controversy lasted was very considerable. Now, I do not intend to express any opinion as to whether Principal Shairp would have been better advised if he had remained silent, but if he thought that the interest of the University was at stake, and felt the importance of the chair of Humanity in regard to every Scotch University—because it is the portal or gateway through which the students enter—I cannot possibly say that he was not within the general rule of law which affixes a privilege to persons expressing their honest mind upon occasions on which they have an interest and a right to speak. Here he spoke to the patron, who was the proper recipient of his opinions.

I am therefore of opinion that this case is clearly within the rule of privilege, and that malice must be proved before the pursuer can succeed.

The question of malice is perhaps not without some little difficulty. What is said on the part of the pursuer, and said with some strength and plausibility, is that Principal Shairp in 1861 and 1862, when he did not expect, no doubt, to have Dr Auld for a colleague, expressed himself in the strongest terms in regard to Dr Auld's qualifications as a teacher, and notwithstanding that, he writes to the Duke of Portland, when he feared that he may have him as a colleague, that he had notoriously failed in the very capacity to which his compliments had previously been addressed, and it is said by the pursuer that that is proof of malice. I think there is plausibility in that statement, but having heard the evidence, and having heard Principal Shairp's account of the matter, I have come to the clearest opinion that there was no personal feeling or ignoble motive on the part of Principal Shairp at all, but that his honest belief when he wrote to the Duke of Portland was that Dr Auld's appointment would be injurious to the University, and therefore he is only liable to this observation, that he made his encomiums somewhat too broad in 1861 and 1862, probably from a feeling of good nature, which sometimes prompts in that direction, but that at all events, whatever he had said in 1861 or 1862 he was quite honest in stating as his opinion that Dr Auld had notoriously failed in the Madras College, and that his appointment would be injurious to the University. The difficulty in which the defender is placed is obvious, but as I must affirm as matter of fact that he did not write his honest opinion in 1869 before I can affirm the allegation of malice, I have no hesitation at all in saying that I believe thoroughly in the honesty of the statement made in the letter in question.

The second point in regard to the proof of malice is also of some weight, and that is, that there was a persistency on the part of Principal Shairp which led him to do what I take to be an illegal act for the purpose of excluding Dr Auld, viz., to retain the professorship against the patron, without right, for no other

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purpose whatever than to prevent the appointment of the presentee, whose appointment he feared. Now, if there had been malice—if there had been the slightest ground to suspect that there was personal and not public motive at the bottom of all this, I should think that a very dangerous element indeed, as far as the Principal was concerned; but not finding any element of that kind, the only result is, that whatever it proves it does not prove malice on the part of the Principal. Whether he had or had not a right to retain the chair of Humanity does not derogate from the honesty of his intervention, whatever may be said of his discretion. What he said about the certificates was hasty and ill considered, but was still a matter of opinion; and therefore, upon the whole matter, I have been unable to come to any other conclusion than that the pursuer must fail in her action.

I cannot close without saying, at the same time, that it is impossible not to feel a considerable amount of sympathy both for the pursuer and for her deceased husband; for the unfortunate man, having been tantalised with the expectation of this professorship, not merely failed to obtain it, but lost at the same time the office which, on the representations of the Duke of Portland, he had been induced to resign.

On the whole matter, I think we must pronounce a decree of absolvitor.

Lord Neaves.—This is a case of interest and importance both on general and on special grounds. I cannot help feeling considerable sympathy for the pursuer, for her husband's and her own disappointment must have been great, and from her own point of view one can easily see how strongly she must have felt. We cannot expect her to adopt any views of her husband's inefficiency or want of right and title to this chair. She must remember him as an amiable and excellent man, who, after getting a promise of this appointment, was deprived of it partly by delay and partly by other circumstances. But while we entertain these feelings of sympathy for her we must also look at the other side of the case, and I firmly believe that Principal Shairp was actuated in what he did by a desire for the good of the University, of which he was a conspicuous member. One sympathises also with his feelings, even although they were expressed with apparent keeness.

The pursuer's pleas are two-fold. The first is, that the defender having illegally retained possession of the chair of Humanity, and wrongfully prevented Dr Auld from being presented thereto, and having thereby caused loss, injury, and damage to the pursuer, ought to be decerned to make reparation as concluded for. As to the alleged illegal retention of the chair by Principal Shairp, I cannot find such a relation subsisting between Dr Auld and Principal Shairp as to lead me to suppose that a right of action can arise to Dr Auld against Principal Shairp for what he may have done. I am rather inclined, with your Lordship, to look upon the holding of the two offices as incompatible. At the same time, they may be retained temporarily for special purposes and in special circumstances. It could scarcely be said that Principal Shairp might not hold the chair of Humanity during the remainder of the session following his appointment, or for the time necessary to make ulterior arrangements; and that shews that there is no vital incompatibility between the two offices. The idea of any permanent retention of both is out of the question, but I am not satisfied that there was any intention to retain them permanently. I do not see any evidence of that, though there may have been a retention until it should be seen what should be

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the final outcome of this dispute. But whether Principal Shairp was right or wrong—whether he might be considered to have vacated the chair or not—I cannot see that that gives rise to any legal ground of action at the instance of Dr Auld or his representative. Dr Auld had no presentation to the chair. He had only a promise of the appointment when the Duke of Portland should consider that the vacancy had taken place. The Duke of Portland was willing to give him the chair when it was vacant, but he was not willing to enter into any litigation on the subject, or to contest the point. A fair enough illustration of this was given during the argument with reference to a landlord's right to remove a tenant in the case of his having promised a lease of the farm to another tenant. I cannot say that that other tenant who may have got that promise has any direct right of action against the tenant in possession. He may urge upon the proprietor by moral or legal considerations to do all that is necessary to fulfil his promise; but I do not think that he has any right of action against the tenant in possession. As little can I say that if the patron here chose deliberately to remain neutral, which he did—for that is the position which he expressly avowed himself as occupying—a party in Dr Auld's position, having no presentation to the office, could have any right of action against Principal Shairp to vacate the chair for his behoof, or to pay him damages. If the Duke of Portland had died before Dr Auld what would Dr Auld's position have been? His promise would not have been binding upon the Duke's successor; and so Dr Auld had just what might be called a *spes successionis* in the matter, which gave him no direct right of action against Principal Shairp.

The second plea is with reference to the slander, and this turns on the letter addressed to the Duke by Principal Shairp. I have great difficulty in seeing any slander in that letter. It undoubtedly speaks of the inferiority of Dr Auld's claim to become a professor, and it also complains that he has used certain testimonials; but I cannot say that I see anything libellous in that letter. We must look at the whole circumstances. Dr Auld was an aspirant to a public situation. He was not being assailed in a position which he occupied by some person who was depreciating him, but he was aspiring to a new appointment of a different kind from the one he held, requiring different qualifications, and a higher training. He was publicly aspiring to that office, and he was in communication with the patron on the subject. Now, I confess I have a strong idea that wherever an appointment of a public nature is contemplated, and, in particular, one which, besides affecting the public at large, affects a certain locality in a very strong way, the aspirant to that position lays his character and qualifications open to criticism by all who have a natural and legitimate interest in the appointment. I am not sure that I would call that privilege. I do not think that it is of the nature of libel to speak of an aspirant for an office of that kind as not being qualified for the office. I think the newspapers might have discussed the merits of all the candidates, and said that they considered one to be good and another to be inferior, with the most perfect freedom, without being liable in damages, any more than for a literary critique. An appointment of that public kind is subject to the observation of the public, and is, I think, a legitimate subject of discussion; and I cannot help thinking that it would be very unfortunate if it were not so. A patron is a trustee for the benefit of the public. He is entitled to expect—and no patron with right feeling will complain that he receives—such light fairly stated by any competent party on the subject, to assist him in his choice, and to guide him to a right

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decision, or prevent him from making an improper choice. That it is a libel to say that a master in a burgh school, although a respectable and amiable man,—for there is not a word said against his morals,—is not a first-rate scholar or has not been successful in his class, when he is aspiring to another position, and putting himself therefore upon a scrutiny—appears to me to be a very dangerous proposition. Upon this ground alone I consider the action unfounded.

At any rate this view is closely connected with the question of privilege, when the relation is considered between Principal Shairp and the office which was to be filled up. Can we suppose that a man at the head of a University is not to take a strong interest in the welfare of the body with which he is connected, and with which his own prosperity and happiness are so intimately bound up? It is for the public interest that he should do all he can, consistently with justice, in such a matter. I cannot doubt that he had a privilege to go to the patron, and to represent, if he did it honestly and without any evil purpose or sinister view, the opinion he entertained of the candidates who were proposed. It is said he should not have interfered because the patron had said he would make the appointment; but that is not sufficient. The appointment was not made. It was right that Principal Shairp should let it be known what he thought on the subject, and the opinion he stated was honestly entertained by a great number of persons in the same position. It was entertained by the other professors, except, I think, by Professor Flint, and by one gentleman who is now no more (Dr Macdonald).

If, then, there is privilege, it can only be got rid of by proving malice, and the question is, has that been proved? I cannot say that I see any proof of malice. The idea of personal malignity has not been suggested, and if it were, it is groundless upon the face of the case. There may have been an anxiety, and perhaps an over-anxiety, about the matter on the part of Principal Shairp, but this will not make malice. It was a matter of great importance that Principal Shairp should make known his opinion if he thought the appointment would be injurious to the University, and, having stated that to the patron, will the mere manner in which it is done constitute malice? I think not. It is said that it arose from a desire to have an Oxford man, and that this makes malice. I cannot see it in that light. I am not such an exclusive admirer of Oxford as perhaps Principal Shairp is, though I recognise in the fullest manner the benefit we have got from Oxford scholars, and from the connection which has subsisted between Oxford and Scotland. But no one who knows the history of English literature is ignorant of the very good reasons which Principal Shairp has for looking back on Oxford as an excellent nursery for young men, and connecting it with some of the most distinguished scholars that have been produced in this century. This was a feeling which he naturally had, and I cannot think that was malice. It was also said that his former testimonials proved malice. His former testimonials proved a little too much facility, I think, in the other direction; but I do not think they prove malice. As to the testimonials, all that Principal Shairp stated was his opinion that he (Dr Auld) had no right to use them as applicable to a professorship, for they had been given him as general testimonials. This seems to have been his view; and I agree with him thus far, that testimonials for a schoolmaster are not necessarily testimonials as to a man's fitness as a professor.

On the whole matter, there being no proof of malice, I think this was either a communication to the patron which required no privilege at all, or a communi-

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cation which was privileged owing to the position of Principal Shairp. On these grounds I come to the same conclusion with your Lordship that we must assoilzie the defender.

I cannot conclude without making the observation that I hope some light has been thrown in this question upon the subject of testimonials which ought to produce serious thoughts in the minds of those who give and those who receive them. A testimonial ought to be strictly true, and not coloured. I do not say one should write a testimonial as he would write history, for there he must not be afraid of speaking of everything that is bad as well as of everything that is good. This would never do, and the testimonial would not be used if it were done. But it ought to be a strictly true testimonial, and, if we may borrow from a heathen author in regard to truth, we should not allow ourselves to be carried beyond the truth on any subject—testimonials or anything else—

"Though Phalaris with his brazen bull be nigh,
And loudly dictate to our lips a lie."

These gentlemen would not have done or said anything incorrect out of fear or compulsion. But favour, friendship, compassion, are sometimes as great seducers from the path of strict accuracy as fear or force, and it is acknowledged that to some extent the testimonials were modified by these amiable influences. But though I think in this case there was a little embellishment given to the facts, I cannot visit that error in such a way as to convict Principal Shairp of malice in this case, because he may have been a little too easily led to further the views of Dr Auld on a former occasion. I think he had countenance for all that was done. There was some truth in what was said about Dr Auld having failed. We see in Mr Grace's evidence an opinion to that effect. But the question is not whether that is the truth, but whether it was an opinion which Principal Shairp was entitled to entertain, and did honestly entertain; and he tells us that even from the time the testimonials were given he had seen proofs of Dr Auld's teaching which did not influence him favourably; and no one connected with the University of St Andrews could fail to see what a serious stigma was cast on the Madras School teaching by the report of the Sub-commissioners on Education becoming publicly known. The idea must have been painful that a man of whom that report had been made (whatever explanation might be given of it) was to become the holder of so important a chair in the University as that of Humanity.

On the whole, I see nothing that would lead me to deprive Principal Shairp of the privilege which he possessed, or of his right to tender to the patron his opinion, believing it to be an honest opinion, in the matter.

LORD ORMIDALE.—In this case, which raises some questions of novelty and importance, I must now assume—my views on the point having been, at a former stage of the litigation, overruled by a majority of the Court—that the pursuer, as executrix of the late Dr Auld, is entitled to sue, as she does, the present action of damages for the injuries caused by certain alleged libellous or slanderous statements uttered by the defender of and concerning her late husband, and also for the defender's alleged illegal conduct in retaining the chair of Humanity in the United College of St Salvador and St Leonard's at St Andrews, he being at the same time Principal of that College.

The pursuer also concludes for damages arising to herself "as an individual," but she does not in the record explain how she was or could be individually in-

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jured, and she has not by evidence or argument attempted to support this branch of her action, which may therefore be laid aside as not requiring farther notice.

The pursuer has endeavoured to support her claim for damages, as executrix, on the grounds, 1st, that the defender libelled and slandered her late husband, Dr Auld; and 2d, that he acted illegally in retaining for some time the chair of Humanity, thereby preventing Dr Auld being inducted into that chair, and enjoying the emoluments thereof. These grounds of action substantially relate to and arise out of the same matters.

The defender, in December 1868, while he held both the office of principal and the chair of the Humanity class, intimated to the College, and to the Duke of Portland, the patron of the chair, his intention of resigning the latter in May following. In consequence of this intimation, Dr Auld, who was then the master of the burgh school of St Andrews, called the Madras College, applied to the Duke to be appointed to the chair about to be vacated by the defender, and the Duke, in March 1869, intimated by letter to Dr Auld that he had determined to give him the appointment. The defender a few days thereafter wrote to the Duke deprecating the appointment of Dr Auld to the chair of Humanity, as not having the necessary qualifications; and the defender also continued till after the death of Dr Auld, in August 1871, to hold the chair himself, thereby, as the pursuer says, preventing her late husband obtaining it.

Such is, briefly, and in general terms, the state of matters in relation to which the pursuer, after the death of her late husband, who had himself neither raised, nor intimated any intention of raising, an action of damages against the defender, insists in her present claim as her husband's executrix. Her claim requires, for the sake of distinctness, to be considered, first, as arising from the defender's alleged libellous or slanderous statements, and, secondly, from his alleged illegal conduct in retaining, as he did, the chair of Humanity as well as the office of principal.

In her record the pursuer is very vague and general in her allegations, which are all contained in the 8th article of her condescendence, touching the libellous and slanderous statements of which she complains. She there explains, as the reason of this, that she did not know the exact terms of the letters the defender had written, and therefore that she could not specify more particularly his libellous utterances—a somewhat strange and unusual statement coming from the pursuer of an action of damages. Ultimately, however, the pursuer, in the course of the proceedings, procured all the defender's letters, and it is in respect of the statements in his letter to the Duke of Portland of 17th March 1869 that she has chiefly, if not exclusively, maintained her claim for damages under her first ground of action. For although it is true that in the 8th article of her condescendence she also avers, in general terms, that besides libelling her husband in letters to the Duke of Portland, the defender slandered her husband in "verbal statements to all the professors of the United College, and particularly to Professor Campbell, the Professor of Greek in the University, during the months of March, April, and May 1869, or about that time," the nature and terms of the slanderous statements thus vaguely alluded to have never yet been explained, and she has made no attempt to support them. It is obvious, indeed, from the proof, that no case of that description has been established, and I did not understand her counsel at the discussion to say that it had. It is a different question, which will be afterwards noticed in dealing with the matter of privi-

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lege, whether the defender's communications to the professors, such as they were, may not go some length to shew *quo animo* he wrote the letter of 17th March to the Duke of Portland.

Now, there is no doubt that the defender, in his letter to the Duke of Portland of 17th March, expressed himself in very decided terms as to the failure of Dr Auld as classical master of Madras School, and stated his opinion, for that and other reasons, that Dr Auld was ineligible for the chair of Humanity. The defender also stated in this letter, in reference to certain testimonials which Dr Auld had some years previously obtained from various persons, and from the defender himself among others, "that they were never intended to certify to his fitness for a professorial chair, and if Dr Auld has laid them before your Grace for this purpose, I must be allowed to say that he had no right to do so." The pursuer endeavoured to make two points out of this—1st, that it was false and calumnious for the defender to say of Dr Auld that he had failed as a teacher in the Madras School, and that he was consequently unfit and disqualified for the position of professor of the Humanity chair in the United College; and 2dly, that it was also false and calumnious for the defender to say of Dr Auld that he had improperly used testimonials given for one purpose in order to accomplish another. I am not quite satisfied that these propositions of the pursuer are maintainable, looking merely at the terms of the letter of 17th March; but as the alleged libellous statements might probably be so innuendoed as to have enabled the pursuer to get into a proof, and as a proof was allowed and has been adduced, I consider it unnecessary, especially in the view I have taken of the result of the proof, to scrutinise, apart from it, very critically the statements of which the pursuer complains, in order to determine whether they are or are not libellous in themselves.

Assuming them to be libellous, or that by innuendo they could be made to bear that character, I can entertain no doubt that in making them the defender had the protection of privilege. According to all the authorities, English as well as Scotch, cited at the discussion, it is a well-established principle that a communication made *bona fide* upon any subject-matter in which the party making it has an interest, or in reference to which he acted in the discharge of a duty, public or private, legal or moral, is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter, which, without that privilege, might subject him in damages. The plea of privilege was, in language even more favourable for the party founding on it, recognised and given effect to in the judgment of the Judicial Committee of the Privy Council in the recent cases of Hart v. Gumpach (Law Reports, Privy Council Cases, vol. iv. p. 439), and Laughton v. The Bishop of Sodor and Man, *ib.*, p. 495. And to the same effect also is the law stated in Broom's Commentaries (p. 753), and in Starkie on Libel (p. 267). In our own Court, again, we have very good illustrations of the principle in the cases of Milne v. Bauchope, 19th July 1867 (5 Macph. 1114), and Macbride v. Williams and Dalzell, 28th January 1869 (7 Macph. 427). The former of these cases related to certain statements which a party claiming to be in the position of head-master of an educational establishment had made about a female teacher in that establishment; but although the jury found he did not occupy the position on which he rested his privilege, and therefore negatived that ground of defence, the Court, in disallowing a motion for a new trial, threw no doubt upon the principle itself as applied to such a position as that of the head of an educational establishment.

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On the contrary, Lord Cowan, apparently with the concurrence of the rest of the Court, expressly said,—"I desire to state, in explicit terms, that I do not dispute the privileged position of a person placed in the position of governor, rector, or head-master of an educational or other institution in his communications to the managers or directors of the institution with relation to its management or its interests. These communications, when made *in bona fide*, within the scope of his proper functions, are certainly privileged." And so in the other case of Macbride v. Williams and Dalzell, the principal of a veterinary college was held to be privileged in making certain statements in themselves of a criminatory nature to the patrons of the institution in relation to one of the professors. That case indeed has, in its leading features, a very striking resemblance to the present; the only distinction between the two being one pointed out by the pursuer at the discussion, viz., that there the individual complained of held the appointment of professor, and was in the actual discharge of its duties, while here the statements made by the defender were of and concerning a candidate merely for the office of professor. But I am unable to see how this distinction can be held to affect the matter of privilege, for all the elements requisite to constitute privilege are to be found in the present as clearly as they existed in the case referred to.

But, before remarking farther upon the position of the defender, in the circumstances of the present case, as a privileged one, it is necessary to notice that, besides the statements in his letter of 17th March to the Duke of Portland in regard to Dr Auld's unfitness for the professorship of Humanity, the pursuer also complains of his statements in the same letter regarding the testimonials, to the effect that they had been granted about seven years before to assist Dr Auld for a different object than to obtain a professorship, and therefore that "if he has laid them before your Grace for this purpose I must be allowed to say that he had no right to do so." Surely the defender was entitled to express that opinion, whether it was a correct one or not, without subjecting himself in damages as for a false and calumnious libel. The defender did not say that Dr Auld laid the testimonials before his Grace for a fraudulent or deceitful purpose. And in anything he said he did not impugn the motives of Dr Auld at all, but merely questioned his right.

Supposing, however, that the defender's statements regarding the testimonials were held to be calumnious, I think that, in making them, equally as in making his other statements complained of, he must be taken as having acted in a matter in which he had an interest, and from a sense of duty, and is accordingly protected by privilege. What the precise rights and duties of the defender as Principal of the United College are does not appear, and for the present purpose need not, I think, be minutely inquired into. It is enough that his position as Principal vested him with an interest and conferred on him a duty to interfere to the extent he did. According to the pursuer's own statement in the first article of her condescendence, the defender, as Principal of the United College, is "head of the society, and in that capacity fulfils the offices of superintendence and jurisdiction which the original constitution of the colleges assign to him." It can scarcely be doubted, therefore, that the defender had, in reference to the reputation and prosperity of the college, of which—in the pursuer's own words—he was the head, and exercised a superintendence, a material and obvious interest to see that a suitable appointment of a professor, and especially a professor of Humanity, who holds, as it were, the door of entrance to the

college, was made. And if he had such an interest, it follows that, interfering to the extent he did, he did no more than exercise a duty which obviously belonged to him. Nor can it be doubted that the defender's communication was made to a party who, as patron of the Humanity chair, had a corresponding interest and duty.

If I am right so far, the pursuer cannot prevail, unless she establishes that the defender acted maliciously. But I have been unable to discover from the proof any ground for imputing malice to the defender. To me it appears manifest that he entertained none, but that in making his communication to the Duke of Portland he acted solely from a sense of what he honestly believed to be his duty to the college of which he was the head, and whose interests were in some measure in his keeping and under his superintendence. One thing at least is clear, that in his whole actings he had the approval, with two exceptions, of all the professors of the United College, who, indeed, participated in everything he did. His communications to and with the professors, in place of shewing that he was actuated by any improper animus or feeling towards Dr Auld, go far to prove the reverse.

In regard, again, to the alleged illegal conduct of the defender in retaining the Humanity chair after the date when he had intimated his intention of resigning it, the pursuer's statements are to be found in the third and seventh articles of her condescendence, and require careful attention. In the third the pursuer sets out a minute of the college, which bears that the defender "while he was ready to demit the chair immediately, if it should seem desirable, was willing to teach the Humanity classes until the end of the session, and at that date, or on the 15th of May, to resign the chair;" and then she goes on to say, that, "notwithstanding the legal disability of the Principal of said United College to hold a professorship in conjunction with the office of Principal, and, notwithstanding his actual resignation of the professorship of Humanity, to take effect on the 15th of May 1869, as embodied in the foresaid minute, the defender, on the expiration of the time during which it was agreed that he should continue to perform the duties of the professorship, refused to demit the same, and continued to exercise the office of professor, and to receive the endowments pertaining to the office until after the death of the said James Auld, which took place on 11th August 1871." In making this statement the pursuer proceeds on the assumption that the defender had, by the minute referred to, actually resigned the professorship, but I scarcely think she is right in this, for by the minute the defender had merely intimated an intention to resign it at a future date, and, in point of fact, he had not, prior to the death of Dr Auld, actually resigned. The pursuer, again, in the seventh article of her condescendence, assumes the "legal disability" of the defender to hold a professorship in conjunction with his office of Principal, but she has not succeeded in shewing that there was any such disability. Indeed, beyond some speculative observations and suggestions made at the discussion, nothing has been advanced, by way of evidence or otherwise, to instruct this, while it is well known that the Principal of St Mary's College at St Andrews has long held and now holds a professorial chair, along with his office of Principal.

Irrespective, however, of such considerations, and whatever may be thought of the defender's conduct in retaining as he did the Humanity chair, it is sufficient to remark that the pursuer has entirely failed to shew that any right of action could have thence arisen to Dr Auld, or to her as his executrix. Dr

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Auld was not the patron of the chair, nor had he actually obtained any legal or enforceable right to it. Neither had the defender come under any obligation or promise to Dr Auld to resign the Humanity chair. In short, there neither was, nor is it said that there was any privity of contract whatever between the defender and Dr Auld in the matter. Whether the Duke of Portland, as patron of the chair, or the Crown, might have challenged the defender's retention of the Humanity chair, is another thing altogether, which it is unnecessary to inquire into, for it is not pretended that Dr Auld had come into the right and place of either the patron or the Crown by assignation or otherwise. I am therefore quite unable to understand upon what principle the pursuer, as executrix of Dr Auld, has any right or title to insist in the present action, so far as it is laid upon the assumed disability of the defender to retain for some time, as he did, the Humanity chair in conjunction with his office of Principal.

The result is, that for the reasons I have now stated, I am of opinion that the pursuer has failed to support her action on any of the grounds libelled, and that the defender is entitled to absolvitor.

LORD GIFFORD.—This case is now before us as a concluded cause upon the proof which has been led, and on the whole pleas of parties, which have been very fully and ably argued. The case involves several distinct questions, all of which are attended with nicety and difficulty, but on all of these questions, so far as necessary for the decision of the present case, I have formed a clear opinion in favour of the defender, Principal Shairp.

The case divides itself into two great branches.

I. The first question is, whether Principal Shairp is liable in damages to the pursuer, Mrs Auld, for having, as she alleges, slandered her husband, the late Dr Auld. The slander is said to be contained in Principal Shairp's letter to the Duke of Portland, dated 17th March 1869. The pursuer also complains of Principal Shairp's letter to the Duke of Portland of 12th May 1869, but this last letter merely repeats part of the previous one, and substantially the statements complained of are those contained in the letter of 17th March 1869. The pursuer maintains that the statements in this letter, relative to the late Dr Auld, are false and calumnious, and operated to his loss, injury, and damage.

The alleged slander complained of consists of two particulars, which may be shortly stated thus—(1) a statement that Dr Auld was unfit to discharge the duties of Professor of Humanity in the United College, St Andrews, and that he had notoriously failed to discharge efficiently the duties of classical master in the Madras College; and (2) that Dr Auld had made an improper use of testimonials which had been given him some years previously by the defender, and by some other Professors of St Andrews University.

The main defence relied upon by the defender in this branch of the case is, that the defender, in making the statements complained of, was in a position of privilege as Principal of the United College of St Andrews, and that, having made the statements *in bona fide*, and in the honest discharge of his duty, he is not liable in damages therefor. Although not on record, the plea of *veritas* was also suggested at the debate, and it seemed to be maintained that the statements in the letter of 17th March being in all respects true, there could be no damages awarded in respect thereof.

If the case had depended upon the plea of *veritas* I would not feel myself in

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a position to sustain it. I do not think that upon the closed proof now before us there is sufficient evidence to enable me to affirm that, in point of fact, the late Dr Auld was unfit to be Professor of Humanity in St Andrews University, or that he had notoriously failed as classical master in the Madras Institution, and still less would I be prepared to find, in point of fact, that Dr Auld had made an unfair or unjustifiable use of the old testimonials which he had received from the St Andrews Professors. The question of Dr Auld's fitness for the professorship, and the question whether he had been successful in the Madras Institution, are to a large extent matters of opinion, as to which different persons might very fairly take different views. It is apparent that different views on these questions were held, and quite honestly held, by different parties, as well as by different sections of the public of St Andrews interested in its educational prosperity; but I find no sufficient evidence to enable me to say with any confidence which of the conflicting opinions was the right one, and accordingly I could not sustain the technical plea of *veritas convicii.*

But I think the main defence upon which Principal Shairp relies in this branch of the case is well founded. I think Principal Shairp was in a privileged position, entitling him honestly to express to the patron of the Humanity chair his opinion as to the fitness or suitability of any of the candidates for that chair. Principal Shairp admittedly held the office of Principal of the United College. Whatever be his special duties as Principal I cannot doubt that they include the general supervision of his branch of the University, and impose upon him the duty of doing what is in his power to secure its efficiency. Nothing can more closely touch the efficiency and prosperity of the University than the appointment of its professors, and although the duty may be a most difficult and delicate one, requiring the greatest prudence and caution in its discharge, I cannot say that it is not fairly within the duty of the Principal to remonstrate in proper and fitting terms, and to the proper persons, against an appointment which he honestly thinks would be injurious or ruinous to the interests of the University. To this extent I am of opinion that Principal Shairp was in a privileged position, and this seems to me to be sufficient for the determination of this branch of the case.

To a certain extent, every one who openly and avowedly becomes a candidate for a position like a public chair in a public University exposes himself to and invites fair and honest criticism, and if that criticism proceeds from proper quarters, and does not exceed fair and reasonable limits, I think the candidate cannot complain, although the criticism should be adverse or even severe; but it is not necessary in this case to consider any such general question of privilege, for surely if any person was privileged or called upon honestly to criticise or comment upon Dr Auld's claims it was the Principal of the University in which Dr Auld was seeking a chair. I say nothing of the delicacy of the Principal's position, or whether the case was such as to make his interference an absolute duty. Of this the Principal must, I think, be himself the judge; but this I do say, that if the Principal honestly believed that the proposed appointment would be hurtful or ruinous to the University, then it was his duty to remonstrate, and he will be protected by his privilege in an action for slander. I do not think it necessary to find how far this privilege extends. I incline to think it would extend to the other Professors and members of the Senatus, all of whom have a very direct interest, and some of whom have a serious pecuniary

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interest in the appointment of their colleagues. It is enough to say that this interest, this duty, and this privilege, resides in the Principal.

Now, if this be so, it follows that the Principal must be protected in an action for slander, unless it can be established that he acted maliciously and *in mala fide*, not in the honest discharge of what he believed to be his duty, but under the influence of personal and unjustifiable motives, and with an intention not to benefit the University, but to injure the late Dr Auld. I think malice in cases like the present has this wide meaning, that it includes every motive except the honest and pure wish fairly and sincerely to discharge a duty.

Now, the existence or absence of malice is always a question for the jury, and the jury are entitled to take into consideration the whole circumstances of the case, and the whole actings of the defender, and to infer therefrom whether his conduct has not been such as to infer the presence of other than pure and upright motives. On this point I am of opinion, as a juryman, that malice has not been established; on the contrary, I think it sufficiently appears that Principal Shairp, in what he did, was actuated only by an honest desire to secure the welfare of the University, and to avert what he honestly believed would be an injury or a misfortune. I do not judge of his actings according to canons of mere taste, but I think that his whole conduct shews an earnest and sincere belief that what he did was necessary for the University over which he presides. I abstain from entering upon detail. He was a personal friend of the late Dr Auld. He seems to have gone to him privately to induce him to withdraw his candidature. He addressed his remonstrances to the proper quarter, the Duke of Portland, and privately, without seeking to give needless publicity thereto. His opinions were shared by the great majority of the Senatus, the action of some of whom was even stronger than his own. I think his remonstrance was timeous, for although the patron had intimated his intention to appoint Dr Auld, no appointment had been issued, and it was undoubtedly in the patron's power, if he found sufficient reason, to withhold the appointment, and give it to another. If the appointment had been actually issued it might have been otherwise, for it would have been a strong proof of mere malice to express an opinion when it was too late, and when there was no end to be served thereby. The pursuer founded strongly on the fact that the defender retained the Humanity chair after having intimated his resignation, and this as a proof of malice, apart altogether from her separate plea that such retention was illegal and wrongous. I do not think that this argument has much weight. It is proved that the defender retained the chair at the express request of the Senatus, with only two dissentient voices. He did so after communication with the patron, who left him at entire liberty to act as he thought right, and apart from all questions of illegality. I am disposed to think that the defender's continuing to hold the chair of Humanity in compliance with the earnest wish of the great majority of the professors, and in circumstances open to misconstruction, is rather a proof of the Principal's strong and *bona fide* belief in the extreme inexpediency of the proposed appointment of Dr Auld. I cannot for a moment listen to the suggestion that the defender was actuated by unworthy or mercenary motives regarding the fees or emoluments connected with the chair.

It was farther urged for the pursuer that the defender's malice was proved by his having misrepresented to the patron the nature of the testimonials which he and the other professors had granted to Dr Auld in 1861 and 1862. It is true that some of these testimonials appear to have been given not merely to enable

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Dr Auld to retain his situation in the Madras College, but with a view to his candidature for the Ayr Academy or other appointment. Principal Shairp seems to have overlooked this, and to have represented that they were merely given to save him from the threatened dismissal from the Madras College. But the real substance of the statement was that the testimonials were not intended to certify Dr Auld's fitness for a professorial chair, and this is undoubtedly true; and it appears to me that the mere inaccuracy in detail as to what had happened six years previously is no sufficient proof of the defender's malice, and not even an indication of the absence of *bona fides*.

On the issue of slander, therefore, in respect of the defender's privileged position, and that he acted *in bona fide* and without malice, I feel myself bound to find for the defender. I might add, in reference to the alleged damage resulting directly from the slander, that there is no proof of any direct damage. It is in evidence that Principal Shairp's letter had no effect on the mind of the Duke of Portland, to whom it was addressed. It did not alter the Duke's intention. The Duke himself expressly says so. He adhered to the last to his intention to appoint Dr Auld the moment the office should become vacant, and whether the defender acted illegally or not in retaining the office (which is a different question), it seems clear enough that the alleged slanderous letter had no effect *per se* in keeping Dr Auld out of the professorship; and this brings me to the second branch of the case.

II. The second ground of action on which the pursuer relies is that the defender acted illegally, and to Dr Auld's loss, injury, and damage, in retaining the Humanity chair after having intimated his intention to resign it as at 15th May 1869. This branch of the action involves several distinct and difficult questions, apart altogether from its bearing on the question of malice, to which I have already adverted.

In the first place, I am of opinion that neither the late Dr Auld, up to the time of his death, nor the pursuer as his widow and executrix, ever had any title to challenge the illegality of Principal Shairp's retention of the Humanity chair, or to claim damages therefor.

The late Dr Auld never was appointed Professor of Humanity. The presentation was never issued or delivered. All that Dr Auld had or could have was an intimation of the patron's intention to appoint him to the chair, an intention which while it never varied, and was never altered on the part of the patron, was yet never carried into effect. Dr Auld, so far as that chair was concerned, was never more than one of the general public, with expectations certainly, but with no more rights than any citizen of the country. A hoped for or expected appointment will not give a title to sue. Suppose, then, that Principal Shairp had never written to the Duke of Portland at all, and had never been in communication either with the patron or his agents, would this action have lain? Would the present branch of it have been competent either at the instance of Dr Auld or of his widow? I think not. The abstract legality or illegality of Principal Shairp's conduct might have been raised by the patron, by the Crown, by the Senatus or its members, and perhaps by any member of the University, or by others, but not by any mere member of the community, and not by Dr Auld, unless he had actually obtained a presentation; and certainly without such presentation Dr Auld, even supposing that he could have tried the question, could never have claimed damages.

But, in the second place, I am not prepared to affirm in point of law the

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absolute illegality in Principal Shairp continuing after his induction as Principal to hold the chair of Humanity. It is plain that in certain circumstances he might do so after becoming Principal. For example, in this very case, when appointed Principal in the middle of a session, it was hardly disputed that he might fairly and rightly continue Professor of Humanity till the close of the session. Any other course would have been unfair to the University, and unjust to the students of the class.

In like manner, it might often happen that circumstances might render expedient even a more prolonged tenure of the chair by a Principal, or by an occupant who had been promoted to the principalship. It is rather a question of expediency than of absolute illegality, and if all interested concur or acquiesce in a temporary union of the two offices I see no absolute illegality which would prevent such temporary arrangement. In this case there was, if not a virtual acquiescence and concurrence, at least an absence of any challenge on the part of all concerned,—that is, neither the Crown nor the patron, nor the Senatus, nor the University Court, nor any other party interested, intervened or complained of the illegality of the course taken.

On the general abstract question, whether a Principal holding that office for life might not also hold for life the chair of Humanity, I would rather decline giving any opinion. Such unions are not unknown in other Universities, although in general I should think they are not expedient. Something might depend on the terms of each appointment, and on the concurrence of the Crown, the patrons, and the authorities of the University. It is sufficient for the present case,—if indeed it is even necessary to go so far,—to find that there was no absolute illegality in the unchallenged arrangement of a temporary and precarious character which took place in the present case. On the second branch of the case also I think the defender is entitled to absolvitor.

THIS interlocutor was pronounced:—"Having heard counsel on the reclaiming note for John Campbell Shairp against Lord Gifford's interlocutor of 30th June 1874, recall said interlocutor, and assoilzie the defender from the whole conclusions of the action: Find the defender entitled to expenses, with the exception of such part thereof as have been incurred between the 10th of February 1874, when the record was closed, down to the 15th of December 1874, when the plea on title was repelled, and remit to the Auditor to tax the same and to report, and decern."

THOS. SPALDING, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

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JAMES EAGLESHAM AND COMPANY, Pursuers.—*Balfour—Alison.*
JOHN GRANT, Defender.—*D.-F. Clark—Mackintosh.*

Agent and Principal—Partnership—Right in Security.—A cautioner in a composition settlement between a trader and his creditors obtained an assignation to the trader's business and estate. It was agreed that the cautioner should receive a commission of 7½ per cent on the gross proceeds of the sales, and he bound himself, after providing for the payments undertaken by him and for his own commission, to account to the trader for the balance. Notwithstanding the assignation, the trader was allowed to continue his business without ostensible change, subject, however, to the control of the cautioner. *Held* that the cautioner was not liable for a business debt incurred by the trader, either on the footing that the business truly belonged to him, or that he was a partner in the

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same, the true intention and effect of his agreement with the trader being merely to create a security in his favour.

THIS was an action at the instance of James Eaglesham and Co., warehousemen, Glasgow, against John Grant, accountant, Inverness, for certain sums, amounting to about £100, being the balance of the price of goods furnished by the pursuers to one James Munro, who formerly carried on business as a draper in Inverness in a shop called the "London House."

The pursuers averred that although the business, for which they supplied the goods in question, was carried on in the name of Munro, he was merely the agent or servant of the defender, acting for the defender's behoof as sole principal, or at all events that the defender was a partner with Munro in the business.

In support of these averments the pursuers founded upon certain deeds which had come to their knowledge. They pleaded;—(1) The goods in question having been furnished upon the order of the said James Munro, acting as the agent or servant of the defender, his principal, and the defender having received and taken the benefit of the said goods, he is liable to pay the price thereof. (2) At all events, the defender is so liable, in respect that if he was not the sole principal, he was at least the chief partner in the business for which the said goods were ordered, and that as such he accepted and took the benefit thereof. (3) In respect of the deeds and writings above narrated, and of the actings which followed thereon as aforesaid, the defender is liable to the pursuers for the price of the said goods, and they are entitled to decree therefor, with expenses.

A proof was allowed, from which the following facts appeared:—

In the early part of 1871 Munro became insolvent. He offered his creditors a composition of 15s. per £, payable by five equal instalments, which they were prepared to accept if duly secured. In these circumstances Munro applied to the defender to assist him in carrying out the composition arrangement. The defender, as a matter of business, agreed to guarantee the last two instalments of the composition upon certain conditions, which were embodied in a minute of agreement between him and Munro, dated 4th April 1871.

By this deed Munro bound himself to transfer to the defender his whole business and estate, with power to the defender to realise the estate and carry on the business, as he might choose or direct. The deed contained an obligation on Munro to assign the lease of his shop and dwelling-house to the defender, and to insure his life for £500 in name of the defender. Munro undertook to devote his entire time and energies to the business of the "London House," with a view to enabling the defender to realise the stock to the best advantage as speedily as possible. It was provided that no goods should be ordered for the purpose of the business without the defender's written authority, and that for the payment of any goods ordered in contravention of this provision the defender should be in no way liable.

The defender bound himself to pay out of the proceeds of Munro's stock and other effects the two last instalments of the composition, and also the value of such goods as might, upon his written authority, be ordered for the purposes of the business or replenishing the stock; and further, to pay out of these proceeds to Munro a weekly alimentary allowance of £1, 10s., and to allow Munro to retain his dwelling-house, rent free, and to pay the rent, taxes, and public burdens for the shop and dwelling-house, and whole wages to servants and assistants in the shop and house, and generally the whole working expenses of the establishment, as the same should be fixed by him, together with the premiums

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on Munro's life, and the insurance on the property, and the expenses which had been or might be incurred in carrying out the agreement. The defender further bound himself to pay all the monies and proceeds which he might realise from the sale of the stock, from the recovery of the debts, and generally from the estate of Munro, into a separate bank account to be opened by him in his own name, and which might be operated on by him when necessary.

It was stipulated that the defender should receive a commission of £7, 10s. per cent "on all the monies which might be received or recovered by him in connection with the carrying on of the business and realisation of the estate," and the defender bound himself, after providing for all the payments undertaken by him, or for which he had rendered himself or might render himself responsible, as well as for his own commission and expenses, to account to Munro for the balance which might remain in his hands.

In pursuance of this agreement the defender guaranteed to Munro's creditors the last two instalments of the composition, and on 17th April 1871 Munro executed in favour of the defender an assignation and conveyance of his stock in trade and whole other estate, and also an assignation of the lease of his house and shop, which was not, however, intimated to the landlord.

Munro continued in possession of his house and business premises as before without any ostensible change. His name remained over the door, and was used in all advertisements regarding the business, and in the invoices of goods sent out and received. The correspondence in the course of the business was conducted entirely in his name, and the bills granted to creditors for goods supplied were signed by him.

On the other hand, in pursuance of the agreement, the whole receipts for the business were paid by Munro into a bank account kept in name of the defender, and which was operated on by the defender's cheques alone. Munro was restricted to an allowance of 30s., afterwards with the defender's consent enlarged to £2 a-week, for personal and family expenses, and this sum and the wages or salaries of shop assistants and servants, and rates and taxes on the house and shop, were deducted from the drawings from time to time before the balance was paid into bank. A cash-book was also opened by Munro at the defender's desire, containing a record of the cash transactions in connection with the business; and this book and the bank book in the defender's name gave the means of tracing all such cash transactions. When sums became payable, either on account of composition on Munro's former debts, or on account of goods ordered, or for payment of rents, or the like, in carrying on the business, after the agreement was entered into, the defender granted cheques on the bank account in his name, into which the proceeds of the business were paid. These cheques were granted almost invariably, not to the creditors directly, but were payable "to bearer," and handed to Munro, who made the payment or remittance, but they generally specified the particular purpose for which they were granted. The defender did not insist on Munro obtaining written authority from him before giving orders for goods. He was aware that goods were required, and were in course of being ordered from time to time, and the extent of his interference on this subject was to urge Munro to be careful to avoid ordering anything more than was absolutely required for the current wants of the business.

Under this system matters proceeded from April or May 1871 until April 1873. In the meantime Munro's creditors, including the pursuers, who had a debt due to them when the defender interposed as cautioner,

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received payment of the composition on their debts. The money was to a great extent obtained from the receipts of the business; but there was a considerable deficiency, which was met by advances from the defender.

The goods the price of which the pursuers sued for were supplied to the "London House" in the winter of 1872-3. They were ordered by Munro, and invoiced to him, and were not furnished in reliance on the defender's credit to any extent. It was admitted that at the time the goods were furnished the pursuers knew nothing of the arrangements between the defender and Munro, beyond the fact that the defender had become cautioner for the last two instalments of the composition. Munro granted bills for the goods.

In April 1873 a state of Munro's affairs was made up, which shewed that the business was not prospering, and it was resolved that the business should be wound up, and the stock disposed of, if possible, to a purchaser. An opening having occurred elsewhere, Munro removed in May 1873 from Inverness, taking with him his household furniture, with the knowledge of the defender, and without objection on his part. Munro subsequently granted a bill to the defender for the estimated value of the furniture, and at the same time a bill for the estimated amount of the defender's advances.

When Munro left Inverness both he and the defender anticipated that when the stock was sold there would be a reversion in Munro's favour of £200 or £300, after repayment of the defender's advances and payment of his commission. The stock was sold in July with Munro's sanction, and it then became apparent that in place of a reversion the business would shew a considerable loss.

Munro having incurred additional debts in his new business, his estates were sequestrated on 4th October 1873. A claim was lodged for the defender, based upon the two bills mentioned; but that claim was afterwards withdrawn and another given in for the defender's actual advances and commission.

After Munro's sequestration, the existence of the agreement between him and Grant, and relative deeds, became known to the trustee in the sequestration, and through him to the trade creditors, in consequence of which the present action was raised.

The Lord Ordinary pronounced this interlocutor:—"Finds that the pursuers have failed to establish facts relevant to infer responsibility on the part of the defender for the sums sued for: Repels the pursuers' pleas in law, sustains the pleas in defence, and assoilzies the defender from the conclusions of the action, and decerns: Finds him entitled to expenses," &c.*

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* "NOTE.—(After a narrative of the facts)—Such being the state of the facts as to the origin and history of the defender's connection with the business, the questions of law which arise are,—whether the defender has become responsible for the business debts (1) because the business carried on ostensibly in Munro's name was truly carried on for his behoof, Munro being agent, and the defender the principal? or (2) because the defender was truly a partner with Munro in the business? and it will, I think, be convenient to take the last of these questions first.

"I am of opinion that in a question between Munro and the defender no partnership existed, and that the substance and effect of the agreement into which they entered was that the defender undertook to guarantee the payment of debts due by Munro, which might involve an advance on his part, on condition that Munro should conduct his business under stringent supervision, regulations, and restrictions, and should pay the defender a commission on the gross

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Argued for them;—Munro was absolutely divested in favour of the amount to be received in connection with the carrying on of the business and realisation of his estate, until the defender should be relieved of his guarantee. That this was the substance of the arrangement between these parties is, I think, apparent, if it be considered what would have been the position of matters if the parties had realised their expectations, and the business had prospered instead of going back. In that case, from the receipts of the business, the composition on the debts, the payment of which the defender had guaranteed, would have been paid without any advance on the defender's part being necessary; and as soon as his guarantee had in this way been superseded, and assuming that he was not under an advance, Munro would have settled with him by simply paying the stipulated commission under the agreement. On payment of that commission it is clear the defender was bound to discharge all the deeds that had been granted in his favour. This shews that the true nature of the arrangement between him and Munro was that commission should be paid by Munro for services rendered,—the service being the interposition of the guarantee, and the amount of commission being dependent on the sums received from the business, and in the realisation of any part of Munro's estate which might be sold. The defender was not even to receive a share of the profits of the business. His commission had no relation to profits, but was fixed with reference to the gross receipts from Munro's whole estate; and as between him and Munro there was no stipulation that he should bear any share of the losses which might be sustained. Both parties transacted on the footing that the business should continue to be Munro's. If it succeeded and he paid the defender's commission, the business belonging to him was freed from any burden or obligation in favour of the defender. If it failed, on the other hand, I see no reason for holding that the defender in that case became a partner with Munro. He did not undertake in that case to bear a share of the losses, any more than he became entitled in the case of success to a share of the profits. The losses of the business fall on Munro because the business belonged to him. The defender's loss is the amount of his commission and any sum he advanced under his guarantee, excepting any composition he may recover on these amounts; for his interest, as between him and Munro, was by their agreement limited to his commission and the repayment of any advances he might be obliged to make.

"Previous to the now leading case of Cox v. Hickman, House of Lords (Appeal from Exchequer Chamber), August 1860, 8 Clark's House of Lords Cases, 268, and 30 Law Journal (Common Pleas), 125, participation in the profits of a business was sufficient to infer responsibility as a partner, as explained, with the only limitation of the rule, and a full reference to the authorities, in the last edition (3d edition) of Mr Lindley's work on Partnership, p. 36. In that case it was decided that the right to a share of the profits of a business does not necessarily infer the liability of partnership, and that the relation of partnership depends on the question whether the business is in substance and reality carried on by the alleged partner himself, or by others authorised to act as his agent or agents for that purpose, the destination or division of profits being a material or pregnant circumstance, but a circumstance only, in determining that question. The case of Cox v. Hickman has been followed by several others, referred to by Mr Lindley on pp. 40 to 45 of his work, the leading cases being those of Bullen v. Sharpe, 1865, Law Reports, 1 Common Pleas, p. 86, and Mollwo, March, and Company v. Court of Wards, in the Privy Council, July 1872, 4 Privy Council Appeals, 419. These two cases have perhaps a more direct bearing on the second ground of responsibility maintained here against the defender; and the latter of them indeed in some material respects in its circumstances closely resembles the present case. Without entering into any analysis of these cases, which would involve much detail, I have only to say that I concur in the view expressed by Mr Lindley that the judgments in these two cases merely carried out to their legitimate results the principles which were announced, and which received effect, in the decision of Cox v.

defender, with merely the hope of a reversion. The business was truly the defender's.[1]

Hickman; and I think they bear out the statement made by Mr Lindley, obviously after very careful consideration and examination of the judgments, and with a special knowledge of the case of Mollwo, with which he was very familiar, that they 'establish the doctrine that no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*.'

"Of course a business carried on in the name of one person may be entirely the business of another whose name may be unknown to third parties, and in that case the unknown principal is responsible for all contracts made by his agent carrying on the business within its ordinary line, while the agent, even if paid by a salary only, will himself be responsible for the business debts, not because he is truly a partner, but because he holds himself out as such. The case of Edmunds v. Bushell and Jones, Law Reports, 1 Queen's Bench, 97, cited by the pursuers, is an illustration of this rule. Where, however, the question is, whether a person who receives with others a share of the profits of a business, of which they are unquestionably partners, is also a partner, I think it is the result of the decisions above referred to that (in the absence of acts shewing that with his knowledge or authority he was held out as a partner) the receipt of profits will not infer responsibility as a partner unless the parties, having regard to the subsistence of their arrangements, are really partners *inter se*; and referring, in particular, to the opinion of Baron Bramwell in the case of Bullen v. Sharpe, and to the judgment in the case of Mollwo, March, and Company, I think there is no more reason for inferring agency, with resulting liability for the debts of the business, from an agreement to share profits, than for inferring partnership as between the parties receiving profits.

"Reverting to the question whether the defender was a partner with Munro in the business in question, I think the pursuers have failed to instruct such partnership, (1) because what the defender received, or was to receive, was really not a share of profits, but a commission on the gross receipts from the business and the realisation of Munro's estate; and (2) because, even if these could be represented as a share of profits, the true nature of the arrangement between Munro and the defender was that a guarantee was interposed for a certain return, and not that the defender should have any share in the business to be carried on as belonging to him as well as Munro.

"The remaining question is, Whether the business belonged entirely to the defender, Munro being merely his agent or servant in conducting it? I am of opinion that the facts proved do not warrant this inference. The defender never took possession, as he no doubt might have done, of the stock and other personal property which belonged to Munro, but, on the contrary, allowed Munro to continue in open possession as formerly. The conveyance was not acted on in any way. It is true, the business was conducted under the stringent conditions and restrictions for which the defender stipulated when he agreed to interpose his guarantee, and, in particular, the whole monies drawn were paid into an account in the defender's name, and could only be drawn out again on his cheques. Certain other conditions were relaxed, as, for example, the provision that goods should not be ordered without written authority; but, notwithstanding, Munro alone carried on the business, subject, no doubt, to strict control, and to an obligation to limit himself to a small sum for maintenance. Munro's own name appeared in every way, so far as regards the public, as if he were under no control. The sole change under the agreement was, that, as the price for the defender's interposition by his guarantee, Munro submitted to the defender's control so far as he chose to exercise it, which appears to have been very little, in carrying on the business.

"For the reasons already stated, I hold it to be clear there was no partner-

[1] Murray and M'Gregor v. Campbell and Co., Nov. 28, 1827, 6 S. 147; and cases cited by the Lord Ordinary.

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LORD JUSTICE-CLERK.—The question raised in this case is very important, ship between the parties *inter se*, and the same considerations appear to me to shew that Munro was acting for himself as the proprietor of the business, and not for the defender in carrying it on. The defender, no doubt, had an interest, viz., to receive his commission, and be relieved of his guarantee, and for that purpose had stipulated for such control as he took over the management. But the management was not for his behoof as in right of the business, but for Munro, to whom the profit or loss belonged.

"The points chiefly relied on as fixing liability on the defender in the character of a principal, Munro being his servant or agent merely, are the existence of the bank account and the operations on it, the fact that the defender made large advances from his own funds to enable the business to be carried on, and the granting of the bills above mentioned by Munro to the defender on the eve of bankruptcy. As to the first of these, if it be assumed that the bank account had been in the name of a third party for the defender's protection, and to secure him against the application of the receipts of the business to any other purpose than payment of its debts, and that the cheques of this third party had alone been effectual, the result, so far as the business is concerned, would have been the same, viz., that it would have been carried on subject to the control stipulated for. In that case I do not think there would have been room for the argument founded on the existence of the bank account, and it seems to make no real difference that the defender himself had this check on the application of all money received in the business, by having the bank account in his own name. The fact that the defender paid considerable sums out of his own pocket in carrying on the business is, I think, of no importance, for substantially they were loans by the defender, or payments which he could not avoid making under his guarantee. They cannot, I think, be truly represented as money advanced by the defender as principal to Munro as his agent in carrying on his business. As to the bills granted on the eve of bankruptcy they appear to me to have been taken at a time when the parties were in some confusion as to the precise effect of their agreement and what had followed, which is not to be wondered at, having regard to the rather unusual and somewhat complicated nature of the arrangements which they had entered into. The defender was entitled to commission on any part of Munro's estate which was realised, and as the furniture was, as it were, taken away from his power of control and of taking possession of it, he may have regarded it as realised, in the sense of giving him a claim for commission on its value. But, whatever be the explanation, the parties were evidently under a misapprehension as to the nature of the defender's rights. The bills were subsequently abandoned, and I do not attach any real importance to the fact of their having been taken.

In the view now stated, the agreement between the parties not having been followed by the defender himself taking possession of Munro's business or effects,—a fact which is illustrated by the circumstance that the trustee has now right to the debts, and would also have had right to the stock if it had not been sold and realised before the sequestration,—it follows that Munro was acting for himself and not as the defender's agent in carrying on the business, and if so, responsibility against the defender cannot be maintained.

"It is perhaps unnecessary to consider what would have been the result if the defender had taken possession in a way which seems never to have been contemplated—viz., by removing Munro from the occupation of the premises. Even in that case, however, it is by no means clear, that if the defender carried on the business under the agreement in Munro's name, and without holding himself out in any way as a partner, or as carrying on the business to any extent for his own behoof, that the result would have been different. In that case it is clear that the return to be received by the defender would still have been a commission on the receipts of the business and nothing more, and he would have carried on the business for Munro's behoof ultimately,—the profit

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and has been treated with great ability and at considerable length by the Lord Ordinary. But I think that the grounds on which the case falls to be decided lie within a narrow compass.

The pursuers, who are merchants in Glasgow, furnished goods to a man named Munro, who kept a shop in Inverness. He was the sole party known to them, and they trusted solely to his credit. He has become bankrupt, and the pursuers say that they have since discovered that Munro was merely an agent, and that the real person who had the benefit of the transaction was Grant, the defender; and they found upon a deed which they maintain has the effect of making Grant the real trader, and Munro only an agent. I do not doubt that if this deed, said to constitute the relation of principal and agent between Grant and Munro, had been for the benefit of Grant, if Grant had been the real trader, though Munro was ostensibly put forward, the pursuers' claim would have been well founded. Nor should I have been disposed to admit the limitations on the agent's powers as giving rise to an exception to the general rule, if the business were truly that of Grant, and not that of Munro.

It is clear, however, that the whole transaction, by whatever name it be called, was nothing but a security. It was a piece of mechanism devised for the purpose of getting Munro's composition accepted, for the purpose of securing the creditors in payment of that composition, and also for the purpose of securing Grant, who guaranteed the payment of two of the composition instalments, against loss in consequence of his guarantee. We must take the whole transaction as one. That being so, the fact seems conclusive of the case. The principle of partnership so largely dealt with in the English cases cited has no place here. This deed conferred upon Grant no participation in the profits of the business of any kind. The profits went to one man only,—to Munro. No other person, as trader, had any interest in them. True, these profits were appropriated to pay Munro's debts, his composition to his creditors, and the relief of his cautioner; but these were purposes wholly for Munro's benefit, and no one participated in any part of the profits, excepting as a consequence of Munro's having them applied for his individual advantage. Grant was simply a medium, interposed to accomplish the payment of Munro's debts. He gets nothing to himself but a commission. In short, beyond this he cannot gain, but he may lose by the arrangement. The profits of the trade go to Munro, or, what is precisely the same thing, to Munro's creditors. In this state of matters, there could not in any view be any ground for alleging a partnership between Grant and Munro. As little was Grant the principal in the trading, and Munro an agent. The business was not carried on for Grant's benefit, but for Munro's benefit.

This is sufficient for the decision of the case. At the same time I think that a valuable principle is laid down in the English cases, particularly in that of

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or loss being Munro's under the agreement. He would truly have been, I think, the agent for Munro, the principal; and if his acts in carrying on the business were all consistent with the character of agent for Munro, in whose name and by whose mandate the business was conducted under the agreement, and the defender had not held himself out as a partner to the public, I am disposed to think he would not have been responsible for the trade debts. With reference to this question, however, much might depend on the special circumstances proved as to the mode of taking possession and the particular acts of the defender; and without actual facts, such as do not here occur, the question does not admit of being made the subject of a definite opinion."

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Mollwo, March, and Co., which comes nearest to the present, that the substance and not the form of the transaction is to be looked at. Here the substance of the transaction was not the constitution of a partnership, nor of the relation of principal and agent, but of a security between debtor and creditor, which subsisted solely for that purpose, and was intended to terminate when that purpose was served.

LORD NEAVES.—I take the same view as your Lordship. There are two strong facts in the case. The public were never in any way misled by anything done by Grant. Neither was Grant embarking on the business for his own benefit. The agreement was that the business should be proceeded with so as to pay Munro's debts, and after that to revert to its old channel. If by any means, either from the business or from extraneous sources, Munro had been able to pay off his debts and Grant's commission, Grant's right and interest in the business would have ceased at once. No equity demands that Grant should be made liable to parties who never knew anything of him until after Munro's sequestration. There never was any delivery to Grant of the stock in trade so far as the public were concerned. Partnership between Grant and Munro is therefore out of the question. Nor can it be said that they stood to one another in the relation of principal and agent. It is no doubt true that if a person whose name may be unknown to third parties carries on a business by means of another, whom he allows to be held out as his general agent, the principal cannot plead any private stipulations between him and his agent in bar of his liability. The case of Edmunds v. Bushell and Jones, L. R. 1 Q. B. 97, illustrates this proposition. It came out that a business, carried on under the firm of Bushell and Company, was truly the property of Jones, and therefore Jones was made liable for business debts. But I cannot assimilate that case to the present.

LORD ORMIDALE.—It is acknowledged by the pursuers that they did not rely on Grant's credit. They knew nothing indeed of Grant at the time they sold the goods to Munro. Still, if it had been proved that Munro was only the ostensible trader, and that Grant was the real principal, or was a partner with Munro, Grant would be liable. Was he, then, principal or partner in any proper sense? I entirely concur in thinking that there is no evidence sufficient to establish that he was. Grant, no doubt, had an interest of a certain kind in the business. He was to be remunerated for his services in being interposed as a check on behalf of Munro's creditors, and further stipulations were made to secure himself from his guarantee. Beyond that he had no interest in the drapery business. It was conceded that Munro could have discharged Grant at any moment on relieving him of his guarantee, and paying him the commission stipulated for. A partner could not be so discharged, and this is perhaps a sufficient test of the question of partnership.

The second alternative maintained for the pursuers is that Grant, although not a partner with Munro, was the principal in the business, and that Munro was a mere man of straw. I cannot think that this was the case. On the contrary, when we come to consider the true position of the parties, we find that Grant was really no more than an agent. Munro was still principal. The business was carried on to liquidate his debt. Grant was there as a check to superintend Munro, and he was to get for his services a certain remuneration.

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His position was, in short, that of agent. The present case is quite different from that of Edmunds v. Bushell and Jones,[1] cited for the pursuers. In that case, while Jones had the sole interest in the business, Bushell was put forward as the ostensible trader, Jones lying behind, and, as he thought, exposing himself to no liability. In the present case, so far from Grant having the sole interest in the business, or being able to stop it when he pleased, the fact was the very reverse.

Upon these grounds, and without going into the other English cases cited, Cox v. Hickman, and Mollwo, March and Company v. Court of Wards,[2] which were stronger cases against the parties sought to be made liable than the present, I have come to be of the same opinion with your Lordship. I wish, however, to guard myself from being supposed to afford any countenance to a case of fraudulent concealment, as where a man of straw is put forward to carry on business on behalf of another. No such case arises here. It is not so stated on record, and there is no indication of it in the evidence.

LORD GIFFORD.—I have arrived at the same result without any difficulty. When the pursuers made the furnishings for which they are now claiming they knew nobody but Munro, who was carrying on business in his old shop, and they took Munro's bills, three in number, in payment of the debt. They now maintain that it was Grant who was the draper, and that it was to him that the goods were really furnished. This contention is founded on two grounds.

In the first place, it is said that Grant was a partner of Munro's, and therefore liable, and this plea is a good one if made out in fact. But the pursuers have entirely failed to prove that Grant was a partner. We have the minute of agreement and the whole facts before us. Whatever the effect of the deed is, it is not a contract of copartnery. The defender is not under the deed to receive any share of the profits, nor are any of the elements which belong to a partnership present.

The alternative ground on which the pursuers rest their claim presents only a little more difficulty, viz. that the business was Grant's. Here again it is a question of fact whether Grant was the real person with whom the pursuers dealt, for if Munro was a mere servant, it is not disputed that if the real trader can be got at he would be liable. In my opinion the pursuers have failed to prove this branch of their case also. I quite agree that we must look to the substance of the transaction between Grant and Munro, and not to the mere form; but the substance is in accordance with the defender's contention, and not with the pursuers'. The real nature of the transaction was that Munro was to continue to carry on the business for his own behoof, and it does not cease to be his business because the proceeds were to go to his creditors. The agreement was, in short, a form of security stipulated for by Grant—perhaps not a very good form of security, but that does not make Grant the real trader. On the contrary, it is proved that Munro was the party who contracted with the pursuers.

On these grounds, I think that the interlocutor of the Lord Ordinary is well founded.

THE COURT adhered.

J. W. & J. MACKENZIE, W.S.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

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[1] L. R., 1 Q. B. 97.
[2] See Lord Ordinary's note *supra*, p. 964

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MARGARET WILSON OR STEUART, now ROBERTSON, AND HUSBAND, Pursuer.—*D.-F. Clark—Scott—Brand.*
FRANC NICHOLS STEUART, Defender.—*Sol.-Gen. Watson—Balfour.*

Process—Expenses—Separate Defenders—Joint Defence.—Two defenders convened in an action agreed to conduct their defence jointly, and this agreement was acted upon from the date of closing the record, until, after a judgment of the Inner-House in favour of the pursuer, one of the defenders compromised the case by payment of a sum of money "in full of the conclusions of the action against him," including that for expenses. The other defender appealed to the House of Lords, and obtained a reversal of the judgment of the Court of Session, in consequence of which he was assoilzied from the whole conclusions of the action, and was found "entitled to the expenses incurred by him" in the action in the Court of Session.

Held that the latter defender was only entitled to recover his own separate expenses and one-half of the joint expenses incurred by both defenders under the arrangement between them.

1ST DIVISION. M.

Vide ante, vol. i. p. 532, and *supra*, House of Lords reports, p. 80.

In this case the House of Lords, on 7th June 1875, reversed the judgment of the Court of Session, and ordered the appellant, Franc Nichols Steuart (defender in the Court of Session) to be "assoilzied from the conclusions of the summons, with expenses of the Court below," and remitted the case back to the Court of Session to do therein as should be just and consistent with their judgment.

The Court, on 26th June 1875, on the petition of Franc N. Steuart applied this judgment of the House of Lords, and found him "entitled to the expenses incurred by him in this Court, and also to the expenses of the said petition, and of the procedure thereon," and allowed an account of these expenses to be given in to the Auditor to tax and report.

The action had originally been laid against Sir Archibald Douglas Stewart, as well as against Mr Franc Nichols Steuart. Up to the date of closing the record in the case the two defenders were represented by separate counsel and agents, but at that stage they arranged (July 20, 1872) that throughout the subsequent procedure they should be represented by the same counsel, but that, as the case was one requiring an extraordinary amount of investigation and precognition of witnesses preparatory to the proof, they would continue to employ their two agents jointly, each agent taking a separate department in the preparation of the cause. This arrangement was acted upon down to 6th June 1874, when, in consequence of the judgment of the Inner-House of 27th February 1874, the defender, Sir Archibald Douglas Stewart, resolved to compromise the case. This he did by payment to the pursuer of £5750 "in full of the conclusions of the action against him," including that for expenses.

The defender, Franc Nichols Steuart, alone appealed to the House of Lords.

In terms of the interlocutor of 26th June 1875, applying the judgment of the House of Lords, Franc Nichols Steuart lodged his account of expenses with the Auditor. This account was made up on the principle of charging the work done by the two agents separately between 20th July 1872 and 6th March 1874, as if one agent only had been employed to conduct the whole case. No charge was made for double attendance, &c. The amount of this account the Auditor taxed at £1392, 15s. 10d., "reserving for the determination of the Court the question as to the amount which should be deducted from the account in respect of the

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joint representation of the defenders during the period between 20th July 1872 and 6th June 1874." *

The defender, F. N. Steuart, objected to the Auditor's report, in as far as he proposed to disallow him the half of the joint expenses from 20th July 1872 to 4th June 1874.

He contended that his account of expenses, as rendered and taxed, was just the same as if he had been sole defender in the cause. There were no separate or separable expenses incurred by the double representation included. He was liable to both sets of agents, and it was *jus tertii* of the pursuers to found on any arrangement there might be between him and Sir Archibald Douglas Stewart, who was no longer a party to the case, or on any right of relief he might have against Sir Archibald.[1]

It was argued for the pursuers;—Sir Archibald Douglas Stewart had compromised the whole case, including the matter of expenses. To give effect to the contention of the defender, F. N. Steuart, would be to interfere with the terms of that compromise, and to relieve Sir Archibald of his share of the defender's joint expenses. The Auditor was therefore right in making an apportionment.

LORD PRESIDENT.—The finding under which this defender is asking expenses is thus expressed in our interlocutor of 26th June last:—"Find the said defender entitled to the expenses incurred by him in the action in this Court," &c. The question now before us depends, I think, entirely upon the meaning of the words "expenses incurred by him."

The expenses included in this account were undoubtedly incurred by Sir Douglas Stewart and Mr Franc Nichols Steuart jointly, and they are jointly liable to the two agents employed. But I do not see that in these circumstances one of the two joint employers can be held, in a question with the opposite party to the action, to have incurred the whole of the account. He may be so held in a question with the agents to whom he has incurred a joint liability along with his co-defender, but that is a matter with which his opponent has no concern. I think the true meaning of the words "expenses incurred by him" is just the amount which, in the result, he will have to pay to his agent or agents. Now, there can be no possible doubt that, even if he has to pay the whole account to the agents, he will be entitled to relief against Sir Douglas Stewart to the extent of one-half. As Sir Douglas is now out of this process, he may have to raise a separate action of relief against him, but that he will have relief there can be no doubt whatever. All therefore that he will in the ultimate result have to pay is the one-half of the joint account. That is all, therefore, that he can recover from the pursuer under our interlocutor.

The soundness of this view is, I think, very well illustrated by a considera-

* NOTE BY THE AUDITOR.—"During the period mentioned the defenders were represented by the same counsel, and were or might have been represented by the same agents also. Such an arrangement was, in the opinion of the Auditor, proper in the circumstances, and it humbly appears to him that the expenses may fairly be regarded as applicable to the extent of one-half to the case of the defender Sir Archibald Douglas Stewart. In the event of this view being approved of by the Court there will fall to be deducted from the taxed amount reported the sum of £651, 13s., leaving, as balance of expenses to be decerned for, £741, 2s. 10d."

[1] Hughes and Duncan v. Gordon, Dec. 13, 1823, 2 S. 580 (N. E. 498); Stewart v. Robertsons, Nov. 25, 1852, 15 D. 94, 25 Scot. Jur. 68; Macleod v. Heritors of Morvern, Feb 16, 1870, 8 Macph. 528, 42 Scot. Jur. 245.

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tion of the compromise entered into between the pursuer and Sir Douglas Stewart, and of the very strange and unjust result which would follow were we to sustain the opposite contention.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT pronounced this interlocutor:—Having heard counsel on the Auditor's report on the account of expenses incurred by the defender, Franc Nichols or Franc Nichols Steuart, No. 306 of process, taxing the same at the sum of £1392, 15s. 10d., approve of the deduction therefrom of £651, 13s., as mentioned in said report: Approve of the said report, and decern," &c.

M'CAUL & ARMSTRONG, S.S.C.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 166.

July 15, 1875. Graham v. Bell.

HENRY GORDON, Pursuer and Real Raiser.
JOHN GRAHAM, Claimant and Appellant.—*Kinnear.*
MUNGO BELL, Claimant and Respondent.—*Fraser.*

Diligence—Arrestment—Execution—Clerical Error—1 *and* 2 *Vict. c.* 114 (*Personal Diligence Act*, 1838), *sec.* 9.—Where an execution of arrestment bore to proceed on an extract Sheriff-court decree (containing warrant to arrest, in virtue of the Personal Diligence Act, 1838, sec. 9) dated 13th January and extracted 6th February 1872, whereas the decree which formed the warrant of arrestment was dated 30th January 1872, *held* that the discrepancy was fatal to the validity of the arrestment.

1ST DIVISION. Sheriff of Dumfries-shire. M.

THIS multiplepoinding was raised in the Sheriff-court of Dumfries, at the instance of Henry Gordon, sheriff-clerk of Dumfriesshire, *curator bonis* of William Graham.

The fund *in medio* was a sum which the pursuer and real raiser was due to Peter Graham.

Inter alia, a claim was lodged for Mungo Bell, who founded on a decree obtained by him against Peter Graham, dated 30th January and extracted 6th February, and upon arrestment of the fund *in medio* executed on 20th February 1872.

It was objected by the claimant John Graham to the claim for Mungo Bell that both the schedule of arrestment and the execution of arrestment founded on bore to proceed upon an extract decree containing warrant of arrestment obtained by him against Peter Graham dated 13th January and extracted 6th February 1872, whereas the extract of the decree produced bore the decree to have been pronounced on 30th January 1872.

This objection was sustained by the Sheriff-substitute (Hope) and by the Sheriff (Napier). An appeal was taken for the claimant John Graham upon another point, under which the claimant Mungo Bell was heard.

Argued for Mungo Bell;—The error was not *in essentialibus*. Since the passing of the Personal Diligence Act, 1838,* the extract not the

* 1 and 2 Vict. c. 114 (the Personal Diligence Act), sec. 9, enacts,—"Where an extract shall be issued of any decree or act pronounced or to be pronounced by any Sheriff . . . . the extractor shall, in terms of the schedule (No. 6) hereunto annexed (or as near thereto as circumstances will permit) insert therein a warrant to charge the debtor or obligant to pay the debt or perform the obligation within the days of charge, under the pain of poinding and imprisonment, and to arrest and poind according to the present practice . . .; which extract shall be subscribed and prepared in other respects as extracts are at present subscribed and prepared," &c.

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decree was the warrant of arrestment. The decree contained no warrant to arrest. It was only under his statutory powers, first given by the Personal Diligence Act, 1838, that the extractor inserted, when required, a warrant to arrest in the extract decree. Thus the extract became the warrant. Now, though the date of the decree was given by mistake as the 13th January instead of 30th January, the date of the extract was right, and that was the material point. Further, the charge and execution of charge on which the arrestment proceeded gave correctly the date of the decree. There could, therefore, be no real doubt as to the true date of the decree, and the debtor could not be misled by the mere clerical error which had occurred.[1]

Argued for John Graham;—A decree since the passing of the Personal Diligence Act, 1838, necessarily implied a power in the extractor to issue a warrant of arrestment. But it was not the act of the extractor, but the decree of the Judge that was the real warrant. The date of the decree was therefore material.[2]

LORD PRESIDENT.—The arrestment founded on by the claimant Mungo Bell proceeds upon an extract decree of the Sheriff of Dumfries, and that extract has appended to it a warrant to charge and also to arrest and poind in the form prescribed by the Personal Diligence Act, 1838.

The objection to the arrestment arises in this way. The extract begins as usual with the date of the decree,—"At Dumfries, the 30th day of January 1872." And at the end, in conformity with schedule 6 appended to the Act, there is this statement,—"Extracted upon this and the four preceding pages at Dumfries, the 6th day of February 1872 years, by me, Sheriff-clerk-depute of the county of Dumfries. CHARLES M'KIE, Sh.-Ck.-Dep." Therefore the date of the decree is 30th January, and the date of the extract is 6th February 1872. On the warrant contained in that extract a charge was given on 7th February, the execution of which is perfectly correct. So far therefore the diligence is good, and no objection lies. But it is in the next step that the blunder is committed. When the creditor proceeds to arrest, in virtue of the warrant contained in this extract decree, his execution of arrestment, which is dated 20th February 1872, refers to the decree as bearing date 13th instead of 30th January. No doubt it bears also correctly that it was extracted on 6th February. The same blunder is committed in the schedule of arrestment which was left with the arrestee.

The question then is, whether this error, appearing in the execution and schedule of arrestment, is fatal to the arrestment?

It must be observed that the Personal Diligence Act merely gives authority to make certain additions to the form of extract previously in use. It does not in any way regulate the form of extract. For after the words authorising the extractor to insert a warrant to charge, arrest, and poind, the 9th section of the Act proceeds,—"Which extract shall be subscribed and prepared in other respects as extracts are at present subscribed and prepared." Therefore so far as the extract itself is concerned, there is nothing new introduced by the statute, and when it is argued that the extract is thereby made the warrant of the arrestment, I think the Act of Parliament is simply misread.

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[1] Henderson v. Rollo, Nov. 18, 1871, 10 Macph. 104, 44 Scot. Jur. 73.

[2] Ersk. iii. 6, 18; Menzies, 312; Beattie v. M'Lellan, May 28, 1844, 6 D. 1088, 16 Scot. Jur. 472; Brown v. Blaikie, Feb. 1, 1849, 11 D. 474, 21 Scot. Jur. 135.

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The truly important thing for consideration here is that the date of the decree is misstated in the execution of arrestment. Now, a decree dated 13th January and extracted 6th February is a different thing from a decree dated 30th January and extracted 6th February, and, what is of more importance, they are by no means inconsistent with one another. It is quite possible that there should be two decrees, one pronounced on 13th and the other on 30th January, and both extracted on 6th February. There is, therefore, an essential discrepancy between the execution of arrestment and its warrant. We must therefore adhere to the interlocutor of the Sheriff.

The case of Henderson v. Rollo, to which we have been referred, was very different from the present. There the whole steps of diligence were written on the same piece of paper, and therefore means were afforded of at once correcting the clerical error which had been committed in the date of the decree on which the diligence proceeded. That is not, however, the case here.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THIS interlocutor was pronounced:—"Find with reference to the claim of Mungo Bell, respondent, that the schedule of arrestment and execution thereof, dated 20th February 1875, founded on in the claim, are disconform to their warrant, inasmuch as the decree on which they proceed is stated to be dated the 13th instead of the 30th January 1872, and that the arrestment is consequently inept and did not attach the fund *in medio*," &c.

JOHN WHITEHEAD, S.S.C.—JOHN GALLETLY, S.S.C.—Agents.

No. 167.
July 16, 1875.
Symington v. Symington.

MRS MARY SANDERSON EDMONSTON or SYMINGTON, Pursuer.—*D.-F. Clark—Asher—Mackintosh.*
ANDREW JAMES SYMINGTON, Defender.—*Fraser—Scott—Burnet.*

Husband and Wife—Parent and Child—Separation—Custody of Children.—In an action of separation the House of Lords, after granting decree of separation at the wife's instance, found that, in the circumstances of the case, the husband was entitled to the custody of the sons and the wife to the custody of the daughters of the marriage during pupillarity, so long as no different order should be made by the Court of Session, but subject to such regulations as the Court might make for the access of each parent to the children in the custody of the other, and subject to an obligation by the parents respectively not to remove the children from the jurisdiction of the Court. Terms of order made by the Court.

1ST DIVISION. B.

THIS was a petition by Andrew James Symington to apply a judgment of the House of Lords in an action of separation and aliment at the instance of Mrs Symington.

The judgment of the House of Lords is reported *supra*, H. L., p. 41.

The Court, having heard counsel, appointed the parties respectively "to lodge minutes with regard to the application of the said judgment," and particularly with regard to the custody of the children of the marriage.

Minutes were put in accordingly. The only difference between the proposals made by Mr and Mrs Symington respectively was, that Mr Symington desired that the two girls, who were to remain in the custody of the mother, should be allowed to remain with him from Saturday to

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Monday, and not for Saturday only, on the occasion of the monthly visits which it was agreed that they should pay to him, and that they should be allowed to reside with him during six weeks of the year, while Mrs Symington objected to their visiting him except for the day.

The ages of the children were as follows:—Boys—Andrew James, twelve years; Eric, nine and a half; and Harold, eight and a half. Girls—Agnes, seven; and Margaret, five.

LORD PRESIDENT.—I take it for granted that the husband and wife are not to be resident at any great distance from one another. In fact the wife has intimated her intention, in the interest of the children, of changing her residence when necessary, so as to be sufficiently near the husband, wherever he may be. This facilitates very much the disposal of the points now before us. The first of these points is that of the occasional residence with the one parent of the children committed to the care of the other. Now, on this matter there is a manifest distinction drawn in the remit of the House of Lords between the case of the boys and of the girls. It is suggested that the occasional residence of the boys with the mother is desirable, and I do not entertain any doubt that an arrangement ought to be made with that view. In that respect, I think Mrs Symington's proposal is most judicious.

But, on the other hand, Mr Symington proposes the occasional residence of the girls with him. There is no suggestion in the remit that we should provide for that, and there are obvious reasons why, for the present, we should not do so. It is hardly necessary that I should enter in detail into the reasons why it is not desirable that young girls of the ages of five and seven should be transferred from one house to another, particularly where they must be deprived of the services of their ordinary attendant, whether she be a servant or their mother. The mother could not, of course, accompany them, nor would it be judicious to introduce a servant from the one household into the other. Therefore for the present, but for the present only, I am against any occasional residence of the girls with their father. It depends on circumstances, and on the after history of this pair, what arrangement we may sanction in the future.

As to the visits on Saturdays, I think the arrangement is on the whole satisfactory. It will admit of all the children being with each parent once a month. But for the same reason as I am against the occasional residence of the girls with the father, I am not disposed to allow of their remaining from Saturday till Monday. And that being so, as regards the girls, it is not expedient that any other arrangement should be made as regards the boys.

There remains to be disposed of the question of the education of the boys, and we shall not pronounce any final interlocutor till we hear what proposal Mr Symington has to make on that point.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

THIS interlocutor was subsequently pronounced:—"Apply the said judgment: Appoint the pursuer, Mrs Symington, forthwith to deliver the children, Andrew James, Eric, and Harold, to the defender, Mr A. J. Symington, but under the condition that the said children are to reside with the pursuer for one month during their autumn holidays, for one week in April, and for one week at Christmas; and under the further condition that once a-month, every alter-

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nate fortnight during the remainder of the year, the said children shall spend a Saturday in the house of the pursuer, the defender making all the necessary arrangements and disbursements for fulfilling these conditions; and under this further condition, that the said children shall be educated at the school of Langside till the further orders of the Court: Find that the pursuer is to have the custody of the children, Agnes and Margaret, subject to the future orders of the Court, but under the condition that the said children, Agnes and Margaret, are, except during the residence of the children, Andrew James, Eric, and Harold, with the pursuer, once a month—a fortnight after the fortnightly visit of the other children to the pursuer—to spend a Saturday in the house of the defender, so that the whole five children shall spend the day together once every month in the house of the defender; and it is further ordered that neither the pursuer nor the defender shall remove any of the children beyond the jurisdiction of this Court: Reserving to either party to apply to the Court for any further or other orders which may become necessary, and decern."

J. & R. D. Ross, W.S.—John Galletly, S.S.C.—Agents.

No. 168.
July 20, 1875.
Miller, &c. v. Powell, &c.

Thomas Robson Miller and Others (Owners of the "Isabella"), Petitioners.—*Sol.-Gen. Watson—J. G. Smith.*

Thomas Powell and Others (Owners of the "Maranham"), Respondents and Claimants.—*MacLean.*

James Donald and Others (Owners of the "Sourabaya"), Respondents and Claimants.—*Alison.*

Michael Sundt and Another (Owners of the "Anna"), Claimants.—*Keir.*

Ship—Collision—Reparation—Merchant Shipping Act, 1854, *sec.* 514, *and Merchant Shipping Act Amendment Act*, 1862, *sec.* 54.—It is competent for the owner of a vessel to present a petition to the Court under the 514th section of the Merchant Shipping Act, 1854, with a view to having his liability for damages ascertained or restricted, without admitting liability for such damages.

Merchant Shipping Act, 1854, *sec.* 514.—Forms of procedure.

1st Division. B.

On 21st October 1874, during a storm of wind, the ship "Isabella," while lying at the "Tail of the Bank," off Greenock, came into collision successively with two other vessels, the "Maranham" and the "Anna," and with a floating dock called the "Sourabaya." The collision with these three vessels in succession took place on the same occasion, and within the space of an hour or thereby. Considerable injury was sustained by all three.

The owners of the "Maranham," on 3d December 1874, raised an action of damages against the owners of the "Isabella," concluding for £2000.

The owners of the "Anna," on 8th December 1874, brought a similar action, concluding for £1500, and the owners of the "Sourabaya" also brought a similar action on 10th February 1875, concluding for £13,000. All three sets of pursuers arrested the "Isabella" on the dependence of their respective actions.

The owners of the "Isabella" denied liability, and defended these actions.

On 4th March 1875, during the dependence of these actions, and before any proof was led, the owners of the "Isabella" presented a petition,

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founding on sec. 54 of the Merchant Shipping Act, 1862, 25 and 26 Vict. c. 63,* and on sec. 514 of the Merchant Shipping Act, 1854, 17 and 18 Vict. c. 104,† and stating that it would be convenient to have the actions which had arisen out of the collision of 21st October 1874 tried together, and that they were desirous, in the event of their being found liable, to have their liability restricted, in terms of the statute,—the value of the "Isabella" at the time of the collision, at £8 per ton, being insufficient to answer the suits or claims instituted against them; and in which they craved the Court "to find that, if liable, the petitioners are not liable in respect of the loss or damage caused by the said collisions, or any of them, to ships, goods, merchandise, or other things, to an aggregate amount exceeding £8 for each ton of the registered tonnage of the said vessel 'Isabella,' being in all the sum of £8536; and on the petitioners consigning or finding caution for said sum, to recall the said arrestments; to appoint all persons having any claims in reference to or arising out of the said collisions to lodge the same within such time as may be fixed, with certification that otherwise they shall be excluded; to stop further proceedings in said actions, or give such directions for the trial of the questions therein raised, or otherwise, as may appear to be convenient; and in the event of its being found that the petitioners' vessel is to blame, to decern for payment of the sum or sums which may be found due out of the said sum of £8536, or distribute the same rateably among the several claimants; to interdict, prohibit, and discharge the said respondents and all other persons from bringing any other action or actions, suit or suits, against the said vessel 'Isabella,' or against the petitioners, or any or either of them, in respect of the said collision; and to find the petitioners entitled to expenses."

The Court, on 5th March 1875, appointed intimation to be made on the walls and in the minute-book, and to be served on the owners of the "Maranham," the "Anna," and the "Sourabaya," and ordained them to lodge answers within eight days; and further appointed "advertisement of the said petition and this deliverance to be made once in each of the 'Edinburgh Gazette,' the 'Scotsman,' and the 'Shipping and Mercantile Gazette' newspapers, respectively."

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* Sec. 54.—"The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur, without their actual fault or privity, that is to say,—. . . . '(4) Where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat,—Be answerable in damages in respect of . . . loss or damage to ship's goods, merchandise, or other things, whether there be in addition loss of life or personal injury, or not, to an aggregate amount exceeding £8 for each ton of the ship's tonnage . . . .'"

† Sec. 514.—"In cases where any liability has been or is alleged to have been incurred by any owner, in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, then . . . . it shall be lawful in . . . . Scotland in the Court of Session . . . . . to entertain proceedings at the suit of any owner, for the purpose of determining the amount of such liability, ... and for the distribution of such amount, rateably, amongst the several claimants, with power for any such Court to stop all actions and suits pending in any other Court in relation to the same subject-matter; and any proceeding entertained by such Court of Chancery, or Court of Session, or other competent Court, may be conducted in such manner, and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the Court thinks just."

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Answers were put in for the owners of the "Maranham," in which they stated,—"The present petition seems to the respondents to be incompetent, or, at all events, premature," and, founding on sec. 506 of the Merchant Shipping Act, 1854, contended that the owners of the "Isabella" were liable for the full amount of damages done by her.

Answers were also put in for the "Sourabaya," in which they maintained that the liability of the petitioners to them should be dealt with independently from their liability to the other owners, but did not object to the competency of the petition.

No answers were put in for the "Anna," and no appearance was made for any other party.

The value of the "Isabella" at £8 per ton was admitted to be £8536, and the Court, on 20th March, having considered the petition and answers, recalled the arrestments upon caution for that amount, and, *quoad ultra*, continued the petition in the roll.

The three actions against the owners of the "Isabella" were tried together in May 1875, and resulted in their being found liable to the owners of the "Maranham" in £2000, and expenses; to the owners of the "Anna" in £1227, 8s. 8d., and expenses; and to the owners of the "Sourabaya" in £4750, and expenses. The total amount in which they were thus found liable did not exhaust the value of the vessel at £8 a-ton. The owners of the "Isabella" thereafter consigned in the hands of the Clerk of Court the sum of £8536, for which they had previously found caution.

On 6th July 1875 the Court pronounced this interlocutor in the petition:—"Appoint the respondents and all others having or pretending to have any interest in the matter of the petition to lodge claims within eight days from this date, under certification that if they fail to do so they will be excluded from participation in the fund for division, and appoint this deliverance to be advertised once in the 'Edinburgh Gazette' and in the 'Scotsman' and the 'Glasgow Herald' and the 'Shipping and Mercantile Gazette' newspapers."

Claims were accordingly lodged for the owners of the "Maranham," the "Anna," and the "Sourabaya," claiming the amounts found due to them in their respective actions of damages.

Parties were then heard as to the final disposal of the petition and as to expenses.

Argued for the respondents;—The petition was incompetent. Such petition could only competently be brought when the petitioner admitted liability.[1] The petition was also unnecessary and premature, and ought to be refused.[2] The sum for which the petitioners were liable, even under the 54th section of the Merchant Shipping Act, 1862, greatly exceeded the damages found due. Moreover, there never had been any decision by the Court that the £8 per ton limitation of liability applied. The respondents had always maintained that the three collisions were independent collisions. Were it necessary they were prepared to prove this. But in consequence of the damage found due being fully covered by the value at £8 a-ton of the "Isabella," there was no necessity for any such inquiry being entered on. All that they had done was to consent to loosing of the arrestments on caution for £8536, or £8 a-ton on the vessel's tonnage, being satisfied that that was the full value of the vessel. At

[1] Hill v. Audus, 1855, 1 Kay and Johnson, 263.

[2] Flensburg Steam Shipping Company v. Seligmann, July 18, 1871, 9 Macph. 1011, 43 Scot. Jur. 550.

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any rate they ought to be found entitled to their expenses, the petitioners having brought this petition while resisting liability.[1]

Argued for the petitioners;—The petition was competent. It was also necessary at the time it was brought, for the damages claimed by the respondents greatly exceeded the sum for which they were liable under the 54th section of the Merchant Shipping Act, 1862. It was only because the respondents had failed to establish the full measure of damages claimed that the total sum found due was less than the snm for which the petitioners were liable. On the question of expenses, they consented to the respondents getting the expenses of putting in their claims, but no further expenses.

The respondents thereafter intimated that they accepted this offer, and withdrew their further claim for expenses.

LORD PRESIDENT.—If the Solicitor-General consents to the respondents being allowed these expenses* good and well, but I certainly should not have been disposed to allow them.

I think it right also to add that I have no doubt of the competency of the petition. It was presented under the 514th section of the Merchant Shipping Act of 1854, which provides—(His Lordship read the section quoted, *supra*, p. 977, note †). The reason why that enactment was inserted in the Merchant Shipping Act was, that the Act had already provided for a limitation of the sum to be paid in name of damages by the offending ship. It is quite clear on the face of the 514th section that its provisions are intended to apply whether the owners admit or deny liability.

When they admit liability the Court will proceed to stop all actions and suits brought or to be brought for the purpose of constituting liability.

When they deny liability the Court will allow such actions to go on.

But as to the competency of this petition, I do not see the smallest room for doubt. The only suggestion of doubt has arisen from a plain misunderstanding of the case of Hill decided by Vice-Chancellor Wood.

The question of expenses is one of some nicety. If the claims made against the owners of the offending ship are of such large amount that it is absolutely necessary to get them restricted under the provisions of the statutes, it may be that the petitioner will not get his own expenses, especially if additional claimants come in under the petition, but it does not follow that the claimants are to get theirs. It is not, however, necessary to dispose of this point, as parties have come to an arrangement.

The other Judges concurred.

THIS interlocutor was pronounced:—"In respect the petitioners have now consigned the sum of £8536, being the aggregate amount for which they are liable in respect of the loss or damage caused by the collisions referred to in the petition, grant warrant and authority to the Accountant of Court to deliver to the petitioners or their agent the bond of caution granted by them for said sum upon delivery of a certified copy of this interlocutor; and in regard to the distribution of said sum, rank and prefer upon the said sum of £8536 the claimants afternamed to the extent follow-

[1] "Normandy," 1870, L. R. 3 Ad. 152 (see p. 157); "Amalia," 32 L. J., Probate, 191.

* i.e., expenses of claims, but not of discussing the competency of the petition.

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ing:—The claimants, James Donald and others (owners of the 'Sourabaya'), for the sums of £4750 and £192, 5s. 6d.; the claimants, Thomas Powell and others (owners of the 'Maranham') for the sums of £2000 and £193, 10s. 5d.; and the claimants, Michael Sundt and others (owners of the 'Anna') for the sums of £1227, 8s. 8d., and £158, 16s. 5d., in terms of their claims respectively; and repel said claims *quoad ultra:* Of consent find the claimants entitled to the sum of £4, 4s. each as the expenses of lodging their claims, and find neither party entitled to expenses *quoad ultra:* Grant warrant and authority to the Governor and Company of the Bank of Scotland to make payment to the claimants respectively of the said sums to which they are ranked and preferred aforesaid, and also of the said respective sums of £4, 4s. of expenses, and that out of the said sum of £8536, and to pay to the petitioners or their agent the balance of said sum of £8536, with interest accruing or which may accrue thereon after deducting the payments above mentioned, and grant warrant and authority to the Accountant of Court for the purpose of payment as aforesaid to exhibit, or, when necessary, deliver up to the said bank the deposit-receipt, No. 30 of process, and decern."

WILLIAM B. GLEN, S.S.C.—J. & R. D. ROSS, W.S.—WEBSTER & WILL, S.S.C.—Agents.

No. 169.
July 20, 1875.
Harvey v. Lindsay.

JOHN HARVEY, Pursuer and Appellant.—*Party.*
JAMES LINDSAY, Defender and Respondent.—*Burnet.*

Process—Judgment—Cancelling Interlocutor—A. S. 10th March 1870, *sec.* 3 (1).—In an appeal to the Court of Session in a Sheriff-court action for payment of £50, the appellant, *per incuriam*, printed the summons in another action between the same parties in which the conclusion was for payment of £20. The respondent having taken the objection that the appeal was incompetent, in respect that the sum concluded for was under £25, the counsel for the appellant, who had only been instructed at the bar, being in ignorance of the mistake, admitted that he had no answer to the objection, and the appeal was dismissed as incompetent. A note having been presented by the appellant, setting forth the mistake, and craving that the interlocutor should be cancelled, *held* that the interlocutor having been pronounced and signed under an error in point of fact, induced by the parties, it was within the power of the Court to order it to be cancelled, and that, in the circumstances, it should be cancelled accordingly.

1ST DIVISION. Sheriff of Lanarkshire. M.

JOHN HARVEY brought an action in the Sheriff-court of Lanark against James Lindsay concluding for £50.

On 15th June 1875 the Sheriff-substitute dismissed the action.

On 1st July the pursuer appealed to the First Division of the Court of Session.

On 5th July the appeal was received by the Clerk of the First Division.

On 14th July the appellant lodged his print, in terms of the Court of Session Act, 1868, sec. 71, and the Act of Sederunt 10th March 1870, sec. 3 (1). This print contained the proper note of appeal and interlocutors in the cause, but wanted the minute of defence, and the summons was not the summons in the cause, but the summons in a previous action at the instance of the same pursuer against the same defender, proceeding upon the same *media concludendi*, but concluding only for £20, which action had been abandoned by the pursuer before the present action was raised, and the summons in which had been lodged in process in the present action by the respondent as a production. The appellant's agent

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having borrowed up the inferior Court process, had sent the wrong summons to the printer *per incuriam*, and had not observed the mistake on boxing the copies of the print.

On 15th July, when the appeal appeared in the single bills, the respondent moved the Court to dismiss the appeal as incompetent, in respect that the action in which it was taken concluded only for £20.

Mr Scott, advocate, appeared for the appellant, and stated that the case had only been put into his hands at the bar, that he had no information beyond what was contained in the print, and that on the face of the print he saw no answer to the objection.

The Court, accordingly, pronounced this interlocutor:—"Edinburgh, 15th July 1875.—The Lords having heard counsel on the competency of the appeal, dismiss the appeal as incompetent, and decern: Find the appellant liable in expenses, which modify to £3, 3s. sterling, and for which sum decern against the appellant for payment to the respondent."

On 20th July, the appellant having lodged a note to the First Division, appeared personally at the bar, and craved that the interlocutor of 15th July should be cancelled, or that he should be otherwise reponed against it, in respect of the circumstances stated above, and, in particular, that the respondent had been fully aware of the nature of the mistake which had occurred at the time he made his motion to have the appeal dismissed, the summons erroneously printed having been produced by the respondent himself, and had concealed his knowledge; and that the competency of the appeal should be sustained.

The respondent contended that it was not competent for the Court to recall or alter their own interlocutor once pronounced,[1] and that, even if it were recalled, that would not benefit the appellant, as he had now fallen from his appeal by not lodging a proper print within fourteen days from the date on which the appeal was received.

LORD PRESIDENT.—This is a very curious and important point. The appeal came before us on the 15th instant, and upon its being moved, the respondent took the objection that the appeal was incompetent, because the conclusion of the summons was only for £20. The appellant's counsel admitted that he had no answer to this objection, and, accordingly, we dismissed the appeal as incompetent.

It now turns out that the fact on which that interlocutor proceeded was not a fact at all. The summons really concludes for £50, and, therefore, the objection of incompetency does not apply.

The true facts of the case are these. The agent for the appellant in printing the necessary papers printed not the record in this case, but the record in a former action at the instance of the same pursuer against the same defender, arising out of the same circumstances, but concluding only for £20. That action had been dismissed, but the service copy was produced by the defender, the respondent in this Court, as a production in this process. The appellant's agent had simply, by a piece of gross carelessness, put the wrong record into the hands of the printer, and had either not revised the proof sheets, or, in doing so, had failed to notice his mistake.

In these circumstances, it is impossible to deny that our interlocutor of the 15th instant proceeded on an error in point of fact, induced by the parties themselves. Both parties are to blame; the appellant for lodging an incorrect print, and the

[1] Cuthill v. Burns, March 20, 1862, 24 D. 849, 34 Scot. Jur. 426.

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respondent for stating an objection founded on what he ought to have known was an inaccurate statement as to the value concluded for in the summons, and so materially contributing to mislead the Court.

That being so, it seems to me very much the same as if we had been misled by a misprint occurring in the printed papers; for the printing of a wrong summons is just a very large misprint. The question then comes to be, is there no remedy for this state of matters except an appeal to the House of Lords? I should be very sorry to find myself compelled to come to that conclusion. On the contrary, I think it is within our powers, the facts being quite ascertained by an examination of the process, to order our interlocutor of the 15th inst. to be cancelled.

We are told, however, that on that being done there arises another objection to the appeal, inasmuch as the appellant has not boxed a print of the note of appeal, record, and interlocutors, within fourteen days after the process was received in Court, in terms of the Act of Sederunt 10th March 1870, section 3. But even supposing that to be a well-founded objection, it will not interfere with what we are now doing. If we were to sustain it we should not refuse the appeal as incompetent, but should hold it abandoned, in terms of the above mentioned Act of Sederunt.

But the respondent will find on looking more carefully at that Act of Sederunt that his objection is not of much value. The fourteen days for printing only expired yesterday, and the appellant has eight days from that date to get himself reponed. All he has to do, therefore, is to put in a proper print and get himself reponed in terms of the Act of Sederunt.

Lord Deas.—It is perfectly settled by the immemorial practice of this Court that, where a clerical error has been committed, or other undoubted mistake has occurred in a signed interlocutor, we can, *de recenti*, correct it.

On the same principle I think we can, *de recenti*, cancel the whole interlocutor where it is framed under a palpable mistake as to the matter of fact on which it proceeds, which is undoubtedly the case here.

Lord Ardmillan and Lord Mure concurred.

This interlocutor was pronounced:—"The Lords having considered the note for the appellant, No. 19 of process, and heard the appellant personally, and the counsel for the respondent, in respect the interlocutor of 15th current was pronounced and signed under an error of fact as to the amount concluded for in the summons, induced by the summons in another action having been printed as the summons in the cause now under appeal, authorise and appoint the clerk to cancel the said interlocutor: Farther, direct the printed papers in this appeal to be withdrawn from process as being an insufficient compliance with the provisions of the Act of Sederunt."

D. F. Bridgeford, S.S.C.—N. M. Campbell, S.S.C.—Agents.

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Gelstons v. Christie.

S. and I. Gelston, Pursuers.—*Trayner.*
James Christie, Defender.—*J. C. Smith.*

Proof—Judicial Admission—Qualified Admission.—In an action by a manufacturer against his agent for the amount of certain accounts alleged to have been

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collected by him from customers, the defender produced an account debiting himself with the sums collected by him, and on the other hand stating as an item on the credit side an unliquidated claim of £200 for time and labour spent by him in promoting the business of the agency, which agency he alleged had improperly been taken from him. *Held* that the pursuer was not entitled to take the admission of the sums collected contained in the account without the qualification contained in the other entries, but must prove his averments in common form.

1st Division. Ld. Craighill. M.

MESSRS S. AND I. GELSTON, tobacco manufacturers, Belfast, sued James Christie, their agent in Glasgow, for the sum of £230, 15s. 3d. as due by him to them, being the amount of certain accounts collected by the defender from their customers at various dates from 4th to 30th September 1874, conform to an account produced with the summons, under deduction of a contra account for commission, porterage, and other charges, amounting to £31, 8s. 1d., also produced, and which they admitted to be due.

The defender stated that the accounts produced with the summons were incorrect, and averred;—"A correct statement of the accounts between the defender and the pursuers is herewith produced, and here held as repeated *brevitatis causa*."

The following was the account produced by the defender:—

Account-current, Messrs S. and I. Gelston, Belfast, with James Christie, Glasgow.

1874.								
Sept. 12.	To cash,	£30	0	0				
19.	Do.	40	0	0				
26.	Do.	60	0	0				
30.	To commission on sales,	38	6	5				
"	To sundries (porterage, storage, and incidents),	23	15	4				
"	By cash from various customers—(here followed a list),				363	9	9	
"	To time and labour bestowed on the agency personally by James Christie, working up a connection and making a business in S. and I. Gelston's tobacco, the agency having been unwarrantably taken away when this done, and the connection as unwarrantably assumed by them, as per circulars of 30th September and 2d October last, issued by them, and advertisement in Glasgow newspapers inserted by them on 3d October last—say during four months, at £50 per month,	200	0	0				
"	To salary of traveller, William Coutts, employed in the agency for 13 weeks at £2, 10s. per week,	32	10	0				
"	By balance,				61	2	0	
		424	11	9	434	11	9	
	To balance brought down due J. C.	61	2	0				

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The defender pleaded;—(2) Compensation. (3) Retention.

The pursuers, on the footing that the last two items on the credit side of the defender's account could not be looked at in the present action, and that, setting them aside, the account shewed a balance of £171, 8s. due to them, put into process a minute (No. 13 of pro.) offering to accept of that sum as in full of the debt sued for, and moved for decree accordingly.

The Lord Ordinary, on 16th March 1875, pronounced this interlocutor:—"Finds (1) that the defender is not entitled to bring forward in the present action, as items of credit, the sum of £200 and the sum of £32, 10s., being the two last items on the credit side of the account, No. 10 of process, produced by the defender, and held *brevitatis causa* as repeated in his defences, these neither being constituted as debts due by the pursuers, nor claims arising out of the contract libelled by the pursuers: Finds (2) that, deducting the said two sums of £200 and £32, 10s., there is shewn by the said account produced by the defender, No. 10 of process, to be due by the defender to the pursuers, a balance of £171, 8s.: Finds (3) that by the said minute, No. 13 of process, the pursuers accept of the said sum of £171, 8s. as in full of the debt sued for, and move for decree accordingly: Therefore repels the defences so far as inconsistent with the preceding findings, and decerns against the defender for the said sum of £171, 8s. sterling, in terms of the conclusions of the summons: *Quoad ultra* assoilzies the defender, and decerns: Finds the pursuers entitled to expenses, subject, however, to a slight modification, to be afterwards settled; meantime allows an account of pursuer's expenses to be given in," &c.

The defender reclaimed.[1] At advising,—

LORD DEAS.—The pursuers are tobacco manufacturers in Belfast. They bring this action against James Christie, commission agent in Glasgow, on the narrative that they appointed him their agent there in 1874, and that he had, in that capacity, collected accounts due to them by various customers, according to the account libelled, No. 7 of process, and had failed to account for the sums so collected. This account, No. 7 of process, extends from 7th to 30th September 1874, and sets forth a list of the sums which Mr Christie is said to have collected, and for which it is alleged he has not accounted.

In defence, Mr Christie denies that there has been any irregularity in connection with his accounts, denies that the account, No. 7 of process, is correct, and alleges that there is a sum due to him by the pursuers which is in excess of that claimed by the pursuers from him, and he produces a state of accounts between himself and the pursuers.

Now, the account, No. 7 of process, produced by the pursuers, is not an account current at all. It contains nothing but those items which the defender is said to have collected, and for which he is said to have failed to account. The account which Mr Christie produces, on the other hand, has two sides, a debit and a credit side, and is therefore a proper account current between the parties. It begins at an earlier date than the pursuers' account. It contains a long list of sums which Mr Christie admits that he did collect for the pursuers, but several of which differ from those charged in the pursuers' account. Credit is taken for certain sums of cash as paid over by Mr Christie to the pursuers,

[1] Johnston v. Robertson, March 1, 1861, 23 D. 646, 33 Scot. Jur. 335; Milne v. Donaldson, June 10, 1852, 14 D. 849, 24 Scot. Jur. 504; Bilsborough v. Bosomworth, Dec. 5, 1861, 24 D. 109, 34 Scot. Jur. 49.

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and for several sums which he alleges are due to him by the pursuers, and a balance is brought out as due to him instead of to the pursuers.

Now, the question is whether, by giving in that account, the defender is to be held to have admitted the debt sued for? I do not think that he is. I do not see how the production of that account current can be held to be an admission of the debtor's liability for the sum sued for.

It has long been decided that, in the case of judicial admissions, the admission must be taken with any qualifications attached to it. I may refer to the cases of Carnegy v. Carnegy, Feb. 22, 1825, 3 S. 566; Grierson v. Thomson, Jan. 14, 1830, 8 S. 317; Campbell v. M'Cartney, June 23, 1843, 14 D., appendix, p. 1086; Milne v. Donaldson, June 10, 1852, 14 D. 849, 24 Scot. Jur. 504. In this last case the Lord President (Colonsay) expressly laid it down that it was "no matter whether the admission be put in words or in figures." Then we have the recent case of Picken v. Arundale and Co., July 19, 1872, 10 Macph. 987, in which the Lord President, after carefully examining the decided cases, says,—"I apprehend that it is too late to call in question the soundness and expediency of this rule of practice."

It is true that only one of these important cases was cited to us from the bar. But the cases exist, and the import of them is, that no admission on record, be it in words or in figures, is to be taken without its qualifications. The question now is whether we are to depart from that doctrine? It may very well be that the Lord Ordinary has arrived at an equitable result. But, looking at the current of decisions, I do not think the defender can be held to have admitted the debt. The pursuers are not obliged to accept the admission with its qualification, but, failing their doing so, there is nothing to absolve them from the burden of proving their debt in the ordinary way, and I think they must just do so.

The LORD PRESIDENT, LORD ARDMILLAN, and LORD MURE concurred.

THIS interlocutor was pronounced:—"Recall the said interlocutor: Find that the balance claimed by the pursuers as due by the defender on the accounts between them is not to any extent admitted, except under the qualification that the pursuers are owing the defender larger sums, as stated in the account lodged by the defender, No. 10 of process: Find that the pursuers are not entitled to take the admission of the defender without its qualification, but must prove their averments in common form, and remit to the Lord Ordinary to proceed as shall be just and consistent with the above findings: Find the defender entitled to expenses since the date of the said interlocutor reclaimed against: Allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and to report to the Lord Ordinary, with power to his Lordship to decern for the taxed amount."

M'EWEN & CARMENT, W.S.—T. & W. A. M'LAREN, W.S.—Agents.

No. 171.

July 20, 1875. Johnston v. Johnston, &c.

JOHN JOHNSTON, Pursuer.—*Thoms—Rhind.*
MRS MARION WADDELL OR JOHNSTON, Defender.—*Balfour.*
JOHN WALLS AND OTHERS (William Johnston's Testamentary Trustees), Defenders.—*R. V. Campbell.*
JOHN M'CULLOCH AND OTHERS (Cardowan Trustees), Compearers and Defenders.—*Balfour.*

Acquiescence—Bona fide Consumption—Legacy—Election—Approbate and Reprobate—Compensation.—A husband, by trust-disposition and settlement, gave his widow a liferent of the residue of the testamentary trust-fund, and in respect thereof "recommended" and "enjoined" her "to discharge or abstain from exacting from a son of the marriage her liferent rights in certain lands under a previous *inter vivos* trust-deed. This deed gave to the son, on his surviving his mother, an alimentary liferent of the lands, protected from the diligence of his creditors, of which lands the son was in possession as tenant. The son was a trustee both under the testamentary and under the *inter vivos* trust-deed. The husband died in 1867, and the widow was allowed to enjoy both the liferent of the residue and the rents of the lands until 1872, when, for the first time, the son challenged her right to draw both provisions, and it was found, in an action at his instance, that she was bound to make her election. She thereupon elected to take the liferent of the lands. In a second action at his instance, *held* (1) that the son was entitled during his mother's life to payment of an equivalent provision out of the annual proceeds of the residue as a surrogatum for the liferent of the lands, but that such provision was not subject to the restriction attached by the father to the son's liferent after the mother's death; (2) that though the plea of *bona fide* perception and consumption did not apply in a case of election, yet, as the son had, as trustee on both trusts, concurred in the payments made to his mother, he was barred from claiming repetition of the payments of the produce of the residue down to the date of his judicial challenge of her right to draw both provisions; (3) that though the son was in arrears as tenant with several terms' rent of the land, yet the mother's claim for the rents could not be set off against his claims of repetition of the produce of the residue, there being no *concursus debiti et crediti* between the mother and son by reason of the intervention of the two trusts.

1ST DIVISION. Ld. Craighill. M.

IN the year 1856 the late William Johnston, farmer, South Balgray, purchased the lands of Easter Cardowan or Blackfaulds, near Shettleston, Glasgow, and took the disposition thereof to himself and his wife in conjunct liferent, for their liferent use allenarly, and to his son, John Johnston, his heirs, assignees, and disponees whomsoever, in fee.

In the same year Mr Johnston bought Blackhill and Provan Mill, Glasgow, and took the disposition in similar terms, except in so far as it was in favour of another son, William Johnston junior, as fiar, in place of John.

On 12th January 1858, William Johnston and his wife, Mrs Marion Waddell or Johnston, as liferenters, and John Johnston as fiar of the lands of Easter Cardowan, on the narrative that the former conveyance to the spouses in liferent and their son John in fee, had been made out temporarily until the present trust should be constituted, disponed, for their respective rights of liferent and fee, these lands of Easter Cardowan to John M'Culloch and others, including John Johnston (hereafter called the Cardowan trustees), as trustees, for the purposes following, viz.:—"First, we authorise and appoint our said trustees and their foresaids to allow and grant to the said William Johnston and Mrs Marion Waddell, and the survivor of them, the liferent of the said lands of Easter Cardowan or Blackfaulds, rents, issues, and profits thereof, during all the days and years of their lives, for their liferent use allenarly. Second, We authorise and appoint our said trustees and their foresaids after the death of us, the said Wil-

liam Johnston and Mrs Marion Waddell, to allow and grant to me, the said John Johnston, their son, the alimentary liferent of the said lands of Easter Cardowan or Blackfaulds, rents, issues, and profits thereof, during all the days and years of my life, for my alimentary support, declaring that the said liferent shall not be affectable by the debts or deeds of me, the said John Johnston, nor attachable by the diligence of my creditors; and we empower our said trustees and their foresaids either to allow the said John Johnston to possess and farm the said lands for his own liferent behoof, or the trustees, and the survivors and survivor of them, may assume possession of the same, and let the lands to a tenant at such rent as they can obtain, and for such period of years as they consider advisable, and they shall secure the rent thereof, and pay the same to the said John Johnston for his alimentary behoof." The remaining purposes provided the fee of the property or of the proceeds, should it be sold under power of sale given to the trustees, to the children of John Johnston, and failing children, to his brothers and sisters.

William Johnston left a general trust-disposition and settlement, dated 8th March 1865, with three codicils attached, whereby, on the narrative "that I have already made partial provisions for behoof of my sons, John Johnston and William Johnston, ... by conveying to the said John Johnston the lands of Easter Cardowan or Blackfaulds, and by conveying to the said William Johnston the lands of Blackhill and Provan Mill, ... or, in other words, by purchasing and taking the conveyances of said properties to them," he disponed to John Walls and others, including his son John Johnston, the pursuer (hereafter called the testamentary trustees), as trustees, his whole estate, heritable and moveable, for the purposes following, viz., *inter alia*—"Third, In respect of the provisions in favour of my wife, the said Mrs Marion Waddell or Johnston, hereinafter contained, I recommend and enjoin her, in the event of her surviving me, to discharge or abstain from exacting from the said John Johnston and William Johnston her liferent rights in the lands of Easter Cardowan or Blackfaulds, conveyed to the said John Johnston as aforesaid, and the lands of Blackhill and Provan Mill conveyed to the said William Johnston as aforesaid. Fourth, ... Lastly, I hereby direct, authorise, and empower my trustees to hold, pay, and apply the whole residue and remainder of my said trust-means and estate for behoof of my wife, the said Mrs Marion Waddell or Johnston, in liferent, for her liferent use allenarly during all the days and years of her life; and after her death, I direct and empower them to hold, pay, and apply" the same for behoof of his children and grandchildren in certain proportions.

The Cardowan trustees did not enter upon the management of the property till about eighteen months before the death of William Johnston, the management remaining till then in his hands.

Shortly after the purchase of Easter Cardowan in 1856, the pursuer, John Johnston, became tenant of these lands, under his father and mother, on a verbal lease, at a rent of £60 a-year; and in the same way his brother, William Johnston, got a verbal lease of Blackhill and Provan Mill at the rent of £17.

In 1860 a written lease of Cardowan was executed in the pursuer's favour by his father and mother for their lives, and that of the longest liver of them, at the same rent of £60.

William Johnston senior died on 23d July 1867, and on his death the Cardowan trustees, on the ground that the lease of 1860 was not binding upon them, re-let the lands of Easter Cardowan to John Johnston at a rent of £100.

John Johnston paid the rent of the lands of Easter Cardowan from his

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father's death down to Martinmas 1871, when he fell into arrears; and at the date of this action the whole rents from Martinmas 1871 were unpaid.

William Johnston junior, as tenant of the lands of Blackhill and Provan Mill, paid the rent of £17 a-year to his mother until his death in 1873.

At a meeting of the Cardowan trustees, held on 13th November 1867, at which John Johnston was present, it was intimated for Mrs Johnston, as the minutes of meeting bore, "that she did not intend to exact any rents for the lands for this half year, but that in future she, in the meantime, thought that she might ask both her sons to pay. In these circumstances, the agents were instructed to get Mrs Johnston's concurrence to this minute. The law agents were appointed factors to collect . . . . the rent of the lands that might become due hereafter, in the event of Mrs Johnston continuing to think that her sons ought to pay her rent." This minute was signed by the pursuer, John Johnston. Thereafter the rents of Easter Cardowan, as paid by John Johnston, were handed over by him and the other Cardowan trustees to Mrs Johnston.

From the date of William Johnston's death the testamentary trustees, of whom the pursuer was one, paid over the liferent of the residue of the trust-estate to Mrs Johnston, in terms of the last purpose of the trust.

On 19th February 1872, however, John Johnston, for the first time, formally challenged his mother's right to draw both the rents of Easter Cardowan and the liferent of the trust-estate by an action of declarator, count, reckoning, and payment against her, in which he sought to have it declared that, since his father's death in July 1867, he had been and was entitled to the rents and profits of the lands of Easter Cardowan, and to occupy and use them during his life, and that the defender, Mrs Johnston had no right or title to draw or exact any part of the rents of these lands, and further concluded that she should account for such rents as she had already received. The ground upon which this action was laid was, that Mrs Johnston could not both approbate and reprobate her late husband's settlement, and that she could not, therefore, in respect of the injunction contained in that deed, exact the rents of Easter Cardowan if she accepted the provision of residue made to her by the settlement.

In this action the Lord Ordinary (Mure), on 10th December 1872, pronounced this interlocutor:—"Finds that according to the true meaning and intention of the trust-disposition and settlement of the late William Johnston, executed in the year 1865, the defender, Mrs Johnston, is entitled to take the benefit of the provision of residue, made to her in liferent under the said deed, only on the footing and condition, *inter alia*, of her discharging or abstaining from exacting the liferent of the lands of Easter Cardowan, conveyed by the said William Johnston, her husband, in 1856, to himself and his wife in conjunct liferent, and to the pursuer and his heirs and assignees whomsoever in fee; and before further answer, appoints Mrs Johnston to state within three weeks from this date whether she elects to take the liferent of the residue provided to her by her husband's settlement, or to claim the liferent of the said lands of Cardowan, and reserves in the meantime all questions of expenses."

The First Division, on 25th February 1873, adhered to this interlocutor, and appointed Mrs Johnston to declare her election within fourteen days.

Mrs Johnston accordingly put in process a minute stating that she elected to take the liferent of the lands of Easter Cardowan and others provided to her in the disposition of 1856 and trust-deed of 1858. The

Lord Ordinary, on 6th December 1873, interponed authority to this minute, and *quoad ultra* dismissed the action. No. 171.

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On 25th April 1874 John Johnston raised the present action, calling as defenders his mother, Mrs Marion Waddell or Johnston, and the testamentary trustees, and concluded (1) that the defender, Mrs Marion Waddell or Johnston, should produce an account, shewing the whole sums of money paid by the other defenders, the testamentary trustees, to and received by her during the period between 23d July 1867 and 6th December 1873, shewing the dates at which such sums were paid to her, and also shewing the sums which year by year have been received by her in respect of her liferent right in the said lands of Easter Cardowan or Blackfaulds, and the sums which year by year have been received by her in respect of her liferent right in the lands of Blackhill and Provan Mill, so that there might appear and be ascertained "the true amount which, in pursuance of the said trust-disposition and settlement and codicils, falls to be paid to the pursuer by the said Mrs Marion Waddell or Johnston,—in respect of her having, in disobedience to the recommendation and injunction contained in the said trust-disposition and settlement, that in the event of her surviving the said William Johnston, and in respect of the provisions in her favour, which in his said trust-disposition and settlement are after contained, she should discharge or abstain from exacting from the pursuer and his brother, William Johnston, son of the aforesaid William Johnston, her liferent rights in the said lands of Easter Cardowan or Blackfaulds, and in the said lands of Blackhill and Provan Mill, exacted her liferent right in the said lands of Easter Cardowan or Blackfaulds, as well as taken payment of the said provisions, so far as applicable to the foresaid period, or part thereof, from the trustees for the time being acting under the said trust-disposition and settlement and codicils;—and in respect that in the course of an action raised before our said Lords, at the instance of the present pursuer against the said Mrs Marion Waddell or Johnston and others, the summons in which was signeted 19th February 1872, the said Mrs Marion Waddell or Johnston, on or about 27th May 1873, elected to keep and continue to exact her said liferent right in the said lands of Easter Cardowan or Blackfaulds, to which election the authority of the Court was interponed on or about 6th December 1873;" and that she should make payment to him of such sum as should be ascertained to be the true amount due by her to him as aforesaid; (2) or otherwise that the defender, Mrs Marion Waddell or Johnston, should make payment to him of the sum of £3000 sterling in name of the loss, injury, and damage caused to him in the premises by her having illegally and wrongfully exacted the provisions in her favour made by her husband in his trust-disposition and settlement, as well as the liferents of Easter Cardowan or Blackfaulds, and of Blackhill and Provan Mill; (3) that the defenders, the testamentary trustees, "are bound in future, and as from and after the said 27th day of May 1873, to make payment to the pursuer of a part of the said provisions, which, in terms of the said trust-disposition and settlement, are payable to the said Mrs Marion Waddell or Johnston, the said part being one standing to the whole of said provisions in the same proportion as the annual value of a liferent of the said lands of Easter Cardowan or Blackfaulds bears to the *cumulo* annual value of the liferents of the said lands of Easter Cardowan or Blackfaulds, and of the said lands of Blackhill and Provan Mill," or of such other portion of the said provisions as should be determined, and that they should be decerned and ordained to make payment to him of such part of the provisions in favour of the said Mrs Marion Waddell or Johnston accordingly.

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The pursuer pleaded;—1. The defender, Mrs Johnston, having taken and elected to take the liferents of the lands of Easter Cardowan or Blackfaulds, was not and is not entitled to any part of the provisions made to her in her deceased husband's settlement. 2. The defender, Mrs Johnston, being bound to count and reckon with the pursuer for the sums received from her husband's estate up to December 1873, or to make up to him the loss, injury, and damage he has sustained through her actings between 23d July 1867 and 6th December 1873, he should have decree, as libelled in the first and second conclusions of the summons. 3. By the implied will of his father the pursuer is entitled, out of the revenue of the residue of his father's estate, to a *surrogatum* for the liferent of the lands of Easter Cardowan or Blackfaulds, and he should have decree for such a *surrogatum* as the Court may fix, as libelled in third conclusion of the summons.

The defender, Mrs Marion Waddell or Johnston, pleaded;—1. The pursuer is barred from his demand for repetition of any moneys drawn by his mother from Easter Cardowan, or his father's estate, prior to 19th February 1872, because—(1) he did not previously insist on putting the defender to her election; (2) he concurred and acquiesced in the payments to her; (3) she received and spent the moneys as her own *in bona fide*. 2. Assuming that the principle of equitable compensation is applicable, the pursuer is only entitled to a proportion of the defender's residuary liferent after allowing therefrom also a proportionable equivalent for the liferent of Blackhill and Provan Mill, as the values in question may be ascertained by the Court. 3. The defender is entitled to set off her claim for arrears of rent due by the pursuer against any sum to which he may be found entitled in this action, or, at all events, she is entitled to retain any such sum against the said arrears.

The defenders, the testamentary trustees, stated;—(Stat. 3) "The defenders are advised that the following claims have emerged relative to the disposal of the liferent of the residue provided to the pursuer's mother, viz.—(1) The residuary legatees, and the other legatees entitled to payment or division as at her death, may insist on immediate access to their provisions. (2) If, on the other hand, Mrs Johnston's residuary liferent is to be applied in compensation to the pursuer for the liferent of Easter Cardowan, it must also be similarly and proportionally applied to compensate William Johnston or his representatives for the liferent of Blackhill and Provan Mill. (3) In the same event, whatever be the proportions in which the pursuer and William Johnston's representatives are to be compensated, neither of these parties can draw more than an equivalent for the liferent of their respective lands, as the same may be ascertained by the Court, and the balance, if any, of the residuary liferent falls to the pursuer's mother or the residuary legatees. (4) The pursuer's mother may claim that the condition attached to her residuary liferent was personal to her sons, and that she is now entitled to draw both the liferent of the late William Johnston's lands, and also the balance of her residuary liferent, after deducting the proportional equivalent for the liferent of Easter Cardowan, and that in any event she is now so entitled as to one-third of both liferents, or otherwise the said balance falls into residue."

And pleaded;—1. All parties not called. 2. This action should be sisted until the defenders bring a multiplepoinding and exoneration. 3. Should the defenders' first and second pleas not be sustained, they plead that the claims set forth in their third statement, so far as in the interest of parties not called hereto, are sound in law, and should receive effect in this action. 5. Any provision to which the pursuer may be found entitled

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should be declared alimentary, and not affectable by his debts or deeds, or the diligence of his creditors.

The Lord Ordinary, on 23d July 1874, pronounced this interlocutor :*— "Repels the first and second pleas in law for the defenders, William Johnston's trustees: Finds (1st) that, according to the sound construction of the trust-disposition and settlement of the late William Johnston, the defender, Mrs Johnston, was not entitled to exact payment from his trustees of the liferent of the residue of his trust-estate, and also her liferent interest in the lands of Easter Cardowan, and the lands of Blackhill and Provan Mill, which had belonged to the said William Johnston: Finds (2d) that, since the death of William Johnston, the defender, Mrs Johnston, has drawn the liferent of the residue of her husband's trust-estate down to Martinmas 1873, and that she has also exacted payment of the rents of Cardowan down to the year 1871, when the pursuer fell into arrear in payment of the said rents: Finds (3d) that, shortly after the death of William Johnston, the defender, Mrs Johnston, intimated to his trustees, of whom the pursuer was one, her intention to draw the rents of Cardowan and Blackhill, as well as the liferent of the residue of the trust-estate, and that the pursuer allowed her to do this without objection till the year 1872: Finds (4th) that since the decision pronounced by the First Division of the Court in February 1873, referred to in the record, the defender, Mrs Johnston, has elected to take the rents of the heritable properties of Easter Cardowan, Blackhill, and Provan Mill, instead of the liferent of the residue of the trust-estate: Finds, in these circumstances, in point of law—(1st), that the liferent of the residue of the trust-estate is thus left free for division among the parties, of whom the pursuer is one, whose right to the rents of the heritable properties has been injuriously affected by the defender, Mrs Johnston, electing to draw those rents; and (2d), that the pursuer is not entitled to demand repetition from the defender, Mrs Johnston, of the liferent interest in the trust-estate received by her down to the end of the year 1871; and before further answer, appoints the said defender to put into process a state of the sums received by her since the end of the year 1871 from her husband's trustees, as the liferent of the residue of his estate, and also of the sums paid, or payable to her in respect of her liferent right in the lands of Easter Cardowan, and in the lands of Blackhill and Provan Mill, in order that it may be ascertained what proportion of the liferent residue of the trust-estate falls to be paid to the pursuer in lieu of the rents of Easter Cardowan, and reserves in the meantime all questions of expenses." †

* The case was fully heard before Lord Mure, and this interlocutor and note were prepared by his Lordship; but his removal to the Inner-House prevented them from being issued. In order to avoid the expense and delay of additional discussion both parties agreed that Lord Craighill should issue the interlocutor and note, without a new hearing, and on that footing they were accordingly signed.

† "NOTE.—The first of the above findings in point of law appears to the Lord Ordinary to be fully warranted, upon the principle of the rules laid down and applied in the cases of Kerr and Wauchope, 17th February 1819, 1 Bligh, p. 1; Peat v. Peat, 14th February 1839;[1] and Harvey's Trustees v. Harvey's Trustees, 30th January 1863;[2] while the decision in the case of Peat is also, as it appears to him, an authority adverse to the views submitted on the part of the defenders, Johnston's trustees, to the effect that, in respect of the case of Annandale, 9th June 1847,[3] the residue ought now to be disposed of in the same

[1] 1 D. 508, 11 Scot. Jur. 337.
[2] 1 Macph. 345, 35 Scot. Jur. 211.
[3] 9 D. 1201, 19 Scot. Jur. 529.

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Thereafter, on 12th January 1875, the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having heard parties' procurators on the closed record, productions, and whole process, in relation to the question, what proportion of the liferent residue of the trust-estate now falls to be paid to the pursuer in lieu of the rents of Easter Cardowan, and considered the debate—finds (1) that the proportion of the free liferent of the residue falling to be paid to the pursuer is that borne by the free rents of Easter Cardowan, in computation with the free rents of Blackhill and Provan Mill; (2) that the free rents of Cardowan, as set forth in the minute, No. 37 of process, and as admitted by the defenders at the bar, amount to £127, 5s. 7d., and those of Blackhill and Provan Mill amount to £92, 9s.; and (3) that applying these figures to the free residue, the sums to which the pursuer is entitled, as in lieu of the free liferent of Easter Cardowan for the periods following, are as follows:—That is to say, for the half year prior to Whitsunday 1872, £49, 11s. 8d.; for the half year prior to Martinmas 1872, £50, 0s. 9d.; for the half year prior to Whitsunday 1873, £50, 0s. 9d.; for the half year prior to Martinmas 1873, £50, 4s. 5d.; and for the half year prior to Whitsunday 1874, £50, 4s. 7d., amounting together to the sum of £250, 2s. 2d., all the said sums being set forth in the state, No. 38 of process, admitted by the pursuer at the bar to be correct; appoints the cause to be enrolled that parties may be heard as to the application of these findings to the conclusions of the summons, so far as undisposed of, and on any other questions awaiting discussion and decision, including the question of expenses, which is hereby again specially reserved."

When the case again came before the Lord Ordinary a motion was made for the defender, Mrs Marion Waddell or Johnston, to allow the Cardowan trustees to sist themselves as parties defenders in the action, which was opposed by the pursuer. The Lord Ordinary, however, granted leave to them to compear, and they were sisted by interlocutor of the Lord Ordinary of 3d February 1875, "in order to facilitate the disposal of the third plea in law for the defender, Mrs Marion Waddell or Johnston, by enabling the pursuer to obtain *pro tanto* a discharge of such sums due to the compearers under the lease of Cardowan as the Court may think proper to set off against the pursuer's claims in terms of the said plea."

Thereafter, on 6th February 1875, the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having heard parties' procurators on

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way as it would have been if the liferent had been extinguished by the widow's death. The parties mainly interested to make such a claim are called as defenders in the present action, and have none of them raised any such question as that referred to by the defenders, Johnston's trustees; and if these defenders have any reason to apprehend that the question may yet be raised, it is, in the opinion of the Lord Ordinary, for them to decide whether they ought to have recourse to a multiplepoinding, but that is not, as the Lord Ordinary conceives, a reason why the present process should be sisted to enable them to do so. The Lord Ordinary has therefore repelled the first and second pleas in law for the trustees.

"With reference to the plea of *bona fides* maintained by Mrs Johnston, it appears to the Lord Ordinary that, as the question raised in the principal action was by no means free from difficulty, and as the pursuer till shortly before the date of that action allowed the defender to draw both the rents of the heritable property and the liferent interest of the residue without objection, the defender is fairly entitled to maintain that she is not now bound to repeat payment of the residue drawn and disposed of by her in the belief that the pursuer was not to dispute her interpretation of the settlement. The Lord Ordinary has therefore, to some extent, given effect to that plea."

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the conclusions of the summons, and the pleas of parties still undisposed of, and considered the debate and whole process, finds (1) that the rents and other prestations payable by the pursuer for Easter Cardowan, now in arrear, exceed the sum found to be due to him by the interlocutor of 12th January last; (2) that the trustees under the *inter vivos* trust-deed as to Easter Cardowan, to whom the said rents are payable, for behoof of the defender, Mrs Johnston, as liferentrix, have been sisted as defenders compearers in this action, that they may concur with the defender, Mrs Johnston, in her contention that the said rents and prestations, to the extent of the sum found due to the pursuer as aforesaid, shall be set off against the said sum, and that the judgment now to be pronounced upon that plea may be binding upon them, and the pursuer be thereby exonered and discharged of said arrears to the extent foresaid: Therefore finds that the defender, Mrs Johnston, and the said defenders compearers, are entitled to set off the said arrears of rent and prestations, so far as required, against the said sum found due to the pursuer as aforesaid; and that the said sum being in this way paid or satisfied, nothing remains due to the pursuer for which decree can now be pronounced, and this without prejudice to the right to the defenders, the testamentary trustees, to raise the question as to the alimentary character of the payments to which the pursuer is entitled, should a decision of that question come to be required for safe trust administration: Further, finds and declares that the defenders, the trustees, original and assumed, of the late William Johnston, under his trust-disposition and settlement, dated 8th March 1865, and relative codicil, are bound, from and after the term of Whitsunday 1874, and during the lifetime of his mother, to make payment to the pursuer half-yearly, at the usual terms of Whitsunday and Martinmas, of a share of the free residuary liferent of his father's estate, according to the proportion settled by the first and second findings in the said interlocutor of 12th January last; and decerns and ordains the defenders, the trustees under his father's trust-disposition and settlement, to make payment to the pursuer of such share accordingly, reserving to the defenders, if such share shall in any year exceed the sum of £127, 5s. 7d., to retain, if so advised, such surplus in their hands till the right of the pursuer to payment thereof shall be determined by the Court: Finally, finds no expenses due to or by either the pursuer or the defenders, and decerns."

The pursuer reclaimed.

Argued for him;—(1) The Lord Ordinary was wrong in finding by his interlocutor of 23d July 1874 that the pursuer was not entitled to demand repetition from his mother of the liferent interest in the trust-estate received by her down to the end of 1871. In so doing he virtually sustained the plea of *bona fide* consumption. The doctrine of *bona fide* perception and consumption had never hitherto been held to apply in a case of election. *Bona fide perceptio et consumptio*, according to Erskine,[1] had place only where "one who though he be not truly proprietor of the subject which he possesses yet believes himself proprietor upon probable grounds and with a good conscience." Lord Eldon in Kerr v. Wauchope,[2] stated the elements involved in election thus,—"Courts of equity hold it to be against conscience that A should take the estate bequeathed to him and at the same time refuse to effectuate the implied condition contained in the will." To sustain the plea of *bona fide* consumption in a case where the principle of approbate and reprobate put a person to his election would be going contrary to those equitable considerations on

[1] Inst. ii. 1, 25; Bankton, i. 8, 12.
[2] May 3, 1819, 1 Bligh, 22.

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which alone that doctrine has been shewn to be applicable.[1] Besides, the plea had been repelled in stronger cases for its application,[2] as in the case of Blair, where there had been taciturnity for thirty-nine years on the part of the claimant. (2) In any view the Lord Ordinary was wrong in his interlocutor of 12th January 1875 in not giving the pursuer an allowance as in lieu of the free liferent of Easter Cardowan for the half year prior to Martinmas 1871. By not doing so he practically sustained the plea of *bona fide* consumption in relation to a term's rent which the defender had not received, and therefore could not have spent. (3) The interlocutor of 6th February 1875 should be recalled, and the plea of set off repelled. The attempt to sist the Cardowan trustees shewed that it did not exist between the original parties to this action. They could not sist themselves for this purpose.

Argued for the defender, Mrs Johnston;—(1) *Ex facie* of the deeds the defender had a clear title to draw both provisions, had it not been for the third purpose of the trust-disposition. Now, that purpose was expressed in very doubtful terms; "recommend" and "enjoin" were certainly terms which a lady might be excused for mistaking. But, farther, the pursuer, the party interested, contributed to her mistake. He was a trustee on both trusts, and he not only did not insist on her making her election, but he concurred in making payments to her which were beyond her true right, and he could not now be heard in this demand for repetition. Where a person has not been put in *mala fide* by the actings of a trustee, factor, tenant, or other party, whose duty it is to pay or to withhold according to the rights of parties, the mere obtaining of the money is in favour of the plea of *bona fide* perception and consumption. But (2) *bona fide perceptio et consumptio* had been sustained up to the date of citation in similar cases.[3] (3) If the plea of *bona fide* consumption should be sustained, the next question was at what point did that *bona fide* consumption stop. But here the plea was stated with reference to the liferent of the trust-estate, and not to the rents of Cardowan. It mattered nothing therefore that the rents of Cardowan due at Martinmas 1871 and subsequently were not received by the defender, while the produce of the residue had been received and consumed. *Bona fide* consumption of the liferent of the trust-estate consequently continued until the date of citation in the action of declarator in February 1872 as the Lord Ordinary had found.[4] (4) Waiver was a good plea against the pursuer's demand to go back in the assertion of his rights, and here waiver was well founded.[5] (5) Though a proper case of set off in the strict legal sense could not be maintained in the circumstances, inasmuch as in the matter of the Cardowan rents there was no direct *concursus debiti et crediti* between the pursuer and the defender, he being the tenant not of the defender but of the Cardowan trustees, still the defender was entitled in equity to be protected from having to pay to the pursuer a large sum, while he himself was due a

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[1] 1 Bell's Com. (M'Laren's ed.), 141.

[2] Grant, Nov. 16, 1633, M. 1743; Woolmet, Nov. 20, 1662, M. 1730; Cockburn, Feb. 12, 1697, M. 1734; Agnew, July 15, 1746, M. 1732; Blair v. Stewart, Nov. 18, 1783, M. 1775.

[3] Moir, June 16, 1826, 4 S. 731 (N. E.); Agnew v. Lord Stair, May 19, 1826, 4 S. 612 (N. E.); Duke of Buccleuch v. Duke of Queensberry's Executors, March 10, 1824, 2 Shaw's Appeals, 43; Duchess of Roxburghe, Feb. 17, 1815, F. C.; Menzies v. Menzies, July 3, 1863, 1 Macph. 1025, 35 Scot. Jur. 590.

[4] Ersk. Inst. ii. 1, 29.

[5] Laing, June 2, 1829, 7 S. 693.

similar sum to which she was entitled, though by the intervention of a trust it had to pass through another hand before it reached her. The sisting of the Cardowan trustees removed all difficulty in sustaining the plea.

At advising,—

LORD PRESIDENT.—The late Mr William Johnston was possessed of considerable estate, both heritable and moveable. Some portions of his heritable estate he disposed of by deeds *inter vivos*, but his general estate was made the subject of a testamentary disposition. By his deed of 1858 the lands of Easter Cardowan were settled, through the medium of a trust, in the following way. Mr Johnston and his wife and the survivor were provided in the liferent for their liferent use allenarly, and after the death of the survivor the trustees were directed to allow their son, John Johnston, the pursuer, to enjoy a liferent of the lands, which was declared strictly alimentary, the fee being provided to his children, and failing them, to his brothers and sisters.

By his testamentary settlement Mr Johnston made certain provisions in favour of his wife in the event of her survivance, and among other things he gave her the liferent of the residue of his property. But to that provision there was this addition, viz.,—"In respect of the provisions in favour of my wife, the said Mrs Marion Waddell or Johnston, hereinafter contained, I recommend and enjoin her, in the event of her surviving me, to discharge or abstain from exacting from the said John Johnston her liferent right in the lands of Easter Cardowan," &c.

Upon the death of Mr Johnston in 1867 his widow took the liferent of the residue which was provided to her by his trust-settlement, but without complying with his injunction to discharge or abstain from exacting the liferent of Easter Cardowan. In short, she took both provisions, and continued to do so for nearly six years. But in 1873, in an action at the instance of the present pursuer, we found that she was not entitled to enjoy both provisions, and must make her election. She elected to take the rents of Easter Cardowan, and to give up the liferent of the residue.

The present action has been raised by John Johnston, the son, against the widow and the testamentary trustees, concluding that he should be compensated for the loss of the liferent of Easter Cardowan which the widow has elected to take, by an allowance out of the proceeds of the residue.

There are three interlocutors now under review, viz., those of 23d July 1874, and of 12th January and 6th February 1875, each disposing of only a part of the case.

The first of these, that of 23d July 1874, sets out the various circumstances and points of the case so fully, that I may as well read it, as introductory,—(His Lordship read the interlocutor of 23d July 1874, *supra*, p. 991). Now, the only part of this interlocutor to which the pursuer objects is the second finding in law, and also the corresponding finding in fact. That finding in fact, on which the finding in law is based, is this,—"That shortly after the death of William Johnston, the defender, Mrs Johnston, intimated to his trustees, of whom the pursuer was one, her intention to draw the rents of Cardowan and Blackhill, as well as the liferent of the residue of the trust-estate, and that the pursuer allowed her to do this without objection till the year 1872." The finding in law is—"That the pursuer is not entitled to demand repetition from the

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defender, Mrs Johnston, of the liferent interest in the trust-estate, received by her down to the end of the year 1871."

The question raised on this point is not, I think, attended with much difficulty. A person to whom two alternative provisions are left by testamentary bequest is certainly under no circumstances entitled to both of them; and if, on the face of the settlements, or deeds constituting the settlement, it is clear that he is entitled only to one of two provisions, it is abundantly clear also that he cannot be held *in bona fide* if he accepts and consumes both. A person may be ignorant of law, and incapable of understanding a deed, but he has always access to advice. He must be presumed to take advice, and to act upon it. And if in effect he does draw both provisions, it is impossible to say that he is acting in good faith. The remarks of Lord Eldon in Kerr v. Wauchope, 1 Bligh, 18, on the matter are expressly applicable to the present case.

But, on the other hand, where on the face of the settlement the question is one of great difficulty whether certain provisions are intended to be alternative or cumulative,—and one has seen such cases before the Court,—then the mere fact of a beneficiary accepting both is not inconsistent with good faith, particularly if legal advice is taken.

The question is, under which of these categories does the case fall? If Mrs Johnston had been left to herself and her own law adviser, and had insisted upon receiving the double provision, I should have had the greatest possible difficulty in holding that she was *in bona fide;* for it does not appear to me that there was any difficulty in the question whether the provisions were to be alternative or cumulative which any ordinary lawyer could not have solved for her. We were very clear at any rate when the case came before us.

But the peculiarity of the case is that the party interested acquiesced, and not merely acquiesced but did something more than acquiesce. For John Johnston, the pursuer, was not only one of the Cardowan trustees but one of the testamentary trustees, and therefore his concurrence was indispensable to the payment of money from either estate to Mrs Johnston. If he had chosen to prevent either set of trustees paying to Mrs Johnston he was in a position to do so; but, instead of that, he, being present at the meeting of trustees at which the widow announced her intention of drawing the rents of Cardowan, as well as the liferent of the residue, raised no objection but acquiesced, and thereafter allowed the income of both estates to be paid by himself and his co-trustees to the widow. He himself was therefore a party to putting into the hands of the widow those proceeds of the trust-estate which he now calls upon her to restore. In these circumstances I think Mrs Johnston is quite entitled to say that she received them in good faith, for the party who was interested in objecting, and who was one of those who made these payments to her, contributed to and encouraged her in her mistake. I therefore concur in the Lord Ordinary's finding on this branch of the case.

Turning, now, to the interlocutor of 12th January 1875, in which the Lord Ordinary disposes of the question, what proportion of the liferent residue of the trust-estate now falls to be paid to the pursuer in lieu of the rents of Easter Cardowan, and fixes the period from which that payment is to commence, we find that the pursuer merely contends for another half year,—that is to say, he contends that he is entitled to a payment as in lieu of the liferent of Easter Cardowan for the half year prior to Martinmas 1871 as well as to what the Lord Ordinary has given him.

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Now, it appears that the rents payable at Martinmas 1871 have not been paid to or received by Mrs Johnston, and therefore it is contended that, as she has not received them, she cannot be said to be *in bona fide* in dealing with them in any way, either in uplifting them or in spending them.

But it seems to me that that argument is fallacious. The question is, whether the pursuer is entitled to be compensated out of the income of the residue for the loss of the rent payable at Martinmas 1871. But as that rent has never been paid or received, the question is not whether Mrs Johnston received and spent that rent *in bona fide*, but whether she received *in bona fide* the corresponding part of the annual proceeds of the residue. In coming to the conclusion he has done, I think the Lord Ordinary has satisfactorily carried out the findings in his interlocutor of 23d July 1874.

Lastly, we have to consider the interlocutor of 6th February 1875, and that interlocutor raises a question of an entirely different character. Its object was to dispose of the whole cause, and apply the findings in the previous interlocutors. Accordingly, the Lord Ordinary finds that the sum already found due to the pursuer is extinguished by compensation or set off. Now, it appears that the pursuer was tenant of the lands of Easter Cardowan, and that he has fallen into arrear with his rent. The lands were let to him by the body of trustees who were infeft in the estate, and they were the only parties who had an active title to levy the rents. But this action was not directed against them but against Mrs Johnston, who had levied the liferent of the residue of the testamentary estate, to which they, the Cardowan trustees, were in no way entitled, and also against the testamentary trustees, who had paid to Mrs Johnston the liferent of the residue in their hands, and who were found liable to pay to the pursuer in the future. The trustees under the trust-conveyance of Cardowan were not made parties to the action.

Mrs Johnston, no doubt, has a plea of compensation on record, and the question is, whether, independently of sisting the Cardowan trustees as compearers in the action, that is a good plea in her mouth. I think it is not. I think Mrs Johnston cannot plead compensation. She was not proprietrix of the lands, either in liferent or fee. She was merely a beneficiary under a trust. It is true she was entitled, under the provisions in the trust-deed, and in consequence of her election to abide by them, to the annual produce of the lands in liferent. But then she could not sue for these rents. The trustees were the only parties who could do so. No landlord's remedies were competent to her. Now, when a party pleads compensation on a *concursus debiti et crediti*, he must be in possession of an active title to sue. Unless he can sue for the debt he cannot plead it in compensation. The doctrine of compensation was only introduced for the purpose of preventing unnecessary actions. As, then, this lady had no title to raise an action, she can have no foundation for a plea of compensation.

But then the curious device was resorted to, in order to strengthen her case, of introducing the Cardowan trustees, who have the right to raise actions for the rents, as parties compearers in this process. They could not be competently introduced without consent, and, even if introduced, how could they plead compensation from whom nothing was sought? It seems to have been thought that by a sort of amalgamation of interests a title could be made out to plead compensation. But the proceeding was most irregular. The party who is called as a defender, against whom the conclusions of the action are directed, is the only

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person who can plead compensation. The Cardowan trustees are not here for any proper purpose, and therefore neither by themselves, nor in conjunction with Mrs Johnston, have they right to state this plea.

On this part of the case, therefore, I differ from the Lord Ordinary. The result will simply be to recall this interlocutor of 6th February 1875, and decern in favour of the pursuer for the sum found due to him by the previous interlocutor of 12th January 1875.

But there still remains the fifth plea for the defenders, the testamentary trustees, to be disposed of, viz., that "any provision to which the pursuer may be found entitled should be declared alimentary, and not affectable by his debts or deeds, or the diligence of his creditors." If the trustees have anything to say on that point we shall be glad to hear them.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

It was then stated for the testamentary trustees that they had thought it their duty to state their fifth plea, that they might bring the point under the notice of the Court; but it was admitted by their counsel that they could not cite any authority for imposing such a condition by implication.

It was contended for the pursuer that it was not competent for the Court to lay such a restriction over a fund where it had not been expressly imposed by the testator. The restriction applied to the rents of Cardowan merely, and could not be imposed on the compensatory provision which the Court had fixed on equitable considerations as coming in place of what the testator had intended the pursuer to get under the trust-disposition and settlement.

THIS interlocutor was pronounced:—"The Lords having heard counsel on the reclaiming note for the pursuer against Lord Craighill's interlocutor dated 6th February 1875, and also as a reclaiming note against the two previous interlocutors of Lord Craighill, dated the 23d July 1874 and 12th January 1875, adhere to the said interlocutors of 23d July 1874 and 12th January 1875: Recall the said interlocutor of 6th February 1875: Repel the plea of compensation stated by Mrs Johnston: Find that the trustees on the estate of Cardowan, compearers, cannot either alone or jointly with Mrs Johnston be heard to maintain that plea of compensation in this action; decern against the defender, Mrs Johnston, to make payment to the pursuer of the sums specified in the interlocutor of 12th January 1875, amounting in all to £250, 2s. 2d. sterling, with interest on each sum at five per cent from the date at which it became due till payment: Farther, find and declare that the defenders, the trustees, original and assumed, of the late William Johnston, under his trust-disposition and settlement dated 8th March 1865 and relative codicil, are bound, from and after the term of Whitsunday 1874, and during the lifetime of the pursuer's mother, to make payment to the pursuer, half-yearly at the usual terms of Whitsunday and Martinmas, of a share of the free residuary liferent of his father's estate, according to the proportion settled by the first and second findings in the said interlocutor of 12th January 1875; and decern and ordain the defenders, the trustees under his father's trust-disposition and settlement, to make payment to the pursuer of such share accordingly, reserving to the defenders, if such share shall in any year exceed the sum of

£127, 5s. 7d., to retain, if so advised, such surplus in their hands till the right of the pursuer to payment thereof shall be determined by the Court: Finally, find no expenses due either to or by either the pursuer or the defenders, and decern." No. 171. July 20, 1875. Johnston v. Johnston, &c.

WILLIAM OFFICER, S.S.C.—MILLAR, ALLARDICE, ROBSON, & INNES, W.S.—Agents.

ROBERT WALLACE, AND MRS MARJORY MILLER OR WALLACE, his Wife, Pursuers.—*Strachan.*
JAMES HENDERSON, Defender.—*Mackintosh—Henderson.*

No. 172. July 20, 1875. Wallace v. Henderson.

Process—Accounting—Lis alibi pendens.—A husband raised an action against a heritable creditor who had been in possession of subjects destined to the pursuer and his wife, and the survivor of them, concluding that the defender should be ordained to render an account of his intromissions with the rents, and pay the balance due, with interest from the date of citation. This action was allowed to fall asleep, and several years after the husband and wife raised a second action against the creditor, concluding for an accounting, and for declarator that the debt was extinguished. Pending the action the husband died. *Held* that the surviving wife was fiar of the subjects, and that the plea of *lis alibi pendens* applied to the second action only in so far as it concluded for an accounting for the rents due prior to the date of citation in the first action.

1ST DIVISION. Lord Young. B.

IN 1841 Robert Wallace, merchant, Lybster, and his wife, Marjory Miller or Wallace, obtained a feu of two lots of ground in the village of Lybster. The feu-disposition bore, in consideration of the feu-duty therein stipulated, to sell, alienate, and in feu-farm dispone "to Robert Wallace, merchant, Lybster, and Marjory Miller or Wallace, his wife, and the longest liver of them, and their heirs and assignees whomsoever (but secluding assignees before infeftment), heritably and irredeemably, all and whole," &c.

In March 1853 Mr and Mrs Wallace granted a heritable bond over these subjects for £350, in favour of Robert Sutherland, to which bond the defender, James Henderson of Bilbster, acquired right conform to assignation in his favour dated 21st November 1859.

At Whitsunday 1861 Henderson entered into possession of the subjects in virtue of the bond, and from and after that date he alone intromitted with the rents.

On 27th February 1866 Robert Wallace, suing in his own name alone, and without his wife, raised an action in the Court of Session against the defender, James Henderson, concluding, *inter alia*, that the defender should be ordained "to exhibit and produce before our said Lords a full and particular account of his whole intromissions with the rents, maills, duties, and whole proceeds of the two lots of ground in the said village of Lybster, with the buildings erected thereon belonging to the pursuer, and sometime occupied by him as a hotel or inn, whereby the true balance due by the defender to the pursuer may appear and be ascertained by our said Lords; and the defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £2000, or of such other sum as shall appear and be ascertained by our said Lords as the balance of the defender's said intromissions, with the legal interest thereof from the date of the citation to follow hereon until payment; or in the event of the defender failing to produce an account as aforesaid, he ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £2000, which shall in that case be held to be the balance of said intromissions, with the legal interest thereof from the date of citation until payment."

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Certain procedure took place with regard to a claim of damages, which formed another branch of this action, which resulted in the action being dismissed on 11th January 1867, so far as regarded the conclusions for damages, and in a finding of expenses in favour of the defender.[1] No steps were taken in the accounting. The expenses found due to the defender were not paid, and the action was allowed to fall asleep.

On 12th October 1874, Robert Wallace, and his wife Mrs Marjory Miller or Wallace, raised the present action of count, reckoning, &c., against the defender, James Henderson, concluding that the defender should exhibit and produce a full and particular account of his whole intromissions with the rents of the subjects in Lybster which belonged to them, whereby the true balance thereon might be ascertained; and that the defender should be ordained to make payment to the pursuers of the sum of £500 sterling, or of such other sum as should be ascertained to be due by him as the balance of his intromissions; or in the event of his failing to produce such account, that he should be ordained to make payment to the pursuers of the sum of £500 sterling, which should in that case be held to be the balance of his intromissions; or otherwise, that the defender should be ordained to impute the sum of £500, or such other sum as might be ascertained to be due by him as the balance of his intromissions, to account *pro tanto* of the sums due to him by the pursuers under and in virtue of the bond and disposition in security over the subjects for the sum of £350 sterling, granted by them in favour of Robert Sutherland, and dated the 16th day of March 1853, and assigned to the defender on 21st November 1859; and on the pursuers making or tendering payment of any balance that might remain of the sums due to the defender under the foresaid bond and disposition in security, and assignation thereof, in his favour, after the foresaid sum of £500 sterling, or such other sum as might be ascertained to be the balance of the rents as aforesaid being imputed to account thereof, as well as all other sums which he had received to account, the defender should be ordained to grant, execute, and deliver to the pursuers a formal and valid discharge of the bond and disposition in security, containing all the usual and necessary clauses.

In defence to the action the defender pleaded;—The grounds of action being already *sub judice* in a pending suit at the pursuers' instance against the defender, the present action is incompetent.

The Lord Ordinary, on 4th March 1875, pronounced this interlocutor:—"Sustains the first plea in law for the defender; and in respect thereof dismisses the action, and decerns: Finds the pursuers liable in expenses; and remits the account thereof," &c.

Subsequent to the date of the Lord Ordinary's interlocutor, the pursuer, Robert Wallace, died.

The pursuer, Mrs Marjory Miller or Wallace, reclaimed.

Argued for her;—(1) The parties to the two actions were not the same. The husband was sole pursuer in the first. The husband and wife were joint pursuers in the second. The dependence of the first action at the husband's instance did not prevent the wife insisting in the second in her own right, especially after her husband's death. (2) The object of the two actions was different. In the first the object was merely count and reckoning. In the second the real object was to disburden the subjects and have the bond discharged; the accounting was merely ancillary and preliminary to the main object being attained. (3) In any view the conclusions of the first action were only for accounting up to the date of citation, and did not involve a continuous accounting up to the date of

[1] *Vide* Wallace v. Henderson, Jan. 11, 1867, 5 Macph. 270, 39 Scot. Jur. 124.

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decree.[1] In some cases an accounting was continuous up to the date of the decree, but in such case the summons was expressed accordingly. In other cases, by acquiescence an accounting was allowed to be continuous. But where neither of these things was the case, an accounting was no exception to the ordinary rule—decree could not go beyond the conclusions of the summons. All, therefore, that could be done in any event was to sustain the plea as regarded the years prior to 27th February 1866, the date of citation in the first action.

Argued for the defender;—If the wife's concurrence was not necessary in the second action, then the plea of *lis alibi* held good. Now, (1) in a case of conjunct fee to a husband and wife the husband was the true fiar, the wife having only a protected liferent;[2] and, even if the wife had a right of fee, it was only one which emerged on survivance. During the husband's life, he alone had the active title to uplift and sue for the rents. Hence, in either view, the second action, just as the first, was competent at the husband's instance without the wife's concurrence. Further, an action of accounting, though the mere words of style in the summons appeared to restrict its conclusions to the date of citation, was, in practice, treated as continuous, so far as necessary to settle all questions between the parties. The husband, therefore, could have got all he sought in the first action, and his death did not enable his widow to insist when he could not.

LORD DEAS.—The construction of the destination here is really a simple matter. The destination in the feu-disposition—(for it must be noted that it is an ordinary feu-disposition and not a disposition for a price paid by either of the disponees)—is as follows:—"To Robert Wallace, merchant, Lybster, and Marjory Miller or Wallace, his wife, and the longest liver of them, and their heirs and assignees whomsoever (but secluding assignees before infeftment), heritably and irredeemably, All and Whole," &c.

Under that destination it is clear that the spouses, and the survivor of them, became entitled to the fee. It is not a destination in conjunct fee and liferent. There is no mention of liferent. There is nothing but a fee to the husband and wife and the survivor. The wife is the survivor, and is therefore the fiar.

In these circumstances the first action at the husband's instance was quite a good action. It was an action for the rents only. In virtue of his *jus mariti*, that action was quite good as a personal action at his instance, but it by no means follows that he could have either sold or burdened the subjects to the prejudice of his wife's eventual right as fiar.

That being so, there may be room for the plea of *lis pendens* to a limited extent. But the question is, how far does that plea go? The conclusions of the first action cannot be read as comprehending the rents down to the present date. Assuredly it cannot comprehend them after the husband's death. Such an action is often so laid as to involve a continuous accounting, and parties sometimes hold it to be so, although not expressly so laid. But where it is neither so laid, nor so construed and dealt with by the parties, the accounting is limited to the date of citation. Decree in absence could go no further than the sum concluded for, with interest (as here expressly libelled), from the date of citation.

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[1] Wauchope v. North British Railway Company, Dec. 20, 1860, 23 D. 191 (see p. 201), 33 Scot. Jur. p. 96.

[2] Stair, iii. 5, 51; Ersk. iii. 8, 36; Ferguson, 1739, M. 4202; Bell's Conveyancing, ii. 777.

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Besides, this second action is a different action from the first. It not only concludes that the defender should account for his intromissions with the rents, but also to have it found and declared that the heritable debt due to the defender is extinguished by those intromissions, and that the pursuers are entitled to have their bond discharged. Consequently no plea of *lis pendens* could in any view lie against this action as a whole. But if the second action was to any extent a good action in the husband's lifetime, it remains a good action at the instance of the wife, who is sole fiar in her own right after the husband's death. The result here is that the plea of *lis pendens* can only be sustained so far as regards the rents up to the date of citation in the first action.

The LORD PRESIDENT, LORD ARDMILLAN, and LORD MURE concurred.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor of 4th March 1875: Sustain the plea of *lis pendens*, so far as regards the rents concluded for in the first action: *Quoad ultra* repel that plea, and remit to the Lord Ordinary to proceed as may be just: Find the said pursuer entitled to expenses since the date of the said interlocutor reclaimed against, which modify to £5, 5s. sterling, and for which sum decern against the defender for payment to the said pursuer."

WALLS & SUTHERLAND, S.S.C.—HORNE, HORNE, & LYELL, W.S.—Agents.

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July 20, 1875.* Rhind, *et al.* v. Sheach, *et al.*

JAMES RHIND AND OTHERS, Petitioners.—*Pearson.*
DAVID SHEACH, Respondent.—*Mair.*
MARGARET JAMES SHEACH OR SMITH AND SPOUSE, Respondents.—*Sol.-Gen. Watson—M'Kechnie.*

Process—Petition—Competency—Sequestration of an Estate—Appointment of a Judicial Factor—Junior Lord Ordinary—20 and 21 Vict. c. 56, sec. 4.—Held (by Lord Curriehill, Junior Lord Ordinary) that a petition for the sequestration of a trust-estate and for the appointment of a judicial factor, which did not at the same time pray for the removal of the trustees or executors, was competent before the Junior Lord Ordinary.

Outer-House. Ld. Curriehill.

THIS petition was presented to the Junior Lord Ordinary by James Rhind and others, being certain of the beneficiaries under the last will and testament of the deceased John Rhind, who died on 28th August 1873.

The respondents were David Sheach, the sole accepting executor, and also a beneficiary, and Margaret James Sheach or Smith and others, also beneficiaries under John Rhind's testamentary deed above mentioned.

The prayer of the petition was "to sequestrate the estate of the said deceased John Rhind, if necessary, and to appoint" such person as the Court might think proper "to be judicial factor thereon, with the usual powers."

The petition did not pray for the removal of David Sheach from his office of executor.

Answers were lodged for the respondents, in which it was maintained that the application was competent only in the Inner-House, and was incompetent before the Junior Lord Ordinary, (1) because it was virtually an application for the removal of David Sheach from his office of executor; and (2) because it prayed for the sequestration of the executry estate.

The Junior Lord Ordinary, on 16th March 1875, pronounced this inter-

* Decided March 16, 1875.

locutor:—"Repels the plea of incompetency stated by the respondents; sequestrates the estate of the deceased John Rhind, and appoints Mr Robert Strathern, W.S., to be judicial factor thereon, with the usual powers, he always finding caution before extract, and decerns *ad interim*," &c.* No. 173. July 20, 1875. Rhind, *et al.* v. Sheach, *et al.*

ROBERT J. LINDSAY, W.S.—W. OFFICER, S.S.C.—THOMAS CARMICHAEL, S.S.C.—Agents.

CHARLES HARRIS AND OTHERS, Pursuers and Respondents.—*Scott—Balfour.*
GILLESPIE, CATHCART, AND FRASER, Defenders and Appellants.—*Sol.-Gen. Watson—Guthrie Smith.*

No. 174. July 20, 1875.† Harris, &c. v. Gillespie, Cathcart, and Fraser.

Jurisdiction—Sheriff—Domicile.—Circumstances in which *held* that a firm of Glasgow merchants had also a trading domicile at Greenock, and might be sued in the Sheriff-court of Renfrewshire.

IN March 1874 Charles Harris and others, owners of the screw-steamer "Wastdale," raised an action of damages for breach of charter-party in the Sheriff-court of Renfrewshire at Greenock, against Gillespie, Cathcart, 1ST DIVISION. Sheriff of Renfrewshire. M.

* "NOTE.— . . . If the petition had expressly prayed for the removal of the executor it seems to be settled by the case of Mitchell, 20th July 1864, 2 Macph. 1378, 36 Scot. Jur. 693, that it ought to have been presented directly to the Inner-House and not to the Junior Lord Ordinary. But it does not pray for removal of the executor, but merely for the sequestration of the executry estate and the appointment of a judicial factor, which would not necessarily involve the removal of the executor, though it would cause a temporary suspension of his functions pending the sequestration. It therefore becomes necessary to inquire whether and how far such a petition is, according to the sound construction of the Act 20th and 21st Vict. c. 56, regulating the distribution of business in the Court of Session, one of those petitions which must be brought in the first instance before the Junior Lord Ordinary and disposed of by him in the Outer-House.

"By that Act it is provided, sec. 4, that 'All summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually pending at the time of presenting the same shall be brought before the Junior Lord Ordinary officiating in the Outer-House, who shall deal therewith and dispose thereof as to him shall seem just, and, in particular, all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz.:—

"'1. Petitions and applications under any of the various statutes now in force relative to entails.

"'2. Petitions and applications under any of the General Railway Acts or under the Lands Clauses Consolidation (Scotland) Act, 1845, or under any local or personal Act.

"'3. Petitions and applications relative to money consigned under any statute or law subject to the order, disposal, or direction of the Court of Session.

"'4. Petitions and applications for the appointment of judicial factors, factors *loco tutoris*, or *loco absentis*, or *curators bonis*, or by any such factors or curators for extraordinary or special powers, or for exoneration or discharge.

"'5. All petitions, applications, and reports under the Act of the 12th and 13th Vict. c. 57, entituled "an Act for the better protection of property of pupils, absent persons, and persons under mental incapacity, in Scotland."'

"By a proviso at the end of sec. 5 of the statute it is provided that the 'Lord Ordinary may in special cases, if he see cause, report such petition or application to the Court, who may thereupon dispose of the same, or give such instructions thereanent to the Lord Ordinary as they may deem proper.'

† Decided January 5, 1875.

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and Fraser, designed in the summons as "merchants in Glasgow and Greenock, and having a place of business in each of these towns."

"And by sec. 10 it is provided that 'the Lord Ordinary on the Bills during vacation shall have the same powers in regard to petitions for the appointment of factors *loco tutoris*, *curators bonis*, and judicial factors as are by this Act conferred in relation thereto on the Junior Lord Ordinary as aforesaid.'

"Petitions for sequestration are not expressly specified in the foregoing enumeration, but the petitioners maintain that such petitions are by implication contained under the general words 'petitions for the appointment of judicial factors.' The first question therefore to be considered is whether, upon the sound construction of the 4th sec. of the statute, a petition for sequestration of an executry or trust-estate, and the appointment of a judicial factor thereon, is a petition falling under the 4th subdivision of the enumerated petitions. This question has never, so far as I am aware, been made matter of express decision, but in some of the decided cases it seems to have been taken for granted that such a petition is competent before the Junior Lord Ordinary. See the cases of Morris v. Bain, 27th Feb. 1858, 20 D. 716, 30 Scot. Jur. 369, and Shedden, 27th June 1867, 5 Macph. 956. In each of these cases a trust and executry estate was sequestrated and a judicial factor appointed by the Lord Ordinary on the Bills in vacation, as exercising under the 10th section of the Act the jurisdiction conferred by the 4th section upon the Junior Lord Ordinary.

"It must be observed that in the case of Morris v. Bain the prayer for sequestration and the appointment of a factor was alternative to a prayer for the removal of the trustee and executor, and that both in that case and the case of Shedden the object of the application was to supersede the management of an existing trustee in whom the petitioning beneficiaries had ceased to have confidence. In both of these cases the Inner-House, in disposing of reclaiming notes against the judgment of the Lord Ordinary, seem to have assumed (although the point does not appear to have been raised in either case) that such a petition could be competently presented to and entertained by the Junior Lord Ordinary.

"Further, in the case of Viscountess Hawarden, 31st May 1861, 23 D. 923, 33 Scot. Jur. 477, sequestration of an executry estate was awarded by the Lord Ordinary on the Bills in vacation, and a judicial factor appointed, and the appointment was confirmed in the Inner-House upon a reclaiming note. In that case, however, there was no executor vested with the estate, there being a competition for the office in dependence when the petition for sequestration was presented, and the question as to the jurisdiction of the Lord Ordinary does not seem to have been raised.

"Subsequent, however, to the cases of Morris v. Bain and Viscountess Hawarden, but before the case of Shedden, other two cases occurred, in one of which the Court assumed, and in the other of which they decided, that an application for the removal of a trustee and for the appointment of a judicial factor was properly presented in the first instance, not in the Outer-House but in the Inner-House. In the earlier of these cases, viz., Fleming v. Craig, 30th May 1863, 1 Macph. 850, 35 Scot. Jur. 510, the object of the petition was the removal of the trustee, the appointment of a judicial factor being sought not as an alternative to but as a necessary consequence of the removal of the trustee. But in the more recent of these cases (Mitchell, 20th July 1864, 2 Macph. 1378, 36 Scot. Jur. 693), where the petition was for the removal of certain parties from the office of trustees and executors under the settlement of a deceased party, with an alternative prayer for sequestration of the trust-estate and the appointment of a judicial factor, it was held by the Court on the report of the Junior Lord Ordinary (Barcaple) who distinctly brought under their notice the cases of Morris v. Bain and Fleming v. Craig, that as the real object of the petition was the removal of the trustees such a petition was incompetent before the Lord Ordinary, even in so far as regarded the alternative prayer for sequestration of the estate and the appointment of a judicial factor. In that case the Lord President said,—'The argument turned a

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The defenders stated—(Stat. 1) "The defenders' firm has its principal office and its domicile in Glasgow . . . . . the office in Greenock being merely a subsidiary office, where clerks are kept for the purpose of attending to the discharge of cargoes arriving for them at the port of Greenock, and to the other incidents of the shipping part of the defenders' business. There is no partner of, or any person holding a power of procuration for, the defenders resident in Greenock, or permanently stationed there, and none of the clerks in Greenock make contracts for the firm. The defenders sell sugar extensively to refiners in Greenock, but their sales are not made by any one connected with the Greenock office, nor in the Greenock office, but either by a partner or a person holding a power of procuration, who goes down from Glasgow to attend the Sugar Exchange in Greenock, where the sales are made."

The defenders pleaded;—(1) The defenders are not in the present case liable to the jurisdiction of the Sheriff of Renfrewshire.

The Sheriff-substitute (Smith) repelled this plea.*

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good deal upon the question whether the parts of the prayer could be separated, the respondents contending that if any part of the prayer was incompetent the whole was incompetent, and the petitioners, on the other hand, contending that if part of the prayer was competent the petition to that extent ought to be sustained. In my opinion the way to view the petition is to see what is its real purport and object. I think the main purpose is to have the trustees removed, and I think that is not an object that can be arrived at by a petition presented to the Junior Lord Ordinary.' The other Judges concurred. From these remarks of the Lord President it would appear that had the petition sought merely sequestration and the appointment of a judicial factor it would have been held to be competent before the Junior Lord Ordinary.

"In comparing and contrasting these four cases it must be kept in view that so far as appears from the report neither the case of Fleming v. Craig nor the case of Mitchell was brought under the notice of the Court when deciding the case of Shedden. The result, however, of a comparison of the whole four cases appears to be this,—that where a petition is presented solely or chiefly for the purpose of having the trustee removed, it cannot competently be presented to the Junior Lord Ordinary, but only to the Inner-House, while, on the other hand, a petition for sequestration of a trust or executry estate and appointment of a judicial factor, without any prayer for removal of the trustee or executor, has been hitherto assumed to be competent if presented to the Junior Lord Ordinary, although the effect of the sequestration is to suspend, during its subsistence, the trustee's power of acting and administration. And I understand that ever since the passing of the Act of 1857 it has been the constant practice for the Junior Lord Ordinary to entertain and grant petitions for sequestration combined with the appointment of a judicial factor. I am of opinion that such petitions are truly petitions for judicial factors within the sense and meaning of the Act, and that the respondents' plea of incompetency should be repelled."

* "NOTE.—. . . . In the present case the cargo was to be discharged at Greenock. The contract was to be fulfilled there, and the defenders wrote to the pursuers from Greenock regarding the previous cargoes shipped to Greenock under the same charter-party. Their letter No. 9-35 of process, is dated 'Greenock, 16th Dec^r. 1873,' and it has these words printed on another part of the sheet, 'Greenock, 20 Palmerston Buildings. Glasgow, 54 Millar Street.' There is nothing there to shew that the defenders themselves regarded Greenock as subsidiary to Glasgow, but rather something to indicate that Greenock, *quoad* this piece of business, was their chief office.

"But whether the Greenock establishment be a 'subsidiary office' or not, the Sheriff-substitute thinks that the judgments of the Supreme Court in the cases of the Aberdeen Railway Company v. Ferrier, 28th January 1854, 16 D. 422, and Young v. Livingston, 13th March 1860, 22 D. p. 983, make it impossible for him to sustain the defenders' plea."

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The defenders having appealed, the Sheriff (Fraser) recalled the interlocutor *in hoc statu*, and allowed the parties a proof of their averments in reference to the plea of no jurisdiction.

A proof was led. Samuel Barclay, partner of defenders' firm, deponed,—"I exhibit the defenders' bank pass-books kept here with the Royal Bank in Greenock. . . . We also have an account at the Clydesdale here. But that is only for lodging money. . . . I have charge of the Greenock office of the defenders. . . . Our average number of clerks there is ten. Mr Harvey is now our chief clerk here. He acts under my directions. We keep a full set of books here. . . . In absence of any partner Mr Harvey signs the firm's letters here. Mr Fraser of defenders' firm comes to Greenock daily to the Sugar Exchange, and sometimes he goes to the office. I come down once a week or oftener to the office. Mr Bryce, one of our managing clerks in Glasgow, used to come regularly to Greenock with Mr Fraser. When Mr Fraser comes to Greenock, and does not go to the office here (or when I do that), Mr Harvey comes and meets us at the Sugar Exchange. We have a sugar warehouse in Greenock. We are about the largest importers of sugar here, and the sugar is warehoused here if it does not go direct to the refiners. We have many ships consigned to us here. Our staff here looks after the sugar in the vessels consigned to us. We make large sugar sales here.

"Cross-examined for defenders.—. . . . No partner resides in Renfrewshire. No clerk of ours here holds a power of procuration. No one with such a power resides in this county. Glasgow is our head office. Greenock is a branch. The sugar sales are all made in the Sugar Exchange here. None in the office of the defenders. The sales notes which are issued for the sugar sold are always issued from the Glasgow office, and when we buy by letter we write and send the letters from Glasgow. The clerks here just carry out the instructions sent from Glasgow. They look after the discharge and the storage of the sugar and the custom-house work. They also clear the vessels. They have nothing to do with sales. We have a private wire from the Glasgow to the Greenock office in daily use, so as to give instructions to our subordinates here, and let them consult us. . . . . Our letters from correspondents abroad are always sent to Glasgow, and then we instruct the Greenock clerks of what is required to be done at Greenock. The vessels are generally consigned to Greenock, and they always discharge there. The bills of lading are sent, as a matter of course, to Glasgow, though sometimes, to save a day, we give express instructions to send them to Greenock. Our two bank accounts are for convenience. The Clydesdale account is just of monies paid in here, to be credited to us in Glasgow. No one here can draw on our bank accounts. When money is wanted we send down a cheque or cash from Glasgow. This we do daily. The clerks telegraph the amount probably required. We rent our warehouse here for storing sugar that has not been sold, just keeping it till a purchaser turns up. We don't refine. The contract about the s.s. 'Wastdale' was entered into and signed in Glasgow. J. and R. Young, brokers in Glasgow, represented the pursuers, and met with Mr Bryce on defenders' behalf, and negotiated the contract there. All the letters regarding the contract, so far as I know, were written from Glasgow. Any letter sent from Greenock about it would be written and sent under general instructions from Glasgow. . . . . We buy and sell sugar largely in various parts of the world, and we have consignments of sugar and other goods to other ports besides Greenock. Our business is entirely managed from Glasgow.

"Re-examined for pursuers.—We have no counting-house anywhere but here and in Glasgow. . . . . Mr Fraser goes to the refiner's offices, as well

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as to the Sugar Exchange. The refiners buy the sugar, and when they pay in cash they pay in Greenock, and when they pay by bill we sometimes discount it here. We have a discount as well as a deposit account here. Our office here is for the convenience of our general business. We sell grain to Greenock men, sending down a clerk to do so."

The Sheriff-substitute again repelled the plea.

The Sheriff on appeal pronounced this interlocutor:—"Recalls the interlocutor of the Sheriff-substitute appealed against, and in place thereof, finds, in reference to the question of jurisdiction, that this is an action of damages for breach of contract entered into on 22d August 1873 between the pursuers and the defenders; that the defenders are merchants trading in Greenock, having in that town premises in Palmerston Buildings; that they are importers of sugar and West India produce to Greenock; that they have banking accounts in the branches of the Royal and Clydesdale Banks at Greenock, and have in Greenock a large establishment of clerks and other subordinates, and are, in short, Greenock merchants: Finds, therefore, that the defenders are subject to the jurisdiction of the Sheriff of Renfrew, they being persons carrying on business within the said county: Finds that they have been properly cited to the Court of the Sheriff of Renfrew: Therefore repels the first plea in law stated for the defenders," &c.

The defenders appealed to the First Division, with a view to trial by jury.

THE COURT pronounced this interlocutor:—"Adhere to the said interlocutor, and of new repel the defenders' (appellants') first plea."

W. ARCHIBALD, S.S.C.—A. KELLY MORRISON, S.S.C.—Agents.

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ACCOUNT. *Proof—Settlement of contra-accounts—Parole.*
A, a firm of iron merchants, had an account against B, an iron merchant and broker, for £9562. B, as broker for C, had an account against A for £7536, both payable at the same settling day. B's account as broker for C was, at a meeting for settlement, not disputed, but A's was to a certain extent. B paid the admitted balance due by him, and the payment was marked as a payment to account on the copy of A's account, held by him, and a receipt for the sum so paid was written upon it. A having subsequently become bankrupt, *held*, in a question between A's creditors and B (1) that the account, with the receipt for the payment to account, with pencil markings of figures on the back shewing that the amount of the sum paid had been fixed, after deducting B's account from A's, were insufficient to establish a settlement between A and B by crossing accounts and payment of the balance; and (2) that it was not competent to supplement the proof of settlement by parole evidence. Hannay and Sons' Trustee v. Armstrong Brothers and Company, Feb. 2, 1875, p. 399.

ACCOUNTING. See *Process*, 23.

ACQUIESCENCE. *Trustee.*
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ARRESTMENT. *Execution—Clerical Error—1 and 2 Vict. c. 114 (Personal Diligence Act, 1838), sec. 9.*

Where an execution of arrestment bore to proceed on an extract Sheriff-court decree (containing warrant to arrest, in virtue of the Personal Diligence Act, 1838, sec. 9) dated 13th January and extracted 6th February 1872, whereas the decree which formed the warrant of arrestment was dated 30th January 1872, *held* that the discrepancy was fatal to the validity of the arrestment. Graham v. Bell, July 15, 1875, p. 972.

ASSESSMENT. See *Poor—Public Burden.*

ASSIGNATION. *Right in Security—Jus cedendarum actionum.*

A creditor in a debt, heritably secured, was also assignee of a liferenter of the burdened subject. The fiar having tendered payment of the debt and demanded an assignation, *held* (in deciding a question of expenses) that the creditor was entitled to qualify the assignation with the condition that

ASSIGNATION—*Continued.*

if the interest were regularly paid the assignation should not be used in prejudice of the liferent right. Fraser v. Carruthers, March 11, 1875, p. 595.

See *Railway*, 1.

ATTAINDER. See *Entail.*

ATTESTATION OF DEEDS. See *Writ.*

BANKRUPTCY. *Suspension and Liberation—Caution for Expenses.*

1. A bankrupt is entitled to bring and prosecute a suspension of diligence which has attached or may attach his person without finding caution for expenses, although it may raise large and intricate questions of accounting between him and the incarcerating creditors. Young v. Robertsons, March 13, 1875, p. 599.

Statute 1696, *c.* 5—*Sale—Security.*

2. On 16th May 1874 P and Son, merchants, received from H £500, and granted the following written obligation:—"We have this day received from you £500; and we hereby promise to give you, within one month from this date, delivery-orders on stores in Glasgow for wheat, oats, beans, or Ind. corn, to the full value." P and Son then purchased grain in the market from various persons on credit, and between 22d May and 8th June handed delivery-orders therefor to the value of £238 to H. P and Son were sequestrated on 25th June.

In an action brought by the trustee on P and Son's estate, *held* that the deliveries of grain were reducible as granted within sixty days of bankruptcy in satisfaction or further security of a prior debt in preference to other creditors within the meaning of the Act 1696, cap. 5. Gourlay v. Hodge, June 2, 1875, p. 738.

Trustee—Power to adopt or cancel Bankrupt's Executory Contracts—Current Contract—Delectus Personæ—Mora.

3. A firm contracted to supply shipbuilders with iron for certain vessels which were to be built, and had partially implemented the contract, which was a beneficial one for them, and was daily becoming more so, when they became insolvent. The day after the insolvency the shipbuilders wrote cancelling the contract. Two days afterwards the firm's manager wrote asking for time to make arrangements. Twenty-six days after the insolvency the trustee on the sequestrated estate wrote offering to go on with the contract or to come to terms upon which it might be cancelled, which offer was refused. In an action for damages at the instance of the trustee, *held* that, without deciding whether the contract was one which the trustee could competently have taken up as not involving *delectus personæ*, in the circumstances he had not declared his option to go on with the contract *tempestivé*, and that the shipbuilders were not liable in damages.

Question, whether the contract was one that could competently be taken up by the trustee and creditors? Anderson v. Hamilton and Co., Jan. 22, 1875, p. 355.

19 *and* 20 *Vict. c.* 79 (*Bankruptcy* (*Scotland*) *Act*, 1856), *secs.* 126, 127.

4. A trustee on a sequestrated estate pronounced a deliverance rejecting the claim of a creditor as being insufficiently vouched, and allowing him to lodge further evidence within eight days. The creditor did not lodge further evidence within eight days, and did not appeal within the statutory period of fifteen days. In a suspension at his instance, the Court (*rev.* judgment of Lord Young) interdicted the trustee from paying a dividend till the creditor's claim had been disposed of by a deliverance admitting or rejecting it, the previous deliverance being held incompetent under the 126th section of the statute.

Observed (*per* Lord President), that when a trustee contemplates rejecting a claim by an alleged creditor on the ground that the claimant is a conjunct and confident person, the claimant is entitled to have an oppor-

BANKRUPTCY—*Continued.*

tunity of leading evidence *prout de jure* to prove the reality of the transaction. Ritchie v. Balgarnie, Jan 14, 1875, p. 297.

19 *and* 20 *Vict. cap.* 79 (*Bankruptcy* (*Scotland*) *Act*; 1856), *secs.* 25, 108, *&c.*

5. In a sequestration a creditor, being a brother of the bankrupt, produced, as the only voucher of his debt, a decree in absence obtained by him against the bankrupt within sixty days of bankruptcy,—*objection* to his vote *sustained.* Dow and Co. v. Union Bank, Feb. 23, 1875, p. 459.

Affidavit.

6. The Bankruptcy Scotland Act, 1856, sec. 25, provides that when a creditor is a corporation, an affidavit "by the secretary, manager, cashier, clerk, or other principal officer of such corporation, shall be sufficient." *Held* that an assistant manager of a joint stock banking company was a principal officer of the bank in the sense of the Act. Dow and Co. v. Union Bank, Feb. 23, 1875, p. 459.

7. In a sequestration the Sheriff allowed an addition to be made to an affidavit by one of the creditors. The addition was made by the deponent, and initialed by him and by the magistrate before whom the original deposition had been made.

Objections (1) that the addition was not part of the oath, and (2) that it was not duly authenticated, *repelled.* Dow and Co. v. Union Bank, Feb. 23, 1875, p. 459.

Affidavit—Valuation of Securities.

8. A creditor used an arrestment within sixty days of the bankruptcy of his debtor. In his affidavit he deponed that he put no value upon it. *Objection* that he ought to have put a value upon it *repelled*, in respect that by sec. 108 the arrestment was not effectual to the creditor. Dow and Co. v. Union Bank, Feb. 23, 1875, p. 459.

Ranking—Cautioner.

9. Although a cautioner for the debt of a person who has become bankrupt will not be allowed to rank on the bankrupt's general funds for his loss as cautioner when the creditor has already been ranked for the full debt, if the cautioner holds a lien over any special fund belonging to the bankrupt his right to full indemnity therefrom will not be affected by the ranking of the creditor. Jamieson v. Forrest, May 25, 1875, p. 701.

Ranking—Cautioner—Security.

10. *Held* that a person holding a lien over a portion of a bankrupt's estate in security of advances made to him, and against risks and loss through a cautionary obligation undertaken for the bankrupt, was entitled to apply the security in the first instance to extinguish his loss through the cautionary obligation. Jamieson v. Forrest, May 25, 1875, p. 701.

Ranking—Blank Bill—Cautioner—Accommodation Bill.

11. A lent B £300 and at the same time took in security from B a blank bill stamp for £2000, signed by him and indorsed by four other persons, A being in the knowledge that no relation of debtor and creditor subsisted between B and the indorsers. B not having paid the £300, and one of the indorsers having become bankrupt, A, who had filled up the blank stamp as a note for £2000, claimed to rank on the bankrupt indorser's estate for that amount till the dividends should amount to £300.

Held that the bankrupt indorser was in reality only a cautioner, and that A was only entitled to rank on his estate for the £300 actually lent to B. Jackson v. M'Iver, July 6, 1875, p. 882.

Discharge—Preference—Statutes 19 *and* 20 *Vict. c.* 79, *sec.* 151, *and* 23 *and* 24 *Vict. c.* 33, *sec.* 3.

12. The 151st section of the Bankruptcy Act, 1856, enacts that if a bankrupt shall have been personally concerned in or cognisant of the granting of any preference he shall forfeit all right to a discharge.

In an application by a bankrupt for his discharge, after the lapse of two

BANKRUPTCY—*Continued.*

years from the date of the sequestration, *held* that the terms of the above section were imperative, and that the Court was bound, *ex proprio motu*, although there was no appearance for the trustee and creditors, to enforce them. Pendreigh, June 5, 1875, p. 769.

Foreign—Forum Competens.

13. The mercantile sequestration of a bankrupt in a foreign country renders a subsequent award of sequestration in Scotland incompetent. Goetze v. Aders, &c., Nov. 27, 1874, p. 150.

See *Bill*, 2—*Husband and Wife*, 6—*Railway*, 1—*Recompense.*

BARONY. See *Fishings.*

BILL. *Suspension.*

1. In a note of suspension of a charge on a bill for £100 it was averred that when the bill became due the debtor had paid £30, and granted a bill for £70; that the second bill had been fraudulently altered to £75 by the respondent in order to conceal that it was a partial renewal of the first; that the complainer had paid the £75 to avoid litigation; and that the charger was now fraudulently seeking to enforce payment of the first bill. The £75 bill was produced, and was *ex facie* altered. *Held* that the complainer was entitled to have the note passed on caution. Simpson v. Taylor, Nov. 4, 1874, p. 75.

Compensation—Concursus Debiti et Crediti—Bankruptcy.

2. When certain bills were discounted by indorsees for value, and subsequently retired by them at maturity after the bankruptcy of the acceptor, *held* that they were entitled to plead compensation upon them against a debt due by themselves to the bankrupt; and the special objections (1) that they were neither the holders at the date of the sequestration nor the drawers, but only intermediate indorsees, (2) that they held a letter of guarantee from a third party, whose name did not appear on the bills, but for whose behoof they had been drawn, against any loss they might sustain on the bills, and, therefore, were pleading compensation in the interest of the guarantor, who had no debt to compensate, *repelled.* Hannay and Son's Trustee v. Armstrong Brothers and Co., Feb. 2, 1875, p. 399.

Suspension—Joint Adventure—Partnership—Summary Diligence.

3. The three trustees of an unregistered joint stock building association, who had signed a bill drawn on and addressed to them, B., U., and S., "trustees of the New Imperial Building Association," by one of the members of the association for the amount of an account for plaster work done on the association's buildings, presented a note of suspension of a charge on the bill, on the ground that the charger was not entitled to use summary diligence, in respect (1) that the complainers were only liable *qua* trustees, and (2) that the drawer was a partner of the association, and as such was, under the articles, liable *pro rata* along with the whole members for the amount in the bill. *Held* that the charge was competent, in respect (1) that the acceptor's signatures were unqualified, and (2) that, even if their liability could be held to be *qua* trustees merely, they had not averred that there were no funds of the association in their hands. Brown, &c. v. Sutherland, March 17, 1875, p. 615.

Suspension—Intoxication.

4. In a suspension of a charge upon a bill upon the ground that it had been obtained when the suspender was incapacitated through intoxication, *held* on consideration of a proof as to the suspender's state on the occasion, and his subsequent actings, and in respect that he had never challenged the bill, though frequently applied to for payment of it, until charged, six months after it had become due, that he was not entitled to suspend the charge. Pollok v. Burns, March 3, 1875, p. 497.

Discharge—Indorser—Cautioner—Pactum de non petendo.

5. *The holder of a bill, after it had been dishonoured and duly protested, while he retained possession of the bill, granted a discharge to the acceptors "of all*

BILL—*Continued.*

claims and demands competent" to him against them, "reserving entire my claims against any obligants, other than" the acceptors, "presently bound to me along with" the acceptors. He thereafter sued the latest of three indorsers of the bill for the amount in the bill. Held *that the discharge did not extinguish the debt, but was merely an agreement not to sue the acceptors, and that the indorser must pay, his recourse against the acceptors not being prejudiced.* Muir v. Crawford, May 4, 1875, H. L., p. 148.

See *Bankruptcy*, 11.

BONA FIDES. *Approbate and Reprobate.*

Observed that a person who is put to his election between two alternative provisions, and who draws both, cannot in general plead *bona fide* perception and consumption in answer to a claim for repetition. Johnston v. Johnston, &c., July 20, 1875, p. 986.

See *Sale*, 1.

BURGH. *Burgh Election—Police Commissioners.*

The Ballot Act, in enacting that "all municipal elections shall be conducted in the same manner in all respects in which the elections of councillors in" certain royal burghs "are directed to be conducted by the Acts in force at the date of the passing of this Act, as amended by this Act," only prescribes the mode of conducting the election in the sense of taking the votes, adding them up, and declaring the result, and does not repeal the provisions in secs. 48 and 50 of the Police and Improvement Act of 1862 as to the mode of dealing with an equality of votes, and fixing the day of election of Police Commissioners. Hamilton v. Police Commissioners of Dunoon, Jan. 15, 1875, p. 299.

See *Church*, 3.

CARRIER. *Passengers' Luggage—Contract.*

Held (*in aff. judgment of the Second Division*) *in a case not falling within the provisions of the Railway and Canal Traffic Act*, 1854, *that special conditions limiting the common law liability of a carrier were not imported into a contract of carriage by merely printing them on the back of the ticket delivered by the carrier in exchange for the fare, the person receiving the ticket not having actually read the conditions, and not having had his attention directed to them by anything printed on the face of the ticket, or by the carrier himself when issuing it.* Henderson and Others v. Stevenson, June 1, 1875, H. L., p. 71.

See *Railway*.

CAUTIONER. See *Bankruptcy*, 9, 10, 11—*Bill*, 5.

CESSIO. 6 *and* 7 *Will. IV. c.* 56, *sec.* 2.

1. A person raised a summons of *cessio bonorum*. His creditors objected to the competency of the summons, inasmuch as it did not set forth, in terms of A. S. 24th December 1838, sec. 1 (to regulate proceedings in processes of *cessio bonorum*), any ground entitling the pursuer to *cessio* under the statute. The only fact founded on in the summons was that the pursuer had been charged to pay a debt on 10th November 1873, but as the summons was raised on 18th November, before the *inducice* had expired, no warrant of imprisonment had or could have issued against him. *Held* that as the pursuer was not in any of the situations enumerated by the statute, the objection must be sustained, and the summons dismissed as incompetent. Jacobsen v. His Creditors, Dec. 18, 1874, p. 227.

Future Earnings.

2. *Held* that a person incarcerated for failure to pay a sum of damages awarded for seduction, breach of promise of marriage, and aliment, who was not possessed of any property, but had been earning 27s. a-week before his incarceration, was not entitled to the benefit of *cessio*, except upon condi-

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See separate Indices of Cases decided in the Registration Appeal Court, p. 1056, and Court of Justiciary, p. 1057.

ACCOUNT. *Proof—Settlement of contra-accounts—Parole.*
A, a firm of iron merchants, had an account against B, an iron merchant and broker, for £9562. B, as broker for C, had an account against A for £7536, both payable at the same settling day. B's account as broker for C was, at a meeting for settlement, not disputed, but A's was to a certain extent. B paid the admitted balance due by him, and the payment was marked as a payment to account on the copy of A's account, held by him, and a receipt for the sum so paid was written upon it. A having subsequently become bankrupt, *held*, in a question between A's creditors and B (1) that the account, with the receipt for the payment to account, with pencil markings of figures on the back shewing that the amount of the sum paid had been fixed, after deducting B's account from A's, were insufficient to establish a settlement between A and B by crossing accounts and payment of the balance; and (2) that it was not competent to supplement the proof of settlement by parole evidence. Hannay and Sons' Trustee v. Armstrong Brothers and Company, Feb. 2, 1875, p. 399.

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A dispute between two parishes as to the settlement of a pauper was referred by them to the decision of a society of inspectors of poor, which was in the practice of deciding such questions by vote at their general meetings, at which it was uncertain what members would be present. Held *that the reference and the award following thereon were valid.* Bremner v. Elder, June 24, 1875, H. L., p. 136.

ARRESTMENT. *Execution—Clerical Error—1 and 2 Vict. c. 114 (Personal Diligence Act, 1838), sec. 9.*

Where an execution of arrestment bore to proceed on an extract Sheriff-court decree (containing warrant to arrest, in virtue of the Personal Diligence Act, 1838, sec. 9) dated 13th January and extracted 6th February 1872, whereas the decree which formed the warrant of arrestment was dated 30th January 1872, *held* that the discrepancy was fatal to the validity of the arrestment. Graham v. Bell, July 15, 1875, p. 972.

ASSESSMENT. See *Poor—Public Burden.*

ASSIGNATION. *Right in Security—Jus cedendarum actionum.*

A creditor in a debt, heritably secured, was also assignee of a liferenter of the burdened subject. The fiar having tendered payment of the debt and demanded an assignation, *held* (in deciding a question of expenses) that the creditor was entitled to qualify the assignation with the condition that

ASSIGNATION—*Continued.*

if the interest were regularly paid the assignation should not be used in prejudice of the liferent right. Fraser v. Carruthers, March 11, 1875, p. 595.

See *Railway*, 1.

ATTAINDER. See *Entail.*

ATTESTATION OF DEEDS. See *Writ.*

BANKRUPTCY. *Suspension and Liberation—Caution for Expenses.*

1. A bankrupt is entitled to bring and prosecute a suspension of diligence which has attached or may attach his person without finding caution for expenses, although it may raise large and intricate questions of accounting between him and the incarcerating creditors. Young v. Robertsons, March 13, 1875, p. 599.

Statute 1696, *c.* 5—*Sale—Security.*

2. On 16th May 1874 P and Son, merchants, received from H £500, and granted the following written obligation:—"We have this day received from you £500; and we hereby promise to give you, within one month from this date, delivery-orders on stores in Glasgow for wheat, oats, beans, or Ind. corn, to the full value." P and Son then purchased grain in the market from various persons on credit, and between 22d May and 8th June handed delivery-orders therefor to the value of £238 to H. P and Son were sequestrated on 25th June.

In an action brought by the trustee on P and Son's estate, *held* that the deliveries of grain were reducible as granted within sixty days of bankruptcy in satisfaction or further security of a prior debt in preference to other creditors within the meaning of the Act 1696, cap. 5. Gourlay v. Hodge, June 2, 1875, p. 738.

Trustee—Power to adopt or cancel Bankrupt's Executory Contracts—Current Contract—Delectus Personæ—Mora.

3. A firm contracted to supply shipbuilders with iron for certain vessels which were to be built, and had partially implemented the contract, which was a beneficial one for them, and was daily becoming more so, when they became insolvent. The day after the insolvency the shipbuilders wrote cancelling the contract. Two days afterwards the firm's manager wrote asking for time to make arrangements. Twenty-six days after the insolvency the trustee on the sequestrated estate wrote offering to go on with the contract or to come to terms upon which it might be cancelled, which offer was refused. In an action for damages at the instance of the trustee, *held* that, without deciding whether the contract was one which the trustee could competently have taken up as not involving *delectus personæ*, in the circumstances he had not declared his option to go on with the contract *tempestivé*, and that the shipbuilders were not liable in damages.

Question, whether the contract was one that could competently be taken up by the trustee and creditors? Anderson v. Hamilton and Co., Jan. 22, 1875, p. 355.

19 *and* 20 *Vict. c.* 79 (*Bankruptcy* (*Scotland*) *Act*, 1856), *secs.* 126, 127.

4. A trustee on a sequestrated estate pronounced a deliverance rejecting the claim of a creditor as being insufficiently vouched, and allowing him to lodge further evidence within eight days. The creditor did not lodge further evidence within eight days, and did not appeal within the statutory period of fifteen days. In a suspension at his instance, the Court (*rev.* judgment of Lord Young) interdicted the trustee from paying a dividend till the creditor's claim had been disposed of by a deliverance admitting or rejecting it, the previous deliverance being held incompetent under the 126th section of the statute.

Observed (*per* Lord President), that when a trustee contemplates rejecting a claim by an alleged creditor on the ground that the claimant is a conjunct and confident person, the claimant is entitled to have an oppor-

BANKRUPTCY—*Continued.*

tunity of leading evidence *prout de jure* to prove the reality of the transaction. Ritchie v. Balgarnie, Jan 14, 1875, p. 297.

19 *and* 20 *Vict. cap.* 79 (*Bankruptcy (Scotland) Act*, 1856), *secs.* 25, 108, *&c.*

5. In a sequestration a creditor, being a brother of the bankrupt, produced, as the only voucher of his debt, a decree in absence obtained by him against the bankrupt within sixty days of bankruptcy,—*objection* to his vote *sustained.* Dow and Co. v. Union Bank, Feb. 23, 1875, p. 459.

Affidavit.

6. The Bankruptcy Scotland Act, 1856, sec. 25, provides that when a creditor is a corporation, an affidavit "by the secretary, manager, cashier, clerk, or other principal officer of such corporation, shall be sufficient." *Held* that an assistant manager of a joint stock banking company was a principal officer of the bank in the sense of the Act. Dow and Co. v. Union Bank, Feb. 23, 1875, p. 459.

7. In a sequestration the Sheriff allowed an addition to be made to an affidavit by one of the creditors. The addition was made by the deponent, and initialed by him and by the magistrate before whom the original deposition had been made.

Objections (1) that the addition was not part of the oath, and (2) that it was not duly authenticated, *repelled.* Dow and Co. v. Union Bank, Feb. 23, 1875, p. 459.

Affidavit—Valuation of Securities.

8. A creditor used an arrestment within sixty days of the bankruptcy of his debtor. In his affidavit he deponed that he put no value upon it. *Objection* that he ought to have put a value upon it *repelled*, in respect that by sec. 108 the arrestment was not effectual to the creditor. Dow and Co. v. Union Bank, Feb. 23, 1875, p. 459.

Ranking—Cautioner.

9. Although a cautioner for the debt of a person who has become bankrupt will not be allowed to rank on the bankrupt's general funds for his loss as cautioner when the creditor has already been ranked for the full debt, if the cautioner holds a lien over any special fund belonging to the bankrupt his right to full indemnity therefrom will not be affected by the ranking of the creditor. Jamieson v. Forrest, May 25, 1875, p. 701.

Ranking—Cautioner—Security.

10. *Held* that a person holding a lien over a portion of a bankrupt's estate in security of advances made to him, and against risks and loss through a cautionary obligation undertaken for the bankrupt, was entitled to apply the security in the first instance to extinguish his loss through the cautionary obligation. Jamieson v. Forrest, May 25, 1875, p. 701.

Ranking—Blank Bill—Cautioner—Accommodation Bill.

11. A lent B £300 and at the same time took in security from B a blank bill stamp for £2000, signed by him and indorsed by four other persons, A being in the knowledge that no relation of debtor and creditor subsisted between B and the indorsers. B not having paid the £300, and one of the indorsers having become bankrupt, A, who had filled up the blank stamp as a note for £2000, claimed to rank on the bankrupt indorser's estate for that amount till the dividends should amount to £300.

Held that the bankrupt indorser was in reality only a cautioner, and that A was only entitled to rank on his estate for the £300 actually lent to B. Jackson v. M'Iver, July 6, 1875, p. 882.

Discharge—Preference—Statutes 19 *and* 20 *Vict. c.* 79, *sec.* 151, *and* 23 *and* 24 *Vict. c.* 33, *sec.* 3.

12. The 151st section of the Bankruptcy Act, 1856, enacts that if a bankrupt shall have been personally concerned in or cognisant of the granting of any preference he shall forfeit all right to a discharge.

In an application by a bankrupt for his discharge, after the lapse of two

BANKRUPTCY—*Continued.*

years from the date of the sequestration, *held* that the terms of the above section were imperative, and that the Court was bound, *ex proprio motu*, although there was no appearance for the trustee and creditors, to enforce them. Pendreigh, June 5, 1875, p. 769.

Foreign—Forum Competens.

13. The mercantile sequestration of a bankrupt in a foreign country renders a subsequent award of sequestration in Scotland incompetent. Goetze v. Aders, &c., Nov. 27, 1874, p. 150.

See *Bill*, 2—*Husband and Wife*, 6—*Railway*, 1—*Recompense.*

BARONY. See *Fishings.*

BILL. *Suspension.*

1. In a note of suspension of a charge on a bill for £100 it was averred that when the bill became due the debtor had paid £30, and granted a bill for £70; that the second bill had been fraudulently altered to £75 by the respondent in order to conceal that it was a partial renewal of the first; that the complainer had paid the £75 to avoid litigation; and that the charger was now fraudulently seeking to enforce payment of the first bill. The £75 bill was produced, and was *ex facie* altered. *Held* that the complainer was entitled to have the note passed on caution. Simpson v. Taylor, Nov. 4, 1874, p. 75.

Compensation—Concursus Debiti et Crediti—Bankruptcy.

2. When certain bills were discounted by indorsees for value, and subsequently retired by them at maturity after the bankruptcy of the acceptor, *held* that they were entitled to plead compensation upon them against a debt due by themselves to the bankrupt; and the special objections (1) that they were neither the holders at the date of the sequestration nor the drawers, but only intermediate indorsees, (2) that they held a letter of guarantee from a third party, whose name did not appear on the bills, but for whose behoof they had been drawn, against any loss they might sustain on the bills, and, therefore, were pleading compensation in the interest of the guarantor, who had no debt to compensate, *repelled.* Hannay and Son's Trustee v. Armstrong Brothers and Co., Feb. 2, 1875, p. 399.

Suspension—Joint Adventure—Partnership—Summary Diligence.

3. The three trustees of an unregistered joint stock building association, who had signed a bill drawn on and addressed to them, B., U., and S., "trustees of the New Imperial Building Association," by one of the members of the association for the amount of an account for plaster work done on the association's buildings, presented a note of suspension of a charge on the bill, on the ground that the charger was not entitled to use summary diligence, in respect (1) that the complainers were only liable *qua* trustees, and (2) that the drawer was a partner of the association, and as such was, under the articles, liable *pro rata* along with the whole members for the amount in the bill. *Held* that the charge was competent, in respect (1) that the acceptor's signatures were unqualified, and (2) that, even if their liability could be held to be *qua* trustees merely, they had not averred that there were no funds of the association in their hands. Brown, &c. v. Sutherland, March 17, 1875, p. 615.

Suspension—Intoxication.

4. In a suspension of a charge upon a bill upon the ground that it had been obtained when the suspender was incapacitated through intoxication, *held* on consideration of a proof as to the suspender's state on the occasion, and his subsequent actings, and in respect that he had never challenged the bill, though frequently applied to for payment of it, until charged, six months after it had become due, that he was not entitled to suspend the charge. Pollok v. Burns, March 3, 1875, p. 497.

Discharge—Indorser—Cautioner—Pactum de non petendo.

5. *The holder of a bill, after it had been dishonoured and duly protested, while he retained possession of the bill, granted a discharge to the acceptors "of all*

BILL—*Continued.*

claims and demands competent" to him against them, "reserving entire my claims against any obligants, other than" the acceptors, "presently bound to me along with" the acceptors. He thereafter sued the latest of three indorsers of the bill for the amount in the bill. Held *that the discharge did not extinguish the debt, but was merely an agreement not to sue the acceptors, and that the indorser must pay, his recourse against the acceptors not being prejudiced.* Muir v. Crawford, May 4, 1875, H. L., p. 148.

See *Bankruptcy*, 11.

BONA FIDES. *Approbate and Reprobate.*

Observed that a person who is put to his election between two alternative provisions, and who draws both, cannot in general plead *bona fide* perception and consumption in answer to a claim for repetition. Johnston v. Johnston, &c., July 20, 1875, p. 986.

See *Sale*, 1.

BURGH. *Burgh Election—Police Commissioners.*

The Ballot Act, in enacting that "all municipal elections shall be conducted in the same manner in all respects in which the elections of councillors in" certain royal burghs "are directed to be conducted by the Acts in force at the date of the passing of this Act, as amended by this Act," only prescribes the mode of conducting the election in the sense of taking the votes, adding them up, and declaring the result, and does not repeal the provisions in secs. 48 and 50 of the Police and Improvement Act of 1862 as to the mode of dealing with an equality of votes, and fixing the day of election of Police Commissioners. Hamilton v. Police Commissioners of Dunoon, Jan. 15, 1875, p. 299.

See *Church*, 3.

CARRIER. *Passengers' Luggage—Contract.*

Held (*in* aff. *judgment of the Second Division*) *in a case not falling within the provisions of the Railway and Canal Traffic Act*, 1854, *that special conditions limiting the common law liability of a carrier were not imported into a contract of carriage by merely printing them on the back of the ticket delivered by the carrier in exchange for the fare, the person receiving the ticket not having actually read the conditions, and not having had his attention directed to them by anything printed on the face of the ticket, or by the carrier himself when issuing it.* Henderson and Others v. Stevenson, June 1, 1875, H. L., p. 71.

See *Railway*.

CAUTIONER. See *Bankruptcy*, 9, 10, 11—*Bill*, 5.

CESSIO. 6 *and* 7 *Will. IV. c.* 56, *sec.* 2.

1. A person raised a summons of *cessio bonorum*. His creditors objected to the competency of the summons, inasmuch as it did not set forth, in terms of A. S. 24th December 1838, sec. 1 (to regulate proceedings in processes of *cessio bonorum*), any ground entitling the pursuer to *cessio* under the statute. The only fact founded on in the summons was that the pursuer had been charged to pay a debt on 10th November 1873, but as the summons was raised on 18th November, before the *inducia* had expired, no warrant of imprisonment had or could have issued against him. *Held* that as the pursuer was not in any of the situations enumerated by the statute, the objection must be sustained, and the summons dismissed as incompetent. Jacobsen v. His Creditors, Dec. 18, 1874, p. 227.

Future Earnings.

2. *Held* that a person incarcerated for failure to pay a sum of damages awarded for seduction, breach of promise of marriage, and aliment, who was not possessed of any property, but had been earning 27s. a-week before his incarceration, was not entitled to the benefit of *cessio*, except upon condi-

CESSIO—*Continued.*

tion of granting an obligation to pay weekly to the incarcerating creditor a portion of his wages, which fixed at one-sixth. Mitchell v. Macfarlane, July 13, 1875, p. 930.

CHURCH. *Glebe.*

1. In a petition for authority to feu a glebe the Court approved of certain alterations, rendered necessary by the Conveyancing and Land Transfer Act, 1874, on the model feu-charter approved of in the Penicuick case (5 Macph. p. 1145). Browne, March 1, 1875, p. 488.

Parish Quoad Sacra—Marriage—Proclamation of Banns.

2. *Held* that the proclamation of banns was prescribed by the Church as a preliminary to the celebration of marriage *in facie ecclesiæ*, and that such proclamation was one of the functions and duties of the office of minister of a church erected into a parish church under the Act 7 and 8 Vict. c. 44, for the district attached thereto as a parish *quoad sacra*. Hutton, &c. v. Harper, &c., July 7, 1875, p. 893.

Parish Bells.

3. *On the rebuilding, in* 1779, *of the parish church of a parish partly burghal partly landward, it was agreed between the heritors of the parish and the magistrates of the burgh that a steeple should "be carried up on the east end of the church," at the sole cost of the burgh, "which steeple, when finished, with the bells, &c., therein, is to be the sole property of the burgh for ever, the bells, however, to be employed for the parish as well as the town." The steeple was completed in* 1784, *and the burgh bells were thereafter hung in it.*

Held (*in* aff. *judgment of the First Division*) (1) *that having regard to the circumstances of the contracting parties at the date of the agreement, and specially to the fact that the heritors were bound to provide a bell for the parish church, the agreement was to be construed as conferring on the parish the exclusive right to use the bells for ecclesiastical purposes; and therefore* (2) *that the town-council were not entitled to order the bells to be rung on Sundays or national and parochial Fast-days for the purpose of intimating worship elsewhere than in the parish church at such hours as might be fixed by the kirk-session.* Magistrates of Peebles v. Kirk-Session of Peebles, June 7, 1875, H. L., p. 117.

Division of Area of Church. See *Process*, 16.

COMMISSION. See *Agent and Principal*, 2, 3.

COMPANY. See *Partnership.*

COMPENSATION. *Liquid and Illiquid.*

1. In an action for payment of the price of goods the defender admitted the debt, but pleaded compensation in respect of a counter claim of damages arising out of a separate transaction, which was disputed by the pursuer. *Held* that the defender was not entitled to plead compensation in respect of the illiquid claim of damages. Mackie v. Riddell, Nov. 20, 1874, p. 115.

Concursus debiti et crediti—Bankruptcy.

2. When certain bills were discounted by indorsees for value, and subsequently retired by them at maturity after the bankruptcy of the acceptor, *held* that they were entitled to plead compensation upon them against a debt due by themselves to the bankrupt; and the special objections (1) that they were neither the holders at the date of the sequestration nor the drawers, but only intermediate indorsees, (2) that they held a letter of guarantee from a third party, whose name did not appear on the bills, but for whose behoof they had been drawn, against any loss they might sustain on the bills, and, therefore, were pleading compensation in the interest of the guarantor, who had no debt to compensate, *repelled*. Hannay and Son's Trustee v. Armstrong Brothers and Co., Feb. 2, 1875, p. 399.

COMPENSATION—*Continued.*

Concursus debiti et crediti—Trust.

3. *Held* that arrears of rent due by the tenant of lands vested in trustees under a settlement could not be set off against a debt claimed by the tenant from a beneficiary under the settlement entitled to the income of the lands, there being no *concursus debiti et crediti*, and that the plea of compensation was not validated by the trustees sisting themselves as defenders along with the beneficiary. Johnston v. Johnston, July 20, 1875, p. 986.

See *Contract*, 3.

CONDITION IN RESTRAINT OF MARRIAGE. See *Succession*, 8.

CONTRACT. *Locatio Operarum—Building—Vis Major.*

1. A contractor undertook to build the entire brick-work of a house at certain rates. Before the work was completed a brick gable, forming a portion of it, was blown down during a violent gale of wind. *Held* that it having been proved that the work had been executed according to contract the loss fell upon the owner of the house, and that the contractor was entitled to recover from him the price of the work destroyed (*diss.* Lord Deas, on the grounds (1) that the contractor had not proved that the work had been executed conform to contract, and that the accident might not have been caused by a deviation therefrom; and (2) that even if it had been proved that there was no fault on the part of the contractor, the risk lay with him).

Opinions that the *onus* lay, in the first instance, on the contractor to shew that his work was conform to contract. M'Intyre v. Clow, Jan. 8, 1875, p. 278.

Sale—Timeous Rejection.

2. A firm of engineers contracted to make and deliver a machine consisting mainly of two heavy pieces of cast iron, "the whole to be of the best description, and warranted." The two parts of the machine were transmitted to a railway station—the place of delivery—on 7th February. On 17th February the purchaser, after removing one of the pieces, discovered serious defects in it, and at once intimated rejection to the sellers. On 28th February an agreement was entered into between the purchaser and the sellers that the purchaser should then take delivery of the machine and pay the price, the sellers undertaking to pay half the expense of replacing the defective portion of the machine if it should break within twelve months. Five days afterwards the purchaser removed from the railway station the remaining portion of the machine, and on the same day intimated that he had discovered defects in this part also. *Held* that the purchaser was precluded by the agreement from rejecting the machine for defects which he might have discovered by examination before the date of the agreement. Smith Brothers and Co. v. Scott, March 17, 1875, p. 601.

Damages—Defence.

3. A tradesman entered into a written contract to furnish and fit up machinery by a certain date. The time was allowed to run out without anything being done, and the tradesman having afterwards completed the work sued for the contract price. The defenders did not dispute the sufficiency of the work, but they averred that another definite time had been verbally substituted for the time originally stipulated, and they resisted payment on the ground that the pursuer had failed to execute the work within the time agreed on, and had thereby occasioned them loss to an amount exceeding the sum sued for. *Held*, on the principle that one party is not entitled to enforce performance of a contract if he has himself violated an express condition thereof, that the defenders were entitled to have their claim of damages liquidated in the action at the pursuer's instance, and set off against the contract price. Macbride v. Hamilton and Son, June 11, 1875, p. 775.

See *Agent and Principal—Carrier—Reparation*, 5—*Sale*, 2.

CRIME. See *Index of Justiciary Cases, p.* 1057.

DAMAGES. See *Reparation—Contract*, 3.

DAMNUM FATALE. See *Contract*, 1.

DEED. See *Writ.*

DESTINATION. See *Fee and Liferent*, 2, 3.

DILIGENCE. See *Arrestment—Bill*, 3—*Poinding the Ground.*

DILIGENCE FOR RECOVERY OF WRITS. See *Process*, 1, 2.

DISCHARGE. See *Account—Lease*, 4.

DOMICILE. *Jurisdiction—Sheriff.*

Circumstances in which *held* that a firm of Glasgow merchants had also a trading domicile at Greenock, and might be sued in the Sheriff-court of Renfrewshire. Harris, &c. v. Gillespie, Cathcart, and Fraser, July 20, 1875, p. 1003.

DONATION INTER VIRUM ET UXOREM. See *Husband and Wife*, 4.

ENTAIL. *Crown Charter—Attainder—Forfeiture—Statutes* 1690, *c.* 33, *and* 7 *Anne, c.* 21—*Res Judicata.*

1. In 1868 a person brought an action to establish his right to estates under an entail constituted in 1687 by a procuratory of resignation (which was followed by a crown charter of resignation and novodamus and infeftment thereon), in the character of heir-male of one of the heirs of entail attainted in 1746, alleging that by the Acts 1690, c. 33, and 7 Anne, c. 21, the effect of the forfeiture was limited to the rebel and his issue, and that the estates passed in terms of the entail to the heir-male next after the rebel and his issue, or otherwise, that on the attainder the estates became vested in the Crown, and that the pursuer had right to the estates under the Restoration Act, 24 Geo. III. c. 57.

It was held that the effect of the forfeiture was not so limited, and an interlocutor was pronounced finding that the estates on the attainder became vested in the Crown, and that the pursuer had no right under the Restoration Act.

The pursuer then raised a second action, founding on the crown charter of 1687, on the ground that the terms of the crown grant were effectual, independently of the law of entail, to limit the effect of the attainder to the rebel and his issue. *Held* (1) (*alt.* judgment of Lord Young, and *dub.* Lord Ormidale), that the plea of *res judicata* did not apply, the *media concludendi* of the two actions being different; but (2) (*aff.* judgment of Lord Young), that whatever might be the effect of an original crown grant in terms of the charter of 1687, that deed, being a charter by progress following upon and in terms of the procuratory of resignation, could not have the effect contended for by the pursuer. Earl of Perth v. Lady Willoughby de Eresby's Trustees, March 9, 1875, p. 538.

Destination—Entail by two Deeds—Fetters.

2. A proprietor entailed his estate upon A, and the heirs-male of his body, and a series of substitutes, reserving to himself power to revoke and alter by any writings under his hand, "which writings shall be taken as a part of the present deed of entail, and shall be as effectual" "as if the same had been inserted herein." In a subsequent deed the granter revoked the destination in the former deed in so far as regarded the substitutes following the heirs-male of the body of A, and disponed the estates to A, and the heirs-male of his body, and a series of substitutes entirely different from those in the deed of entail. The second deed contained an obligation to infeft A, whom failing, &c., "in manner and on the terms specified in the previous deed of entail," with and under the burden of the provisions, conditions, restriction, limitations, clauses irritant and resolutive, expressed in the said deed of entail, and an assignation to the procuratory and precept in the deed of entail. The deed further contained a declaration that the institute and substitutes should be entitled to possess the estates on the deed of entail and these presents, and on no other title whatever. The entailer recorded the deed of entail, and

ENTAIL—*Continued.*

A recorded the deed of revocation and new destination in the Register of Entails, and completed a title by infeftment and crown charter of confirmation, each bearing to proceed upon both the entailer's deeds.

In a question *inter hæredes, held*, in accordance with the Countesswells case, that the deed of 1823 must be read as a new substantive conveyance, superseding that in the entail of 1816, and free from the fetters of an entail. Kenny v. Taylor, March 19, 1875, p. 636.

Fetters.

3. A deed of entail cannot effectually impose fetters by reference to another deed. Kenny v. Taylor, March 19, 1875, p. 636.

Resolutive Clause.

4. *A deed of entail, after the cardinal prohibitions, contained a resolutive clause in these terms:—In case the heirs "shall contravene the before written conditions, provisions, restrictions, and limitations herein contained, or any of them, that is, shall fail or neglect to obey or perform the said other conditions or provisions and each of them, or shall act contrary to the said other restrictions to be hereinafter added and appointed by me, they shall* ipso facto *amit, forfeit," &c. The deed contained no subsequent restrictions against altering the order of succession, alienation, or contracting debt. The validity of the entail having been challenged, on the ground that the resolutive clause was not applied to the cardinal prohibitions,* held *(in aff. judgment of the Second Division) that the words "shall fail or neglect to obey or perform the said other conditions or provisions" embraced contraventions of the restrictions before mentioned, and that the entail was valid.* M'Donald v. M'Donald, March 12, 1875, H. L., p. 28.

Trust—Direction to Entail Moveables.

5. A testator by his trust-disposition and settlement directed his trustees "to settle and secure my lands and estate of K. herein specially before conveyed, and the plate, paintings, and other plenishing in the mansion-house thereof, . . . by deed or deeds of strict entail," to his eldest son and the heirs-male of his body, whom failing, to a series of substitutes. On the testator's death the institute under the entail, maintaining that "plate, paintings, and other plenishing" could not be made the subjects of a valid entail, objected to the trustees going through the form of executing a deed of entail to include them, and demanded that they should be delivered to him in fee-simple. In a special case presented by the institute and the trustees to have the point at issue between them determined, *held* that the testator's intention being clear, the invalidity of the proposed entail was not so manifest as to entitle the Court, in the absence of the substitute heirs of entail, to refuse effect to the testator's directions, and that the trustees were bound to include "the plate, paintings, and other plenishing" in the deed of entail to be executed by them, leaving the institute to challenge it in a competent process with the proper contradictors.

Question, Whether it could competently be made a condition of a strict entail that the heirs of entail in succession should always possess certain specific moveable subjects. Kinnear v. Kinnear's Trustees, June 5, 1875, p. 765.

Application of Consigned Money—Lands Clauses Consolidation Act, 1845, *sec.* 67.

6. In an application by an heir of entail in possession of an entailed estate in the neighbourhood of Glasgow to apply money consigned under the Lands Clauses Act in the purchase of other lands to be entailed, the purchase of a Highland sporting estate in Inverness-shire *authorised in the circumstances*, and the value (1) of the mansion-house, (2) of timber necessary for the protection and amenity of the mansion-house, and (3) of the shootings and fishings, *allowed* to be paid out of the consigned money, but the value (4) of other houses not required for purposes of agriculture, and (5) of the other timber on the estate, *disallowed*. Oswald (Petitioner), July 13, 1875, p. 931.

EXECUTOR. *Lease.*

1. A tenant under an agricultural lease in favour of himself and his heirs, in which he bound himself, his heirs and executors, to pay the rent, died before the expiration of the lease. The heir declined to take up the lease, and the executor also refused to do so.

Question, Whether the executor was liable for any loss the landlord might sustain through non-implement of the contract.

Held, by Lord Gifford (Ordinary), that the executor was liable. Bethune v. Morgan, Dec. 16, 1874, p. 186.

Reparation—Slander—Title to Sue.

2. A widow, two years after her husband's death, raised an action of damages as his executrix and as an individual, alleging that the defender, by illegally retaining a professorship in a college after his appointment to the office of principal, and by slanderous statements concerning the deceased, had prevented the patron of the professorship from implementing a written promise to appoint the deceased to the chair. *Held* that the pursuer had set forth a title to sue.

Observations on the maxim of the civil law, *Actio personalis moritur cum persona*. Auld v. Shairp, Dec. 16, 1874, p. 191.

EXPENSES. *Jury Trial.*

1. An action of damages for slander and a counter action of damages for assault were tried together before the same jury. In the action for slander the jury found for the pursuer on one of the issues, and assessed the damages at 1s. The Judge refused to certify that the case was suitable for jury trial under section 40 of the Court of Session Act, 1868. In the counter action for assault the jury found for the pursuer, and assessed the damages at £5. *Held*, in the circumstances, that the pursuer of the action for damages for assault was entitled to expenses. Pirie v. Meikle, Oct. 23, 1874, p. 40.

Mandatary—Jury Trial—A. S. 16th February 1841, sec. 46.

2. On the day fixed for the trial of a cause by jury the pursuer's mandatary lodged a minute of withdrawal before the jury were empannelled. No appearance was made for the pursuer, and the defender took a verdict. *Held* that the mandatary was liable for the fees to counsel and agents, and payments to witnesses and jury for the trial, and for the expenses of audit. Chapman v. Balfour, Jan. 8, 1875, p. 291.

Trustee.

3. It is a question of circumstances whether testamentary trustees who have unsuccessfully defended the trust-deed in an action of reduction will be allowed their expenses out of the estate. Watson v. Watson's Trustees, Jan. 20, 1875, p. 344.

Separate Defenders—Joint Defence.

4. Two defenders convened in an action agreed to conduct their defence jointly, and this agreement was acted upon from the date of closing the record, until, after a judgment of the Inner-House in favour of the pursuer, one of the defenders compromised the case by payment of a sum of money "in full of the conclusions of the action against him," including that for expenses. The other defender appealed to the House of Lords, and obtained a reversal of the judgment of the Court of Session, in consequence of which he was assoilzied from the whole conclusions of the action, and was found "entitled to the expenses incurred by him" in the action in the Court of Session.

Held that the latter defender was only entitled to recover his own separate expenses and one-half of the joint expenses incurred by both defenders under the arrangement between them. Robertson v. Steuart, July 15, 1875, p. 970.

Taxation—Expenses of Witness.

5. In a Sheriff Court action the evidence of an important witness was taken on commission to lie *in retentis*. The witness was brought at great expense from the South of England to the seat of the Sheriff-court. *Held* that the party who adduced the witness and who was successful in the action, was only entitled to recover from the opposite party the amount which

EXPENSES—*Continued.*
would have been incurred if the deposition to lie *in retentis* had been taken at the residence of the witness without sending agents there, but *observed* that there was no absolute rule on the subject. Graham v. Borthwick, June 12, 1875, p. 812.

FACULTY AND POWERS. See *Apportionment—Trust*, 3.

FALSA DEMONSTRATIO. See *Succession*, 7.

FEE AND LIFERENT. *Minerals.*
1. Where a testator by a general settlement left his estate (the minerals under which were wrought during his life, and were let on a lease current at the time of his death) to his two daughters, one-third each *pro indiviso* in fee, and to his granddaughter the other one-third *pro indiviso* in liferent allenarly, and to the heirs of her body in fee,—*held* that the granddaughter as liferentrix was entitled to enjoy the one-third of the mineral rents during her life, and to concur with the fiars in renewing the leases when necessary, provided there was no substantial danger of exhaustion of the minerals. Wardlaw v. Wardlaw's Trustees, Jan. 23, 1875, p. 368.

Heir.
2. Where an estate was conveyed *mortis causa* to a father in liferent for his liferent use allenarly, and to the heirs-male of his body and other substitutes in fee,—*held* that a fiduciary fee was vested in the father during his life for behoof of his heirs-male and the other substitutes, and that he was not entitled to dispone with the concurrence of his eldest son, who could not be during his father's life, and might never be, his father's heir-male.
Observations on the case of Newlands, April 26, 1798, 3 Ross' L. C. 634. Ferguson v. Ferguson, March 19, 1875, p. 627.

Husband and Wife.
3. A feu-disposition to a husband and wife, and the longest liver of them, and their heirs and assignees, gives the fee to the wife, if she survive her husband. Wallace v. Henderson, July 20, 1875, p. 999.

FISHINGS. *Salmon-Fishing—Prescription—Possession—Barony.*
1. In an action brought against a proprietor of lands on the sea-coast to establish the right of the Crown to salmon-fishings in the sea *ex adverso* of his lands, the defender's titles shewed that his lands had formed part of a barony, of which the earliest extant title was a crown charter of confirmation and novodamus, dated in 1584, of the lands and barony, with fishings. By feu-charter, dated in 1587, the lands in question were disponed, with pertinents, by the baron to the defender's ancestor, fishings being mentioned in the tenendas clause only, and upon this charter the disponee was infeft. It was proved that the defender and his ancestors had possessed the salmon-fishings in question from time immemorial.
Held that the crown charter of 1584 being a sufficient title to salmon-fishings, if followed by prescriptive possession, and such possession having followed, the Crown was equally divested whether that possession had been by the Crown vassal himself or some one deriving right from him, and that it was *jus tertii* for the Crown to found upon any defect, if such existed, in the transmission of the right from the crown vassal to the sub-vassal. Lord Advocate v. M'Culloch, Oct. 20, 1874, p. 27.

Salmon-Fishings—Prescription—Possession.
2. Held *that a proprietor of lands on the sea coast under a barony title or a crown grant* cum piscationibus *may instruct a title as against the Crown to salmon-fishings in the sea* ex adverso *of his lands by proof of salmon fishing by net and coble for the prescriptive period.* M'Douall v. Lord Advocate, April 16, 1875, H. L., p. 49.

FOREIGN. *Bankruptcy.*
The mercantile sequestration of a bankrupt in a foreign country renders a subsequent award of sequestration in Scotland incompetent. Goetze v. Aders, &c., Nov. 27, 1874, p. 150.

FRANCHISE. See *separate Index of Cases decided in the Registration Appeal Court, p.* 1056.

FRIENDLY SOCIETY. *Title to Sue.*

By the Friendly Societies Act, 1855, secs. 18 and 19, the property of a friendly society established under it is vested in the trustees, who are authorised to sue or defend any action in any Court of law or equity concerning the property of the society. A branch or "court" of the Ancient Order of Foresters' Friendly Society was itself established as a friendly society under the Act—its rules providing for the election of its officers and for the administration of its affairs by the "court," subject to the laws of the Order. In consequence of the "court" having failed to comply with a decision of a superior judicatory, the executive council of the Order, acting in accordance with their laws, suspended the "court," and subsequently granted a new "dispensation" in favour of a minority of its members, authorising them to assume the name and number of the suspended "court." The majority continued to meet as if there had been no suspension, and elected trustees, who raised an action against trustees elected under the new dispensation, to have it found that the pursuers had right to the custody of the money, securities, &c., belonging to the "court," and for delivery of the same. *Held*, after a proof, that the pursuers had not instructed a title to sue (*diss.* Lord Gifford, who held that while the executive council could cut off the "court" from the Order, it could not disincorporate the "court" as a friendly society). Simpson, &c., v. Ramsay, &c., Nov. 24, 1874, p. 129.

GABLE. See *Property*, 2.

GAME. *Damages—Jury Trial—Evidence Act*, 1866 (29 *and* 30 *Vict. c.* 112), *sec.* 4.

Where by the lease of a farm, under which the game was reserved to the landlord, it was "expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares, or rabbits, during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm," *held*, in an action of reparation for damage by rabbits, that, in view of the difficulties of construction which must arise upon this clause at the trial, the case was unsuited to be sent to a jury, and that this was sufficient cause why the proof should proceed before a Lord Ordinary under the Evidence Act, 1866, but the Lord Ordinary's interlocutor allowing a proof altered, by adding the words "before answer." Cadzow v. Lockhart, July 10, 1875, p. 928.

GLEBE. See *Church*, 1.

HARBOUR. *Private Act—Right to Beach Boats.*

The fishermen of the sea-coast village of B had from time immemorial laid up their boats for the winter on certain ground belonging to the proprietor of the village, to whom they paid a rent (which from an early period was £1, 17s. 6d.), for their houses and certain other privileges, the right of laying up the boats not being specified in the agreements. In 1845 the proprietor obtained an Act of Parliament for the improvement of the harbour of the village, which authorised him to levy dues on all vessels entering the harbour,—and "on all boats laid up at B for the winter season, 5s." He subsequently charged 5s. from each fisherman on that account, the rent being diminished to that extent. The same system was for some years continued by a new proprietor who purchased the estate in 1865. In 1874 he asserted a right to exclude the fishermen. In a suspension and interdict brought against him by the fishermen, *held* that they were entitled to the use of the ground for laying up their boats on payment of 5s. until the proprietor provided them with another safe and suitable place, in respect that the Act, in authorising the proprietor to levy dues, had by implication imposed a corresponding obligation to provide the accommoda-

HARBOUR—*Continued.*
tion for the fishermen laying up their boats. Stephen v. Aiton, Feb. 27, 1875, p. 470.

HEIR. See *Fee and Liferent*, 2.

HERITABLE AND MOVEABLE. *Principal and Accessory—Lease—Heir and Executor.*
1. *Held* that when the tenant of minerals under a lease of ordinary duration erects upon the land fixed machinery for the purpose of working the minerals, and dies during the currency of the lease, the machinery is to be considered as moveable in a question as to the tenant's succession. Brand's Trustees v. Brand's Trustees, Dec. 19, 1874, p. 258.

Minor.
2. The rule that a minor cannot convey heritage does not apply to subjects which are merely heritable *destinatione.*
Observations on the case of Fisher v. Dixon, March 6, 1843, 5 D. 775, 15 Scot. Jur. 394; H. of L., June 26, 1845, 4 Bell's App. 286, 17 Scot. Jur. 568. Brand's Trustees v. Brand's Trustees, Dec. 19, 1874, p. 258.

Fixtures—Sale—Personal Objection.
3. In a question between a purchaser of lands and a person who was entitled to the income of a trust-estate, of which the lands formed part, and who had taken an active part in the sale, *held* that the latter was not entitled to remove wire fencing which he had put up at his own expense, when in occupation of the mansion-house by permission of the trustees, no notice having been given to the purchaser before the sale was completed that the fencing was not to go with the estate. Graham v. Lamont, Feb. 18, 1875, p. 438.

HUSBAND AND WIFE.
1. *Circumstances in which an alleged marriage* per verba de præsenti *was held not to be proved.* (Murthly Marriage Case)—Steuart v. Robertson, June 7, 1875, H. L., p. 80.

Separation and Aliment—Expenses—Agent.
2. A law-agent raised an action against a husband for his wife's expenses in an action of separation and aliment, in which the pursuer had been employed by her, stating that, before any inquiry into the facts, the parties had been reconciled, and decree of absolvitor pronounced, and that a motion by him for his expenses had, at the same time, been refused, on the ground that his claim could not properly be investigated except in a separate action. *Held* that the action was competent, and a proof allowed.
Observed (*per cur.*) that the agent's claim for his expenses in such cases may be competently made, either in the original process or in a separate action, but that the Court will in general not entertain it in the original process if the case is settled before there has been any investigation into the facts.
Observations on Smith v. Smith, Feb. 21, 1871, 9 Macph. 538. Clark v. Henderson, Feb. 6, 1875, p. 428.

Aliment—Sheriff.
3. A married woman raised an action in the Sheriff-court against her husband for interim aliment until a permanent arrangement of the rights and interests of the parties should be made in a competent Court, on the ground that the pursuer was obliged to live separately on account of her husband's cruel conduct. It appeared from a proof that at the date of the action, and until a few days before the proof, the pursuer was living in her husband's house. *Held* that in the circumstances the action was incompetent in the Sheriff-court.
Observed (*per* Lord Deas), that in granting an interim allowance of aliment to a wife the Sheriff ought to fix a time at which the aliment should cease. M'Donald v. M'Donald, May 25, 1875, p. 705.

HUSBAND AND WIFE—*Continued.*

Marriage-Contract—Mutual Settlement—Jus Quæsitum Tertio—Revocation—Donatio inter virum et uxorem.

4. *Held* that a mutual settlement executed by a husband and wife was ineffectual, in so far as it derogated from the wife's rights under an antenuptial contract of marriage, and *quoad ultra* was revocable by the wife after her husband's death as a donation *inter virum et uxorem*, the wife not having received any benefit therefrom. Rae v. Nielson, May 14, 1875, p. 676.

Marriage-Contract Provision—Trust.

5. By antenuptial contract of marriage a wife conveyed all her property to trustees for payment of the revenue to the spouses in liferent, and of the fee to the children of the marriage, whom failing, to herself or any person nominated by her, whom failing, to her heirs, executors, and assignees, excluding the *jus mariti*. When the wife was sixty-five years of age, she, with consent of her husband and of the children of the marriage, all of whom had attained majority, and had offered to renounce their rights, called on the trustees to denude of the trust-estate in her favour. *Held* (1) that the trust-conveyance by the wife had been intended to secure her liferent as a provision in the event of her surviving her husband; and (2) that it was in its nature irrevocable by the wife, although not expressly declared to be so. Menzies v. Murray, March 5, 1875, p. 507.

Postnuptial Contract—Retention—Conjugal Rights Act, 1861 (24 *and* 25 *Vict. c.* 86), *sec.* 16—*Bankruptcy.*

6. *By postnuptial contract in* 1852 *a husband and wife who had no antenuptial marriage-contract conveyed to trustees* £2600, *to which the wife was entitled from her deceased father's estate, while the husband became bound to pay in* 1862 *a sum of* £1999 *to the trustees for the purposes of the trust, and in the meantime to grant security therefor, either heritable or by insuring his life to the amount, and assigning the policy to the trustees, and paying to them an annual premium, or, in their option, a single payment sufficient to redeem the annual payments. The purposes of the trust were to pay the liferent of the trust-funds to the husband, and after his decease to the wife if she should survive him, and the fee to the children* nati *and* nascituri. *These provisions were declared to be alimentary. The husband did not implement his obligation by granting security or otherwise, and he became bankrupt in* 1860.

In a question between the marriage-contract trustees and the trustee on the bankrupt's estate, held (aff. *judgment of Second Division*), (1) *that the husband's right to the annual proceeds of the* £2600 *was vested in the trustee on his sequestrated estate;* (2) *that the marriage-contract trustees were not entitled to retain the income, on the ground that the husband had failed to fulfil the obligation he had undertaken; and* (3) *that the wife was not entitled to a present provision under the Conjugal Rights Act out of the income of the* £2600 *so payable to the husband.* Learmonth, &c. v. Miller, May 3, 1875, H. L., p. 62.

See *Parent and Child.*

INCOME-TAX. See *Revenue.*

INDICTMENT. See *Index of Justiciary Cases, p.* 1057.

INSANITY. *Brieve of Insanity—Cognition—Title to Pursue.*

1. The cousin-german, not being the nearest agnate, or the heir at law, or one of the next of kin of a person alleged to be insane, purchased a brieve of insanity. Objection to his title to pursue *repelled.*

Observed, that although the nearest agnate had not come forward to pursue the cognition, he might, after the person was cognosced, and the brieve retoured to Chancery, come forward and claim the office of tutor. Larkin v. M'Grady, Dec. 8, 1874, p. 170.

2. At the trial of a brieve of insanity an objection was taken to the pursuer's title to pursue the cognition. The presiding Judge reserved the question

INSANITY—*Continued.*
for the consideration of the Court, and allowed the trial to proceed. *Held* that the procedure was competent. Larkin v. M'Grady, Dec. 8, 1874, p. 170.

3. The Act of Sederunt of 3d December 1868, sec. 6, directs that after the trial of a brieve of insanity, if the whole heads of the brieve are not affirmed by the jury in favour of the person claiming as nearest agnate, then the formal writing made out and subscribed by the clerk shall bear that the brieve and claim are not proven. At the trial of a brieve of insanity at the instance of a person who was not and did not claim as nearest agnate the jury returned a verdict cognoscing in terms of the brieve, and finding that the pursuer was not the nearest agnate, and that another person named was the nearest agnate. It was contended that a verdict of not proven should be recorded, in respect that the heads of the brieve had not been affirmed "in favour of the claimant as nearest agnate." *Held* that the clause in the Act of Sederunt applied only to a case in which the purchaser of the brieve claimed as nearest agnate. Larkin v. M'Grady, Dec. 8, 1874, p. 170.

INSURANCE. *Partnership—Trust.*
Two trading companies obtained, in the name of a person who was a partner of both firms, an advance from an insurance office, repayable by instalments, upon the security of a policy of insurance which they opened on the life of that partner, he being the youngest member of both firms. The policy was payable to the "executors, administrators, and assigns" of the insured, but the premiums were paid by the companies. Upon the death of the insured the contents of the policy were realised, and a large balance remained after deducting the debt still due to the insurance office. *Held*, in a question between the firms and the executors of the deceased partner, that the proceeds of the policy belonged to the firms. Forrester, &c. v. Robson's Trustees, June 5, 1875, p. 755.
See *Partnership*, 3.

INTERDICT. See *School*, 4.

INTOXICATION. See *Bill*, 4.

IRRITANCY OB NON SOLUTUM CANONEM. See *Superior and Vassal*, 3.

ISSUE. *Reparation—Criminal Prosecution—Public Officer—Malice.*
1. A person was charged before a police magistrate with the crime of falsehood, fraud, and wilful imposition, in so far as he did "wickedly and feloniously, falsely and fraudulently," present and cash at the head office of a bank a cheque on a branch thereof, "he well knowing that he had then no money" in the branch bank. Upon this charge he was convicted and sentenced to imprisonment. The conviction and sentence having been quashed by the Court of Justiciary in respect that the libel contained no relevant charge of falsehood, fraud, and wilful imposition, he brought an action for £2000 damages against the procurator-fiscal who prosecuted, and the bank who gave the information. The pursuer averred that he had an account current with the branch bank, and that he had previously drawn cheques upon it which had been duly honoured at the head office. *Held* that in regard to each defender the pursuer required to put in issue malice and want of probable cause. Rae v. Linton, &c., March 20, 1875, p. 669.

Counter Issue.
2. In an action of damages for personal injury against the proprietors of a ferry the defenders were allowed to take a counter issue of contributory negligence, in respect that the pursuer did not object, but *observed* that the defence might have been proved without a counter issue, and that a counter issue in such cases was not usual in practice. Donald v. Clyde Navigation Trustees, June 12, 1875, p. 813.
See *Patent*, 2.

JOINT STOCK COMPANY. See *Partnership.*

JUDICIAL FACTOR. *Partnership.*

1. A woman, who was a partner in a business, married and so ceased to be a partner. She then presented an application to the Court to appoint a judicial factor, with power to wind up the copartnery. *Held* that the dissolution of the partnership was not a sufficient reason for the appointment of a factor. Russell v. Russell, Nov. 14, 1874, p. 93.

Process—Special Powers.

2. *Observed* that it is not the practice of the Court to grant special powers under the petition for appointment of a judicial factor. Russell v. Russell, Nov. 14, 1874, p. 93.

*Petition—Sequestration of Estate—*20 *and* 21 *Vict. c.* 56, *sec.* 4.

3. *Held* by Lord Curriehill (Junior Lord Ordinary) that a petition for the sequestration of a trust-estate and the appointment of a judicial factor, which did not at the same time pray for the removal of the trustees or executors, was competent before the Junior Lord Ordinary. Rhind v. Sheach, &c. July 20, 1875, p. 1002.

JURISDICTION. See *Domicile.*

LANDLORD AND TENANT. See *Lease.*

LEASE. *Constitution of Lease—Proof—Writ—Rei Interventus.*

1. Letters between the proprietor of a fishing village and his son and factor shewed that the landlord had been negotiating with the fishermen in the village, who were possessing on tacit relocation, as to their either purchasing their houses or taking leases for fifty-seven years at a certain increased rent; that by the landlord's desire the final answers of the fishermen had been obtained and marked by the factor in a list which specified neither the rent nor the term of endurance of the lease; and that thereupon the landlord, wishing that a larger number should purchase, directed his factor to inform the fishermen that the question of lease or purchase might lie over for another year. From the following term the fishermen were allowed to occupy their houses at the increased rent, and continued so to occupy for four years.

   In an action of removing against three of the fishermen who had been marked as willing to take leases, *held* (1) that verbal contracts for leases of fifty-seven years had been proved by writ of the landlord; and (2) that sufficient *rei interventus* had followed to prevent the landlord from resiling. Sellar, &c. v. Aiton, Jan. 26, 1875, p. 381.

Executor.

2. A tenant under an agricultural lease in favour of himself and his heirs, in which he bound himself, his heirs and executors, to pay the rent, died before the expiration of the lease. The heir declined to take up the lease, and the executor also refused to do so.

   Question, whether the executor was liable for any loss the landlord might sustain through non-implement of the contract.

   Held, by Lord Gifford (Ordinary), that the executor was liable. Bethune v. Morgan, Dec. 16, 1874, p. 186.

Hypothec—Intromitter, Liability of.

3. The tenant of a farm died in January, leaving a pupil son, who was entitled to take up the lease, and a widow, who procured herself decerned executrix-dative to her husband, and carried on the farm for behoof of her son. With the advice of P, her father-in-law, the widow sold the whole crop and stock, except the turnips in the ground, by the end of October, partly by herself, and partly through P in her name, who received the price of part of the crop and handed it to her. A few days before the crop was removed P received a letter from the landlord's factor asking whether he was to hold him responsible for the rent, to which no answer was given. *Held* that by his conduct in regard to the subjects of the landlord's hypothec, P had

LEASE—*Continued.*

rendered himself, jointly and severally with the widow, liable for the whole year's rent (*diss.* Lord Gifford, who held that in the absence of proof of any fraudulent conspiracy to defeat the landlord's right, the liability of P was limited to the extent of his actual intromissions). Steuart v. Peddie, Nov. 14, 1874, p. 94.

Miscropping—Additional Rent—Receipt—Discharge.

4. *Held* that a landlord was barred from recovering additional rent for miscropping, which, by the lease, was payable at the same terms as the ordinary rents, in respect that the ordinary rents had been paid and settled, and receipts granted by him without reservation of further claim. Baird v. Mount, Nov. 19, 1874, p. 101.

Resumption of Lease—Minerals—Clause.

5. A mineral tenant qualified his lease by a minute of agreement in which it was provided that in the event of his death the landlord might resume possession of the minerals if he should at any time thereafter be dissatisfied with the working thereof by the representatives of the tenant. The tenant died, and the minerals were worked by trustees for a year after his death, when the landlord intimated his dissatisfaction with their working, and his intention of resuming possession. The trustees refused to remove, in respect (1) that there was no ground for dissatisfaction, and (2) that the landlord was acting *in mala fide*. *Held*, on a consideration of a proof and correspondence (1) that it was not necessary for the landlord to state his grounds for dissatisfaction, and (2) that the trustees had failed to prove *mala fides* on the landlord's part. Houldsworth v. Brand's Trustees, May 18, 1875, p. 683.

See *Game—Heritable and Moveable—Process*, 2, 15—*Reparation*, 4.

LIFERENT. See *Fee and Liferent.*

LIS ALIBI PENDENS. See *Process*, 2, 3.

MAILLS AND DUTIES. See *Poinding the Ground.*

MALICE. See *Issue*, 1.

MANDATARY. See *Expenses*, 2.

MANDATE. See *Agent and Client.*

MARRIAGE. See *Apportionment—Church—Husband and Wife.*

MARRIAGE, CONDITION IN RESTRAINT OF. See *Succession*, 8.

MASTER AND SERVANT. *Truck Act*, 1831 (1 *and* 2 *Will. IV. c.* 37), *secs.* 6 *and* 25—"*Employers*"—"*Artificers.*"

Held that a foreman at a slate quarry, although bound by the terms of his engagement to assist the workmen when he saw any of the operations "falling back" or "in need of being pushed forward," was not an "artificer" but an "employer" in the sense of the Truck Act, 1831. Phillips v. M'Innes, Dec. 17, 1874, p. 224.

See *Reparation*, 3.

MEMBER OF PARLIAMENT. See *Index of Registration Appeal Cases, p.* 1056.

MINERALS. *Precious Metals—Act* 1592, *c.* 31.

A proprietor of lands obtained from the Crown, in terms of the Act 1592, c. 31, a separate charter of the mines of gold, silver, and other metals and minerals in the lands. He subsequently executed an entail of the lands, without mention of the mines and minerals. *Held* that the mines and minerals were brought under the entail as parts and pertinents of the lands. Earl of Breadalbane v. Jamieson, June 16, 1875, p. 826.

See *Lease*, 5.

MINOR. See *Heritable and Moveable*, 2.

MORA. See *Bankruptcy*, 3.

MORTIS CAUSA CONVEYANCE. See *Succession.*

MUNICIPAL ELECTION. See *Burgh.*

MUTUAL GABLE. See *Property*, 2.

NAUTÆ CAUPONES, &c. See *Carrier—Railway.*

NEGLIGENCE. See *Carrier—Railway*, 4, 5, 6, 7—*Reparation*, 1, 2, 3, 4—*Ship*, 3, 4.

NOBILE OFFICIUM. See *Trust*, 2.

NUISANCE. *Sheriff—Appeal—Statute* 25 *and* 26 *Vict. c.* 101, *Police and Improvement Act*, 1862, *secs.* 135, 396, *and* 397.

1. The Police and Improvement Act, 1862, sec. 135, gives power to the commissioners to erect public urinals, "but so that such erection shall not become a nuisance," and declares that "any householder (*i.e.* any male occupier of lands and premises of the requisite yearly value) who thinks himself aggrieved thereby may appeal to the Sheriff in manner after provided." The only subsequent provisions as to appeal are contained in the 396th and 397th sections, the former of which allows appeal against an order of the commissioners "within seven days next after the making of any such order," and the latter renders the Sheriff's judgment on such appeal final.

   Held that a petition at the instance of the proprietor of a house in a burgh praying for the removal as a nuisance of a urinal erected by the police commissioners was competent at common law. Adam and Another v. Commissioners of Police of Alloa, Nov. 24, 1874, p. 143.

Process—Jury Trial—River—6 *Geo. IV. c.* 120 (*Judicature Act*, 1825), *sec.* 28—13 *and* 14 *Vict. c.* 36 (*Court of Session Act*, 1850), *sec.* 49—29 *and* 30 *Vict. c.* 112 (*Evidence Act*), *sec.* 4.

2. An action of declarator and interdict to prevent the pollution of a river, being an action for nuisance, must be tried by jury, unless special cause is shewn to the contrary. Hume v. Young, Trotter, and Co., Jan. 19, 1875, p. 338.

3. In an action of declarator and interdict brought to prevent the pollution of a river by water pumped from mineral workings the defence was (1) that the defenders had a prescriptive right to send water pumped from the mines into the stream, (2) that the water was the natural drainage of the lands, and (3) that the pursuers had no interest, as the stoppage of the works would not prevent the flow of water from the mines. *Held* that the pursuers' motion for a proof before the Lord Ordinary instead of a jury trial should be granted. Proof before answer allowed. White, &c. v. Dixon, July 7, 1875, p. 904.

OATH, REFERENCE TO. *Triennial Prescription—Act* 1579, *c.* 83.

1. *Held* that the Act 1579, c. 83, in limiting a person suing for payment of a prescribed account to a proof "by writ or oath of his party," excludes the oath of the manager of such party. Bertram and Co. v. Stewart's Trustees, Dec. 19, 1874, p. 255.
2. *Held* that, when a reference is made to the oath of two parties jointly, it is not competent to sustain it as a reference to the oath of one of them. Bertram and Co. v. Stewart's Trustees, Dec. 19, 1874, p. 255.

See *Proof.*

PACTUM DE NON PETENDO. See *Bill*, 5.

PARENT AND CHILD. *Trust-Disposition—Aliment.*

1. A person conveyed certain lands, and generally his whole estate, heritable and moveable, with the exception of his household furniture, to trustees for the following purposes, to pay the expenses of management and all debts due by the granter at the date of the deed, to pay the income to the granter during his life,—after his death to pay an annuity to his widow, and aliment and educate A, B, and C, his children, and eventually to convey the estate

PARENT AND CHILD—*Continued.*

to the said children upon the youngest attaining majority. The deed was delivered to the trustees on the day of its execution, and was recorded in the Register of Sasines three months thereafter. The granter died about five months after executing the deed, and a posthumous child was born nine months after the date of the deed. *Held* (*diss.* the Lord President) that the posthumous child was entitled, as a creditor, to aliment out of the trust-estate. Spalding v. Spalding's Trustees, Dec. 18, 1874, p. 237.

Pupil—Tutor-nominate—Tutor incertus dari non potest.

2. A father conferred on the trustees under his trust-disposition and settlement a power to assume new trustees, and appointed his trustees "named or to be named or assumed, and the survivors and survivor of them," tutors to his pupil children. *Held* that the appointment of assumed trustees as tutors was invalid. Walker v. Stronach, Nov. 21, 1874, p. 120.

Custody of Children—Husband and Wife—Conjugal Rights (Scotland) Act, 24 and 25 Vict. c. 86, sec. 9.

3. *In an action of separation and aliment at the instance of a wife against her husband, in which the husband's adultery was proved, and separation granted,* held, *in the circumstances of the case, that it was expedient that the custody of the daughters of the marriage should be given to the mother, and the custody of the sons to the father, during their respective pupillarities, so long as no other order should be made by the Court of Session, but subject to such regulations as the said Court might consider reasonable for access of each parent to the children in the custody of the other, and subject to an obligation by the parents respectively not to remove the children in their custody from the jurisdiction of the Court.* Symington v. Symington, March 18, 1875, H. L., p. 41. Terms of order made by the Court of Session in applying the judgment. Symington v. Symington, July 16, 1875, p. 974.

Illegitimate Child—Proof of Paternity.

4. In an action of filiation and aliment brought by the mother of an illegitimate child, *held* that the pursuer's allegation of intercourse with the defender was not established by her own testimony, and by evidence of opportunity during the course of an acknowledged courtship, no suspicious circumstances being proved. Gray v. Marshall, July 8, 1875, p. 907.

PARISH. See *Church.*

PARTNERSHIP. *Agent and Principal—Right in Security.*

1. A cautioner in a composition settlement between a trader and his creditors obtained an assignation to the trader's business and estate. It was agreed that the cautioner should receive a commission of 7½ per cent on the gross proceeds of the sales, and he bound himself, after providing for the payments undertaken by him and for his own commission, to account to the trader for the balance. Notwithstanding the assignation, the trader was allowed to continue his business without ostensible change, subject, however, to the control of the cautioner. *Held* that the cautioner was not liable for a business debt incurred by the trader, either on the footing that the business truly belonged to him, or that he was a partner in the same, the true intention and effect of his agreement with the trader being merely to create a security in his favour. Eaglesham and Co. v. Grant, July 15, 1875, p. 960.

Joint Stock Company—Liability inter socios—Companies Act, 1862, 25 and 26 Vict. c. 89, secs. 38 and 133, sub-sec. 9.

2. *Held,* in a voluntary winding up of a company limited by shares that after all debts had been paid shareholders who had taken fully paid-up shares in partial payment of a patent sold to the company were entitled to require the liquidators to make a call upon the holders of shares not fully paid up, so as to equalise the actual payments on these shares with the nominal payments of the holders of paid-up shares. Paterson v. M'Farlane, &c., March 2, 1875, p. 490.

PARTNERSHIP—*Continued.*

Proof—Statute 1696, *c.* 25.

3. *Held* that it was competent to prove *prout de jure* that a policy of insurance on the life of a person deceased belonged to a company of which he was a partner. Forrester, &c. v. Robson's Trustees, June 5, 1875, p. 755.

See *Bill*, 3—*Insurance—Judicial Factor*, 1.

PATENT. *Jury Trial—Issues—Note of Particulars—Prior Invention—Prior Use.*

1. In a suspension and interdict brought by the holder of a patent to prevent infringement, the respondents alleged that the patent was invalid, in respect that the patentee was not the first and true inventor, and that the invention had been publicly known and used prior to the date of the patent, the respondents stating that an invention substantially the same had been described in seventeen prior patents, which were specified, and had been used by thirty different manufacturers.

Held that it was not necessary for the respondents to specify the passages in the specifications of the respective patents which they intended to found upon, or the dates of the alleged prior use.

Observed, that the record was the proper place for making the necessary allegations of prior use. Harrisons v. Anderston Foundry Co., Nov. 24, 1874, p. 122.

Jury Trial.

2. *Observed* that in a question of infringement of patent the objection that the patent is bad in law is always open at the trial as an answer to the pursuer's issue of infringement, and the Judge at the trial, if he is satisfied, on the true construction of the specification, that the patent is bad in law, ought to state his opinion in law to that effect to the jury, and direct them to find a verdict for the defenders. Harrisons v. Anderston Foundry Co., July 2, 1875, p. 857.

Specification.

3. The specification of a patent for the invention of "improvements in looms for weaving" set forth that the invention consisted "in new or improved simple and most efficient modes of and arrangements of mechanism for actuating the set or sets of 'compound' or 'multiple' shuttle-boxes of looms for weaving striped, checked, and other ornamental or figured fabrics requiring two, three, or more shuttle-boxes and shuttles in each set." The specification proceeded to describe in detail, with reference to accompanying drawings (1) a complete shuttle-box moving and holding mechanism, and (2) a complete pattern mechanism, but no part of either was claimed or described as new, nor was any part disclaimed as old. The specification concluded by claiming—"First, the construction and arrangements of the parts of pattern mechanism and shuttle-box moving and holding mechanism generally for actuating the shuttle-boxes of power-looms, all substantially in the new or improved manner herein described and shewn in the accompanying drawings, or any mere modification thereof."

Opinion (*per cur.*), that the patent was not a valid patent for improvements, in respect that it did not describe the improvements and define the novelty otherwise and in a more specific form than by the general description of the entire machines, and failed to limit the patentee's claim to the specific improvements invented by him.

Observed (*per* Lord President) that a new combination of old parts to produce a new result, or to produce a known result in a more useful and beneficial way, may be a good subject-matter of a patent, but only under the conditions that the combination shall be claimed as a combination, and be so described as to shew intelligibly what is the novelty, and what the merit of the invention. Harrisons v. Anderston Foundry Co., July 2, 1875, p. 857.

PAYMENT, INDEFINITE. See *Prescription*, 1.

PENALTY. *Lunatic—Statute* 55 *Geo. III. c.* 69, *secs.* 8 *and* 19.
The statutory penalty of £50, to which a medical man is liable who grants a certificate of lunacy without due inquiry, cannot be sued for by the injured party. Mackintosh v. Weir, July 3, 1875, p. 877.

PERSONAL BAR. See *Sale*, 9.

POINDING THE GROUND. *Maills and Duties—Heritable Creditor—Right in Security.*
A creditor who, under a bond and disposition in security, has obtained a decree of maills and duties, is not in possession of the lands as proprietor, so as to render it incompetent for him to bring an action of poinding the ground. Henderson v. Wallace, Jan. 7, 1875, p. 272.

POLICE. See *Burgh—Nuisance*, 1.

POOR. *Poor-Law Amendment Act*, 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 71—*Settlement—Desertion—Notice.*
1. A native of Edinburgh City Parish, wife of a native of England, became chargeable as a pauper to Barony Parish on 5th February 1869, and received relief from that parish with short intervals till her death on 18th November 1871. Notice was given by the Barony Parish on 15th April 1869 to the Edinburgh inspector, who did not admit the claim, and a correspondence was kept up from time to time till the pauper's death. When she became chargeable she was deserted by her husband, but he came back in May 1869, and lived with her till his death on 19th January 1870. Notice was again given to Edinburgh on 24th August 1870. In an action by the inspector of Barony Parish against the inspector of Edinburgh, as the parish of the pauper's birth, for repayment of the amount of her aliment during the whole time of her chargeability, *held* (1) that Edinburgh was liable for the period from February 1869 to May 1869, the pauper being at that time the deserted wife of a man who had no settlement in Scotland; (2) that Edinburgh was not liable for the period from May 1869 to January 1870, when the husband was at home; (3) that the pauper having ceased to be chargeable to Edinburgh on the return of her husband a fresh notice was necessary upon his death, and Edinburgh was not liable from the date of his death till 24th August 1870, the date of the second notice; (4) that Edinburgh was liable for the period from 24th August 1870 till the pauper's death. Beattie v. Greig, July 9, 1875, p. 923.

Settlement—Poor-Law Amendment Act, 1845, 8 *and* 9 *Vict. c.* 83, *sec.* 76—*Continuity of Residence.*
2. A miner, who rented a room in his father-in-law's house in the parish of S, went to work in the neighbouring parish of M, at first returning to visit his wife on Saturdays, but after about two months he took a house in M, to which he removed his wife and furniture. After another month he returned to S. *Held* that the continuity of residence required by the 76th section of the Poor-Law Amendment Act for a residential settlement had been broken. Allan v. Shaw and King, Feb. 24, 1875, p. 463.

Poor-Law Amendment (Scotland) Act, 1845, 8 *and* 9 *Vict. c.* 83, *sec.* 71—*Inspector's Disbursements.*
3. In an action by the inspector of poor of a parish against the inspector of poor of another parish (1) for relief of a pauper's aliment, (2) for repayment of the travelling expenses incurred by the pursuer in obtaining information as to the settlement of the pauper, and (3) for the expenses incurred in prosecuting the husband of the pauper for desertion, *held* that the second and third items could not be recovered under the 71st section of the Poor-Law Amendment (Scotland) Act, 1845. Austin v. Shennan, Oct. 30, 1874, p. 68.

Poor-Law Amendment Act, 1845, *sec.* 70—*Admission.*
4. When a parish has admitted liability for the support of a pauper, and acted on the admission for a length of time, it cannot open up the question of

POOR—*Continued.*

liability on the ground that the admission was made in error as to the facts, partly induced by *bona fide* misstatements by the inspector of the parish to whom the admission had been made. Beattie v. Arbuckle, Jan. 15, 1875, p. 330.

Admission—Rehabilitation.

5. Where a parish had admitted liability for the relief of a pauper, and continued to relieve her for five years and seven months, after which she resided with a sister for five months without drawing parochial relief, but then was removed to an asylum, the medical officer certifying that she had been insane for six weeks before her removal, *held* that there had been no interruption of the pauperism so as to raise of new the question of settlement. Beattie v. Arbuckle, Jan. 15, 1875, p. 330.

Poor-Law Amendment Act, 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 34—*Poor Assessments Act*, 1861 (24 *and* 25 *Vict. c.* 37)—*Assessment.*

6. In prescribing the manner in which the assessment for relief of the poor is to be imposed, the Poor-Law Amendment Act, 1845, sec. 34, as amended by the Poor-Assessments Act, 1861, requires that "one-half of such assessment shall be imposed upon the owners and the other half upon the tenants or occupants of all lands and heritages within the parish or combination, rateably according to the annual value of such lands and heritages." *Held* that one-half of the sum to be raised by assessment falls to be laid upon owners as a class, and the other half upon occupants as a class. Galloway v. Nicolson, March 19, 1875, p. 650.

See *Arbitration.*

POSSESSION. See *Fishings.*

POSSESSORY JUDGMENT. See *Servitude.*

PRESCRIPTION. *Triennial Prescription.*

Indefinite Payment.

1. In an action for payment of the balance due on a tradesman's account, for goods furnished and cash advanced, the triennial prescription was pleaded. *Held* that as indefinite payments by the debtor credited in the account fell to be applied in extinction of the items on the debit side of the account in the order of date, and as the items left unpaid consisted entirely of cash advances, the triennial prescription did not apply. Maclaren v. Bradley, Dec. 12, 1874, p. 185.

Reference to Oath—Oath of Manager.

2. *Held* that the Act 1579, c. 83, in limiting a person suing for payment of a prescribed account to a proof "by writ or oath of his party," excludes the oath of the manager of such party. Bertram and Co. v. Stewart's Trustees, Dec. 19, 1874, p. 255.

Long Negative Prescription.

Statutes 1469, *c.* 28, 1474, *c.* 54.

3. *Held* that prescription of a bond may be interrupted by payments of interest, but that these cannot be proved by parole.

Observed, that the statute 1474, c. 54, made no alteration on the law introduced by the statute 1469, c. 28, with regard to the necessity of taking document upon an obligation within forty years. Kermack v. Kermack's Trustees, Nov. 27, 1874, p. 156.

See *Fishings*, 1, 2.

PRESUMPTION OF LIFE.

In a multiplepoinding brought for the distribution of an intestate estate the interest of certain claimants depended on the question whether A B was alive in 1872. It appeared that in 1860, when A B was thirty-four years of age, he had gone to the United States and had joined the Federal army,

PRESUMPTION OF LIFE—*Continued.*
and had afterwards deserted, and that his friends had not heard from him since 1862. *Held* that neither his death nor his survivance could be presumed, and that the distribution of the portion of the fund in dispute must be postponed. Stewart's Trustees v. Stewart, March 2, 1875, p. 488.

PROCESS. *Record.*
Condescendence. See *Patent*, 1.
Defences—Lis alibi. See *infra*, No. 23.

Proof.
Diligence—Business Books.
1. In a reduction of an assignation granted by a person who subsequently became bankrupt, on the ground that the deed had been granted in defraud of creditors, at a time when the granter knew that he was insolvent, the defenders moved for a diligence to recover the business books and other documents in the hands of certain of the bankrupt's creditors, with a view to instruct his solvency at the date of the deed. The Court refused the diligence on the ground that the documents called for could not be available as evidence of the granter's solvency apart from the examination of the creditors as witnesses. Steven v. Nicoll, &c., Jan. 9, 1875, p. 292.
2. Circumstances under which, in a question between a landlord and tenant as to whether certain services were to be rendered by the tenant in addition to the rent stipulated, the Court allowed the landlord a diligence to recover the books kept by the tenant in relation to the business of the farm, with a view of shewing the actual profit realised by him during his occupancy. Robertson v. Earl of Dudley, July 13, 1875, p. 935.
Conjunct Probation—Proof in Replication.
3. The defender in an action on an account stated a contra account, and pleaded compensation. Proof was allowed to both parties "of their respective averments in so far as not expressly admitted on record, and to the pursuer a conjunct probation." Evidence was led by both parties, and then the pursuer led his conjunct proof, in which he went minutely into various objections to the defender's contra account raised by him on record, but which he had not touched in his proof in chief. *Held* that the defender was entitled to a proof in replication.
Observed (*per* Lord President) that it was the duty of the pursuer in his proof in chief to lead evidence on all the points raised by him on record. Gairdner v. Young, Dec. 10, 1874, p. 173.
Proof before Answer—Procedure-roll.
4. When a case is in the procedure-roll it is the duty of the Lord Ordinary, before allowing proof, to decide whether there should be any limitation of the mode of proof. Simpson v. Stewart, May 14, 1875, p. 673.

Jury Trial and Proof before Lord Ordinary.
Nuisance—River—6 Geo. IV. c. 120 (Judicature Act, 1825), sec. 28—13 and 14 Vict. c. 36 (Court of Session Act, 1850), sec. 49—29 and 30 Vict. 112 (Evidence Act), sec. 4.
5. An action of declarator and interdict to prevent the pollution of a river, being an action for nuisance, must be tried by jury, unless special cause is shewn to the contrary. Hume v. Young, Trotter, and Company, Jan. 19, 1875, p. 338.
6. In an action of declarator and interdict brought to prevent the pollution of a river by water pumped from mineral workings, the defence was (1) that the defenders had a prescriptive right to send water pumped from the mines into the stream, (2) that the water was the natural drainage of the lands, and (3) that the pursuers had no interest, as the stoppage of the works would not prevent the flow of water from the mines.
Held that the pursuers' motion for a proof before the Lord Ordinary, instead of a jury trial should be granted. Proof before answer allowed. White, &c., v. Dixon, July 7, 1875, p. 904.

PROCESS—*Continued.*

Damages—Game—Evidence Act, 1866, 29 *and* 30 *Vict. c.* 112, sec. 4.

7. Where by the lease of a farm, under which the game was reserved to the landlord, it was "expressly declared and agreed that the tenant shall have no claim whatever for any damage he may sustain from game, hares, or rabbits, during the lease, this being held to have been calculated upon and allowed for by him in offering for the farm," *held,* in an action of reparation for damage by rabbits, that, in view of the difficulties of construction which must arise upon this clause at the trial, the case was unsuited to be sent to a jury, and that this was sufficient cause why the proof should proceed before a Lord Ordinary under the Evidence Act, 1866, but the Lord Ordinary's interlocutor allowing a proof altered, by adding the words "before answer." Cadzow v. Lockhart, July 10, 1875, p. 928.

New Trial—Personal Injury.

8. In an action of damages for personal injury after several medical witnesses had been examined as to the state of the pursuer and the injury he had sustained, the jury gave a verdict for the pursuer. In a motion for a new trial the defenders produced affidavits from persons who deponed that the pursuer's health had materially improved since the trial. The Court, without deciding on the competency, refused to grant a new trial, on the ground that the affidavits did not shew that the medical witnesses were substantially wrong in the evidence they gave at the trial. Shields v. North British Railway Company, Nov. 24, 1874, p. 126.

Excess of Damages.

9. In advising a motion for a new trial, the Court intimated that they considered the damages awarded by the jury excessive. The pursuer having consented to take a much smaller sum suggested by the Court, a new trial was refused. Johnston v. Dilke, &c., June 16, 1875, p. 835.

Jury Trial—Direction to Jury. See *Patent,* 2.

Judgment.

Cancelling Interlocutor—A. S. 10*th March* 1870, *sec.* 3 (1).

10. In an appeal to the Court of Session in a Sheriff-court action for payment of £50, the appellant, *per incuriam,* printed the summons in another action between the same parties in which the conclusion was for payment of £20. The respondent having taken the objection that the appeal was incompetent, in respect that the sum concluded for was under £25, the counsel for the appellant, who had only been instructed at the bar, being in ignorance of the mistake, admitted that he had no answer to the objection, and the appeal was dismissed as incompetent. A note having been presented by the appellant, setting forth the mistake, and craving that the interlocutor should be cancelled, *held* that the interlocutor having been pronounced and signed under an error in point of fact, induced by the parties, it was within the power of the Court to order it to be cancelled, and that, in the circumstances, it should be cancelled accordingly. Harvey v. Lindsay, July 20, 1875, p. 980.

Lost Interlocutor Sheet. See No. 22.

Reclaiming Note.

20 *and* 21 *Vict. c.* 56—*Court of Session Act,* 1857, *sec.* 10.

11. The Lord Ordinary on the Bills, in disposing of petitions for factors, &c., during vacation, under sec. 10 of the Court of Session Act, 1857, does not exercise his Bill-Chamber jurisdiction, but merely acts in place of the Junior Lord Ordinary, and his interlocutors must be reclaimed against within eight days. Staig v. Johnston, May 21, 1875, p. 701.

Printing Record—Judicature Act, 1825, *sec.* 18—*A. S.* 11*th July* 1828, *sec.* 77.

12. A defender was allowed to make extensive additions to the closed record, which introduced an entirely new defence, and formed the main subject of debate in the Outer-House. The Lord Ordinary having repelled the de-

PROCESS—*Continued.*

fences, the defender reclaimed, appending to the reclaiming note the print of the original record, with the amendments in MS. *Held* that, considering the extent of the additions, this was not sufficient compliance with the terms of the Judicature Act and relative Act of Sederunt, 11th July 1828, sec. 77, which require the record to be printed and boxed with the reclaiming note, and the reclaiming note *refused* as incompetent. Muir v. Muir, Oct. 17, 1874, p. 26.

Court of Session Act, 1868, *sec.* 28.

13. *Held* that when the last day for lodging a reclaiming note under the Court of Session Act of 1868 fell upon a Sunday it was timeously lodged upon the Monday. Russell v. Russell, Nov. 12, 1874, p. 82.

Appeal from Sheriff-court.

Competency of Appeal—Sheriff-court Act, 1853, 16 *and* 17 *Vict. c.* 80, *sec.* 24.

14. In a petition for sequestration for rent in the Sheriff-court an interlocutor was pronounced, granting warrant on a judicial manager to make a payment to the petitioner. *Held* that this was to be regarded, in the circumstances, as an "interlocutor, giving interim decree for payment of money," in the sense of sec. 24 of the Sheriff-court Act of 1853, and that an appeal to the Court of Session was competent. Baird v. Glendinning, Oct. 16, 1874, p. 25.

Competency of Appeal—Removing—6 *Geo. IV. c.* 120, *sec.* 44.

15. In an action by the landlord of a farm against the tenant, laid on A. S. 14th December 1756, anent removings, the conclusions were that the tenant should find caution for arrears, and for the rent of the remaining years of the lease, failing which to remove from his farm. The Sheriff ordained the defender to find caution, and subsequently, in respect that he had failed to find caution, decerned against him in terms of the summons. An appeal to the Court of Session *refused* as incompetent, the 44th section of the Judicature Act, 1825, making suspension the only competent form of review. Fletcher v. Davidson, Nov. 3, 1874, p. 71.

Competency of Appeal—Competition.

16. In a petition for division of the area of a parish church among the heritors the Sheriff pronounced an interlocutor finding that the heritors in a part of the parish which had been disjoined and erected into a *quoad sacra* parish were not heritors of the original parish so far as regarded the division. The interlocutor did not finally dispose of the petition as regarded the remaining heritors, and there was no finding as to expenses. The heritors of the *quoad sacra* parish appealed. *Held* that the appeal was competent, in respect that the process was a process of competition, and that the interlocutor disposed of the whole subject-matter of the competition so far as the appellants were concerned. Duke of Roxburghe, May 20, 1875, p. 715.

Appeal for Jury Trial—Statutes 6 *Geo. IV. c.* 120, *sec.* 40, *and* 30 *and* 31 *Vict. c.* 100, *sec.* 73.

17. Where a case, appealed from the Sheriff-court for jury trial, appeared to the Court not suitable for trial by jury, a proof before answer was allowed before one of the Judges of the Division. Laidlaw and Sons v. Wilson and Armstrong, Nov. 24, 1874, p. 148.

18. Where an interlocutor in the Sheriff-court sustained the plea of the triennial prescription *quoad* a part of the claim under a summons and allowed a proof *prout de jure quoad* the rest,—

Held (1) that appeal for jury trial was competent; (2) that appeal being competent, the whole case was removed to the Court of Session, and that it was competent for that Court to review the part of the Sheriff's interlocutor sustaining the plea of prescription.

Observation (*per* Lord President) on Hamilton v. Henderson, June 10, 1837, 15 S. 1105, 9 Scot. Jur. 529. Robertson v. Earl of Dudley, July 13, 1875, p. 935.

PROCESS—*Continued.*

Statute 31 *and* 32 *Vict. c.* 100 (*Court of Session Act*, 1868), *sec.* 71—*A. S.* 10*th March* 1870.

19. The Act of Sederunt of 10th March 1870 provides that an appellant shall print and box the note of appeal, record, interlocutors, and proof, if any, within fourteen days after the process has been received by the clerk of Court, otherwise the appeal shall be held to have been abandoned, unless the appellant should be reponed within eight days. A print of the note of appeal was omitted to be boxed along with the other papers in an appeal. *Held* that, as the mistake was merely in an innocent and formal omission to comply with a regulation as to process contained in an Act of Sederunt, the Court might (although the reponing days had expired), allow it to be rectified, by lodging a print of the note of appeal. Young v. Brown, Feb. 19, 1875, p. 456.

Incidental Procedure.

Fee-Fund Dues—Appeal—Joint Minute.

20. Before an appeal from the Sheriff-court had been heard the parties compromised the case by a joint minute. *Held* that the minute was not to be regarded as a first step for the respondent in the sense of the Act 1 and 2 Vict. c. 118, regulating fee-fund dues, and that a 2s. 6d. stamp was sufficient. Cowan v. Proctor, Nov. 20, 1874, p. 115.

Abandonment of Action—A. S. 10*th July* 1839, *sec.* 61 (*Sheriff-court Procedure*)—*A. S.* 11*th July* 1828, *sec.* 115 (*Court of Session Procedure*).

21. The pursuer of an action, after an interlocutor was pronounced disallowing proof by parole, obtained a diligence for the recovery of writings. He allowed it to expire without using it, and then presented a minute of abandonment of the action under A. S. 10th July 1839 (Sheriff-court Procedure), sec. 61. *Held* that he was entitled to abandon.

Opinion that the 61st section of A. S. 10th July 1839, regulating Sheriff-court procedure, was identical in meaning with the 115th section of A. S. 11th July 1828, regulating procedure in the Court of Session. Kermack v. Kermack, Nov. 27, 1874, p. 156.

Lost Interlocutor Sheet—A. S. 28*th December* 1838, *sec.* 11—*Statute* 31 *and* 32 *Vict. c.* 100, *sec.* 15.

22. In an undefended action of divorce, after decree had been pronounced, the interlocutor sheet, kept in terms of A. S. 24th December 1838, sec. 11, was improperly lent out by the clerk, and was lost. *Held*, on report of Lord Craighill, that the lost interlocutor sheet was not an "original writ" which could be replaced under the provisions of the Court of Session Act, 1868, sec. 15. Cofton v. Cofton, March 13, 1875, p. 599.

Particular Actions.

Count and Reckoning—Lis alibi pendens.

23. A husband raised an action against a heritable creditor who had been in possession of subjects destined to the pursuer and his wife, and the survivor of them, concluding that the defender should be ordained to render an account of his intromissions with the rents, and pay the balance due, with interest from the date of citation. This action was allowed to fall asleep, and several years after the husband and wife raised a second action against the creditor, concluding for an accounting, and for declarator that the debt was extinguished. Pending the action the husband died. *Held* that the surviving wife was fiar of the subjects, and that the plea of *lis alibi pendens* applied to the second action only in so far as it concluded for an accounting for the rents due prior to the date of citation in the first action. Wallace v. Henderson, July 20, 1875, p. 999.

Multiplepoinding.

24. The outgoing tenant of a farm allowed the incoming tenant to reap his crop, under an agreement by which the incoming tenant bound himself to pay the value of the crop to the landlord, the balance, after payment of rent, to be paid by the landlord to the outgoing tenant. A creditor of the out-

PROCESS—*Continued.*

going tenant having arrested the funds in the hands of the incoming tenant, a multiplepoinding was raised by the landlord in the name of the incoming tenant. *Objection* to the competency of the multiplepoinding, on the ground that there was no double distress, *repelled.* Park v. Watson, &c. Nov. 21, 1874, p. 118.

*Petition—Sequestration of an Estate—Appointment of a Judicial Factor—Junior Lord Ordinary—*20 *and* 21 *Vict. c.* 56, *sec.* 4.

25. *Held* (by Lord Curriehill, Junior Lord Ordinary) that a petition for the sequestration of a trust-estate and for the appointment of a judicial factor, which did not at the same time pray for the removal of the trustees or executors, was competent before the Junior Lord Ordinary. Rhind, &c. v. Sheach, &c. March 16, 1875, p. 1002.

Special Case—All Parties not called—Statute 31 *and* 32 *Vict. c.* 100, *sec.* 63.

26. Circumstances in which the Court dismissed a special case on the ground that certain persons interested were not parties to it, although the parties to the case craved a judgment as between themselves. Mackie's Trustees v. Martins, March 18, 1875, p. 621.

See *Cessio—Expenses—Judicial Factor—and Index of Justiciary Cases, p.* 1057.

PROOF. *Settlement of contra accounts—Parole.*

1. A, a firm of iron merchants, had an account against B, an iron merchant and broker, for £9562. B, as broker for C, had an account against A for £7536. Both accounts were payable on the same settling day. B's account as broker for C was, at a meeting for settlement, not disputed, but A's was to a certain extent. B paid the balance admitted by him to be due, and the payment was marked as a payment to account on the copy of A's account held by him, and a receipt for the sum so paid was written upon it. A having subsequently become bankrupt, *held*, in a question between A's creditor and B (1) that the account, with the receipt for the payment to account, though there were pencil markings of figures on the back shewing that the amount of the sum so paid to account had been fixed, after deducting B's account from A's, were insufficient to establish a settlement between A and B by crossing accounts and payment of the balance; and (2) that it was not competent to supplement the proof of settlement by parole evidence. Hannay and Son's Trustee v. Armstrong Brothers and Company, Feb. 2, 1875, p. 399.

Admissibility of Parole Evidence.

2. When a written contract relating to heritage is impugned by one of the parties, and the other, while denying his opponent's averments, admits that the documents do not give a true account of the agreement, the proof is not limited to writ or oath. Grant's Trustees v. Morison, Jan. 26, 1875, p. 377.

3. In a suspension and interdict brought to prevent the sale of a heritable subject by the respondent, who held a disposition in his favour as a purchaser from the complainer's author at the price of £250, qualified by a back-letter, bearing that the disponer should have power to redeem on payment of that sum within a certain time, failing which the respondent should have power to sell, the respondent admitted that he had not paid £250 for the property, but only £125. *Held* that the complainers were not limited to proof by writ or oath of their averments as to the true nature of the transaction. Grant's Trustees v. Morison, Jan. 26, 1875, p. 377.

Judicial Admission—Qualified Admission.

4. In an action by a manufacturer against his agent for the amount of certain accounts alleged to have been collected by him from customers, the defender produced an account debiting himself with the sums collected by him, and on the other hand stating as an item on the credit side an unliquidated claim of £200 for time and labour spent by him in promoting the business of the agency, which agency he alleged had improperly been taken from him. *Held* that the pursuer was not entitled to take the admission of the sums collected contained in the account without the qualification contained

PROOF—*Continued.*

in the other entries, but must prove his averments in common form. Gelstons v. Christie, July 20, 1875, p. 982.

Sale of Heritage—Breach of Contract—Reparation.

5. A father and son raised an action of damages for breach of a contract of sale. They averred that the defender had verbally agreed to purchase the stock in trade and good-will of a baking business carried on by the father at a price to be fixed by valuation, and the property of the shop, belonging to the son, at the price of £450. That in consequence of this verbal contract the father had dismissed his apprentices, and made arrangements for retiring from business, and that by the defender refusing to implement the contract the pursuers had suffered loss. *Held* (1) that, in so far as the contract related to the sale of heritage, it could not be proved by parole, even to the effect of sustaining a claim of damages for non-implement; and (2) on a consideration of the record, that there was no relevant averment of a contract for the sale of the good-will of the business and moveables apart from the heritage. Allan v. Gilchrist, March 10, 1875, p. 587.

See *Oath, Reference to—Parent and Child*, 4—*Partnership*, 3—*Process (Proof)—Presumption of Life—Railway*, 6—*Teinds*, 2, 3.

PROPERTY. *Superior and Vassal.*

1. A proprietor granted a feu of a piece of ground described as bounded on three sides by A Street, B Street, and C Street, with free ish and entry by all roads or streets made and to be made for the use of the feuars. A plan drawn upon the back of the feu-contract, and signed as relative thereto, shewed the streets, but this plan was not referred to in the deed. At its date only one of the three streets had been formed. The vassal was taken bound to pay a proportionate part of the cost of making the streets. In a question between the feuar and the superior *held* that the vassal was entitled to ish and entry by the ground upon which the proposed streets were to be formed, and that the erection of wooden buildings on the site of one of the proposed streets by the superior was an invasion of the vassal's right. Crawford v. Field, Oct. 15, 1874, p. 20.

Mutual Gable.

2. A erected a mutual gable in a burgh, partly on his own ground and partly on that of B, without leaving fireplaces and vents on the side of B's property. Afterwards, when B came to build a house on his ground, he made fireplaces and vents in the gable, and also heightened it. *Held* that B's operations were not in excess of his rights as joint owner of the gable, no injury to A being alleged. Lamont v. Cumming, June 11, 1875, p. 784.

See *Railway*, 1—*Road—Servitude.*

PUBLIC BURDEN. *Assessment—Gas and Water Rates.*

A truster provided that his widow should have the liferent use of his house "free of rent, feu-duty, ground-annual, taxes, and all other deductions." *Held* that the trustees were not bound to pay gas and water-rates for the widow. Rodger's Trustees v. Rodger, Jan. 9, 1875, p. 294.

See *Poor—Revenue.*

PUBLIC-HOUSE. See *Index of Justiciary Cases, p.* 1057.

PUBLIC OFFICER. See *Issue*, 1.

RAILWAY. *Superior and Vassal—Irritancy ob non solutum canonem—Compensation—Bankruptcy—Trustee—Real and Personal—Assignation.*

1. The proprietor of a piece of land bounded by the sea flood brought a statutory claim of compensation against a railway company on the ground that the land, which had been used for shipbuilding, had been injuriously affected by the formation of the railway upon the shore, whereby access to the sea was cut off. When the railway was formed the land belonged to a vassal of the claimant, paying a feu-duty of £150, who had been sequestrated. The trustee in the vassal's sequestration did not take up the feu, and the superior subsequently obtained decree of irritancy of the feu *ob*

RAILWAY —*Continued.*

non solutum canonem. The trustee, on condition that the superior made no claim for feu-duties, assigned to the superior any claim of compensation competent to him. *Held* that the proprietor had no title to insist in the claim (1) in virtue of the decree of irritancy, because the claim of damages, if any, was personal to the vassal, and was vested in the trustee, or (2) in virtue of the assignation, as the trustee had no power to grant it.

Question, whether a claim for compensation on account of the value of land being injuriously affected by the operations of a railway cutting off its access from the sea was competent under the Lands Clauses and Railway Clauses Acts, either to the proprietor of the *dominium utile*, or to the superior for his interest. Caledonian Railway Company v. Watt, July 9, 1875, p. 917.

Retention—Carrier—Tolls—Railways Clauses Consolidation (Scotland) Act, 1845, 8 *and* 9 *Vict. c.* 33, *sec.* 90.

2. The 90th section of the Railways Clauses Consolidation (Scotland) Act, 1845, provides,—"If on demand any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods; or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls payable as aforesaid."

Goods were delivered by a manufacturer to a railway company to be forwarded to his agent, who had accepted bills against the consignment. *Held* that, as against the onerous consignee, the company were not entitled under the enactment above quoted to detain the goods in security of a general balance due to them by the manufacturer for carriage of goods.

Observations on the scope and meaning of the 90th section of the Railways Clauses Consolidation (Scotland) Act, 1845. Peebles and Son v. Caledonian Railway Company, Jan. 20, 1875, p. 346.

Retention—Carrier—Railway and Canal Traffic Act, 1854, 17 *and* 18 *Vict. c.* 31, *sec.* 7—*Special Agreement.*

3. Goods were delivered for carriage to a railway company, with a consignment-note initialed on its face by the sender, bearing, "the Caledonian Railway Company will please receive the under-mentioned goods, and forward them, subject to the conditions on the back hereof," one of the conditions on the back being as follows:—"That all goods delivered to the company will be received and held by them subject to a general lien for money due to them, whether for carriage of such goods or for other charges, and in case the general lien is not satisfied within a reasonable time from the day when the company first received the goods the same will be sold by the company by auction or otherwise, and the proceeds of sale applied to the satisfaction of such lien and expenses." *Held* that this was not an effectual condition, in terms of the 7th section of the Railway and Canal Traffic Act, 1854, in respect (1) that the condition was not duly signed; and (2) that if the condition was meant to give the company a general lien over the goods for arrears of carriage due by the sender to the prejudice of an onerous consignee it was not just or reasonable. Peebles and Son v. Caledonian Railway Company, Jan. 20, 1875, p. 346.

Nautæ Caupones—Public Carrier.

4. Where a railway company, which had been in the practice for twelve years of running a fast goods train, by which dealers could send meat and live-stock to N in time for market without paying any special or extra rates, failed on one occasion, as they alleged, from excess of other traffic, to carry some trucks containing pigs from a station on their line to N by that train, and the pigs consequently arrived too late for the market, *held* that no sufficient cause of delay having been proved, they were liable to the owner of the pigs for damage incurred by loss of market. Anderson v. North British Railway Company, Feb. 18, 1875, p. 443.

RAILWAY—*Continued.*

5. Where, owing to an accident to a train, the cause of which could not be ascertained, a number of pigs arrived about five hours too late for a market to which they had been forwarded, *held* that the railway company were not liable to the owner of the pigs for damage incurred by loss of market. Anderson v. North British Railway Company, Feb. 18, 1875, p. 443.

Proof—Onus—Carriers Act (11 *Geo. IV. and* 1 *Will. IV.* c. 68, *secs.* 1 *and* 8).

6. The first section of the Carriers Act provides that carriers are not to be responsible for the loss of certain descriptions of goods carried by them unless the senders declare the nature of the goods and pay an extra charge. The eighth section provides that nothing in the Act is to be held as protecting the carriers from liability for loss of goods through any felonious act of their servants.

In an action against a railway company for the value of goods of the description specified, stolen while in the custody of the company as carriers, *held* that it was not sufficient for the pursuers to prove that there was a greater probability of the theft having been committed by servants of the company than by strangers. Campbells v. North British Railway Company, Feb. 18, 1875, p. 433.

Reparation—Negligence.

7. It is the duty of a railway company to warn intending passengers of the existence of a block on the line, or other circumstances inferring unusual risk in the journey, before entering into the contract of carriage, and if they fail to do so they may render themselves liable to such passengers for injury caused by accidents, for which otherwise the company would not have been responsible. Jarvie v. Caledonian Railway Company, March 18, 1875, p. 623.

See *Carrier.*

RATES. See *Public Burden.*

RECOMPENSE. *Meliorations—Bankrupt—Trustee—Heritable Creditor.*

Held that a trustee on a sequestrated estate, who had, at his own hand, completed certain unfinished buildings belonging to the bankrupt, and retained possession of the same for two years, was not entitled to recompense from a creditor holding a heritable security over the buildings, in respect that it could not be shewn in the circumstances that the creditor had been *lucratus*, or that the trustee had not made the expenditure with a view to increase the reversion. Buchanan v. Stewart, Nov. 10, 1874, p. 78.

REDUCTION. See *Sale*, 1.

REI INTERVENTUS. See *Lease*, 1.

REPARATION. *Negligence—Culpa—Gun.*

1. A blacksmith sent for a gun (a muzzle-loader) belonging to him, which he had left unloaded at a farm bothy on the last occasion he used it, about two months before. When it was brought him, he asked the boy who brought it whether it was loaded, and upon the boy saying he did not know he lifted the doghead and found there was no percussion-cap on the nipple. He next attempted to draw the ramrod to test whether the gun was loaded or not, but failed in consequence of the rod being stiff from rust, or from the wood having swollen. Without further examination he placed the gun in a press or wardrobe in his smithy, where it was partially concealed. On the same day, the blacksmith having been called out of the smithy to speak to some one, a boy took up the gun, which from some unexplained cause went off, and severely injured a journeyman in the blacksmith's employment. *Held* that the blacksmith had reasonable cause to believe that the gun was not in a condition to be a source of danger, and accordingly that he was not guilty of such negligence as to render him liable in damages to the man injured. King v. Pollock, Oct. 27, 1874, p. 42.

REPARATION—*Continued.*

Negligence—Dog.

2. In order to render the owner of a dog liable for culpably and negligently allowing it to bite one of the lieges it is not necessary to prove that the dog ever bit any person before; it is enough to shew that the owner had some reason to believe that the animal might do mischief in the circumstances in which it was placed.

A dog was put up for sale at an auction, but was not sold. The auctioneer thereupon requested the owner, who was present, to take the dog away. He did not immediately comply with this request, and the dog was meanwhile tied up to a wall of the auction mart, where he bit a boy who was passing. *Held* that the custody of the dog had reverted to the owner, and that there being sufficient proof that he knew the dog to be of a ferocious nature he was liable in damages. Renwick v. Von Rotberg, July 2, 1875, p. 855.

Personal Injury—Culpa—Factory Acts, 13 *and* 14 *Vict. c.* 54, *sec.* 1, 7 *and* 8 *Vict. c.* 15, *sec.* 21, *and* 19 *and* 20 *Vict. c.* 38, *sec.* 4—*Contributory Negligence—Young Person.*

3. A lad between seventeen and eighteen, while employed at night work in a factory, was injured by the belt of a teasing machine, at which he was working, slipping off the drum and catching his arm. The body of the machine was boxed in, but the belt and lower pulley were not fenced. In an action of damages by the lad against his employers, laid on breach of the Factory Acts, which forbid the employment of persons under eighteen at night work, or at unfenced machinery, the defences were (1) that the defenders had been induced by the pursuer's representations that he was above eighteen to engage him as an adult, and had paid him adult's wages; and (2) that the accident occurred through the pursuer's own fault. *Held,* after a proof, that the defenders had not used sufficient diligence to ascertain the pursuer's age before they employed him at night work; that the machine was not duly fenced in terms of the statutes; and that the defenders had failed to prove contributory negligence on the part of the pursuer, and accordingly that the defenders, having been guilty of a double breach of the Factory Acts, were liable to the pursuer in damages.

Question, how far misrepresentation of his age by the pursuer, or contributory negligence on his part, would have barred his claim, had they been proved. Gibb v. Crombie, July 6, 1875, p. 886.

Culpa—Insufficiency of Building—Landlord and Tenant.

4. The tenant of a store employed a carrier with a horse and cart to remove goods. The horse was killed by the fall of the building.

In an action of damages at the instance of the carrier against the tenant and the owner of the building, after proof, *held* that the tenant was liable to the pursuer, in respect that the accident had been caused by his fault in overloading the store, and in not warning the pursuer of the insecurity of the building and danger which had been apparent for some days, but reserving to the tenant any claim of relief he might have against the landlord. Caledonian Railway Co. v. Greenock Sacking Co. and Others, May 13, 1875, p. 671.

Breach of Contract—Specific Damage.

5. An iron company sold iron pipes to the owner of a cotton mill to be used in the mill, but failed to deliver them timeously. In an action of damages the millowners failed to prove specific pecuniary damage, but proved that they were put to trouble and inconvenience before they could obtain fulfilment of the contract. *Held* that they were entitled to moderate damages for the trouble and inconvenience.

Observed (*per* the Lord President) that where a breach of contract is proved, even in respect of time, an award of damages must follow; that if no inconvenience has been suffered the damages will be nominal; but that if trouble and inconvenience have been caused, though no specific

damage is proved, the damages will be substantial. Webster and Company v. Cramond Iron Company, June 4, 1875, p. 752.

Slander—Literary Criticism—Innuendo—Excess of Damages.

6. An atlas was published, entitled "The Edinburgh Educational Atlas of Modern Geography, with complete index, by W. & A. K. Johnston" (being the firm under which the publisher carried on business). A review of the atlas appeared in a journal, which, after adverting to Dr Livingstone's high opinion of the geographical acumen of A. Keith Johnston, a deceased member of the firm, and of his son who bore the same name, proceeded,—"The atlas now before us, though bearing the name of A. Keith Johnston, is the work of neither the *primus* nor the *secundus* of that name, for the son is no longer connected with the house established by his late father, ... and not merely from the present work, but from others which have lately come to our notice, we regret to observe unmistakeable signs of the absence of that true geographical acumen which Livingstone so justly lauded." The review then went into a severe criticism of the atlas in detail.

The publisher of the atlas brought an action of damages against the proprietor of the journal for slander, and averred that the article represented that he (the pursuer) had falsely, and for the purpose of deceiving the public, issued, as the work of A. Keith Johnston, an atlas which was not the work of either the first or the second of that name, but of persons not skilled in making an atlas. An issue was adjusted and sent to a jury, who found for the pursuer, with £1275 of damages.

On a motion for a new trial, on the grounds (1) that the verdict was contrary to evidence, and (2) that the damages were excessive, the Court refused to disturb the verdict on the first ground, holding that the innuendo was sufficiently supported by evidence to make it not unreasonable for the jury to find for the pursuer, but intimated that, unless the pursuer accepted £100, they would grant a new trial on the ground of excess of damages. The pursuer having consented to take £100, a new trial was refused.

Observed (*per* the Lord Justice-Clerk), that if the critic, instead of stating as a matter of fact that the atlas was not the work of either the father or the son, and making that statement of fact the explanation of the inaccuracies which were found in it, had said that, looking to the abounding errors in the atlas, it could not be the work of these experienced men, the innuendo could not have been maintained. Johnston v. Dilke, &c., June 16, 1875, p. 836.

Slander—Privilege—Illegal Retention of Offices.

7. A communication by the principal of a college to the patron of a professorial chair therein to the effect that the appointment of one of the candidates would be injurious to the interests of the university, is privileged.

S, Professor of Humanity in the United College of St Andrews, having been appointed to the office of principal of the college, intimated to the patron of the chair of Humanity his intention of resigning that chair at the end of the current session. The patron wrote to A, one of the candidates for the chair, intimating that he had "great pleasure in determining at once to appoint him to the chair," and requesting him to communicate with his (the patron's) agent "when the proper time arrived for completing the appointment." Thereupon S wrote a letter of remonstrance to the patron, stating that A had notoriously failed as a classical master, and that his appointment would be a heavy blow to the prosperity of the college, and concluding with a request to the patron, if it was still possible, to reconsider his resolution. S, at the request of a large majority of his colleagues, continued to retain the chair, along with the principalship, until A's death, a period of two years. The patron took no steps towards filling the chair by issuing a presentation in favour of A or any one else, and remained entirely neutral. After A's death, his widow and executrix raised an action of damages against S, founded on the defender's having illegally, as she main-

REPARATION—*Continued.*

tained, retained the chair of Humanity after he had been appointed principal, and so prevented A from being presented to the chair, and also upon the slander of her husband alleged to be contained in the letter above mentioned. *Held*, after a proof before answer, (1) that A had no legal nor enforceable right to the chair of Humanity, but merely an expectation of being appointed, and therefore neither he nor his representative could found upon the alleged illegality of the retention of the chair by S as a ground of damage, (2) that the communication to the patron respecting A's qualifications was privileged, and that malice had not been proved. Auld v. Shairp, July 14, 1875, p. 940.

Slander—Witness—Privilege.

8. In an action against a medical man for alleged wrongful granting of a certificate that the pursuer was insane the defender was examined as a witness for the pursuer. *Held* that the privilege of a witness under such circumstances was absolute, and that an action of damages for slander, founded on what the defender stated in evidence, could not be made relevant by any allegation of malice. Mackintosh v. Weir, July 3, 1875, p. 877.

See *Carrier—Contract*, 3—*Issue—Railway*, 4, 5, 6, 7—*Res Judicata*, 2—*Sale—Ship*, 3, 4—*Title to Sue.*

RES JUDICATA.

1. *Observations* on the cases in which a judgment against the pursuer in an action will be available to support a plea of *res judicata* against him. Earl of Perth v. Lady Willoughby de Eresby's Trustees, March 9, 1875, p. 538.

Reparation—Lunatic.

2. A person who had been confined in a lunatic asylum raised an action of damages against, *inter alios*, the medical men who granted the certificate on which the warrant for his confinement proceeded. Upon an issue "whether . . . the defenders did wrongfully and without due inquiry and examination grant the certificate, . . . the pursuer not being then insane, nor in such a state of mental derangement as to require confinement in a lunatic asylum, to the loss, injury, and damage of the pursuer," the jury found that the pursuer was insane at the date in question, and that he was justifiably sent to and confined in an asylum. The verdict was applied, and the defenders assoilzied.

The pursuer subsequently raised an action against one of the medical men, founded on the granting of the certificate, and concluding for damages for slander. *Held* that the action was excluded *exceptione rei judicatæ*, in respect that the pursuer was attempting to try over again the question which had been decided in the former action, viz., whether or not the certificate was justifiably granted, and that the general claim of damages made and decided upon in the former action included a claim for reparation for injury to character concluded for in the present action. Mackintosh v. Weir, July 3, 1875, p. 877.

RETENTION. See *Contract*, 2, 3—*Railway*, 3—*Ship*, 5.

REVENUE. *Succession-Duty Act*, 1853 (16 *and* 17 *Vict. cap.* 51), *secs.* 15, 34, 38.

1. An heir of entail in possession, with consent of the next three heirs, obtained authority to charge, and charged, the estate with debt, the next heir receiving, in consideration of his consent, from the heir in possession, a sum of money and a personal bond of annuity payable during their joint lives. In a question between the next heir and the Crown as to succession-duties, *held* (1) that the incumbrance was not an incumbrance created or incurred by the next heir in the sense of sec. 34 of the Succession-Duty Act; and (2) that the transaction was not an alienation of the succession, or an acceleration of the next heir's title in the sense of sec. 15,—and, therefore, that, in estimating the succession, the next heir was entitled to allowance for the incumbrance; but (3) that he was not entitled, under sec. 38, to allowance for the lapse of the annuity Lord Advocate v. Earl of Glasgow, Jan. 15, 1875, p. 317.

REVENUE—*Continued.*

Income-Tax—5 and 6 Vict. cap. 35, sec. 103.

2. A husband directed his trustees to pay to his wife, if she survived him, "a free yearly annuity" of £1200, and he further provided that if she accepted this annuity it should be in full satisfaction of all her rights, legal and conventional. The wife survived, and accepted the annuity. *Held* that it was unnecessary to decide whether the bequest of a free annuity was equivalent to the bequest of an annuity free of income-tax, as, if it were, the widow by accepting the annuity as in full of her legal rights, had entered into an agreement of the nature struck at by the Act 5 and 6 Vict. cap. 35, sec. 103. Rodger's Trustees v. Rodger, June 9, 1875, p. 294.
3. A testator left to his widow an annuity "free from all burdens, taxes, and deductions whatsoever," and declared it to be in full of all her legal rights. *Held* that she was entitled to the annuity without deduction of income-tax, and that the bequest was not struck at by the 103d section of the Property and Income-Tax Act, 1842. Mackie's Trustees v. Mackie, &c., Jan. 15, 1875, p. 312.

Income-Tax—5 and 6 Vict. c. 35, sec. 100, rule 3, and sec. 159.

4. *Held* that in computing profits for assessment of income-tax a tenant of minerals is not entitled to make deduction from the gross receipts of sums necessary to replace capital expended in sinking pits, or lost by depreciation of buildings and machinery, in respect that the Act expressly provides that "in estimating the balance of profits and gains chargeable under schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from . . . such profits or gains on account of any sum employed or intended to be employed as capital in such trade." Addie v. Solicitor of Inland Revenue, Feb. 16, 1875, p. 431.

Income-Tax—Assessment.

5. The Glasgow Water Commissioners were appointed under a local Act of Parliament, by which they were authorised to borrow money on annuities and mortgages, and to acquire the works of certain private water companies which had formerly supplied the city with water, and to bring in an additional supply of water. They were empowered to levy a compulsory rate within the municipal boundary, and also a rate on persons who chose to take the water outside the boundary, and to sell the water to manufacturers and others. The Act required the commissioners to levy a rate sufficient along with the other income to cover all annual expenses, including a sum of not less than one per cent on the money borrowed, to be accumulated as a sinking fund for redemption of the annuities and mortgages, and to be applied to no other purpose, any balance to be applied to reduce the rate of the following year. *Held* that the surplus after paying expenses was not assessable as profits under the Income-tax Acts. Glasgow Water Commissioners v. Inland Revenue, May 26, 1875, p. 708.

Income-Tax, liability to be Assessed for—Master Mariner—Property-Tax Act, 1842, 5 and 6 Vict. c. 35, sec. 1, schedule (D), and sec 39.

6. *Held* that the master of a merchant vessel trading between Glasgow, the Mediterranean, and New York, who was absent from the country for more than nine months in the year, and was only resident in it during the remainder for short periods of two or three weeks at a time, but whose wife and family resided in Glasgow in a house of which he was tenant, and in which he resided when on shore, was resident in Great Britain in the sense of the Property-Tax Act, 1842, schedule D, and was liable to be assessed for income-tax on his salary as master. Young v. Commissioners of Inland Revenue, July 10, 1875, p. 925.

Inhabited House-Duties—48 Geo. III. c. 55—57 Geo. III. cap. 25, sec. 1—5 Geo. IV. cap. 44, sec. 4—32 and 33 Vict. cap. 14, sec. 11.

7. *Held* that the 11th section of the Act 32 and 33 Vict. c. 14, by which it is enacted that any house "occupied as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, or being used as a shop or

REVENUE—*Continued.*
counting-house, shall be exempt from inhabited house-duties, although a servant or other person may dwell in such tenement or part of a tenement for protection thereof," did not apply to houses used as insurance offices with resident servants. Edinburgh Life Assurance Company v. Solicitor of Inland Revenue—Scottish Widows' Fund v. Solicitor of Inland Revenue, Feb. 2, 1875, p. 394.

REVOCATION. See *Husband and Wife*, 4.

RIGHT IN SECURITY. See *Agent and Principal*, 4—*Assignation—Poinding the Ground—Recompense.*

ROAD. *Public Right of Way.*
In an action brought for declarator of freedom from public right of way by the proprietor of the *solum* of a through-going close in a town it was proved that the close had been originally formed by the proprietor on his own ground for the use of his tenants, and that a door had been placed at one end of it; it was also proved that the close had been used as a thoroughfare by the public for the prescriptive period, but that frequently, and particularly at night, the door had been locked by the proprietor so as to exclude strangers. *Held* (*rev.* judgment of Lord Shand, *diss.* Lords Ormidale and Gifford) that the acts of possession on the part of the proprietor in shutting up the passage were sufficient to prevent the public from acquiring a right of way. Wallace v. Police Commissioners of Dundee, March 9, 1875, p. 565.

SALE. *Bona fides—Reduction.*
1. In an action brought to reduce the title of a purchaser of heritage at the instance of a prior purchaser from the same seller, *held* that it was not necessary for the pursuer to prove fraud on the part of the second purchaser, but only such knowledge as ought to have put him on his inquiry. Petrie v. Forsyth and Another, Dec. 16, 1874, p. 214.

Breach of Contract—Reparation.
2. A father and son raised an action of damages for breach of a contract of sale. They averred that the defender had verbally agreed to purchase the stock in trade and good-will of a baking business carried on by the father at a price to be fixed by valuation, and the property of the shop, belonging to the son, at the price of £450. That in consequence of this verbal contract the father had dismissed his apprentices, and made arrangements for retiring from business, and that by the defender refusing to implement the contract the pursuers had suffered loss. *Held* (1) that, in so far as the contract related to the sale of heritage, it could not be proved by parole, even to the effect of sustaining a claim of damages for non-implement; and (2) on a consideration of the record, that there was no relevant averment of a contract for the sale of the good-will of the business and moveables apart from the heritage. Allan v. Gilchrist, March 10, 1875, p. 587.

Horse—Warranty—Mercantile Law Amendment Act, 1856, *sec.* 5.
3. To establish an express oral warranty of goods sold it is necessary to prove the very words used. Robeson v. Waugh, Oct. 30, 1874, p. 63.
4. In an action for payment of the price of a horse the defender disputed liability, on the ground that the pursuer had represented the horse to be sound while he knew it to be unsound, and that the defender had rejected it on the day after the sale. *Held* that, although it was proved that the horse was unsound at the date of the sale, the sale was valid, in respect that it was not proved that the seller either warranted it to be sound or knew of the unsoundness. Robeson v. Waugh, Oct. 30, 1874, p. 63.

Express Warranty—Mercantile Law Amendment Act, 1856.
5. *Observed* (*per* Lord President), that the Mercantile Law Amendment Act requires warranty to be express, and to prove an express warranty it is not enough for witnesses to say that the goods were warranted. They must specify the terms in which the warranty was granted. Mackie v. Riddell, Nov. 20, 1874, p. 115.

SALE—*Continued.*

Horse—Warranty—Statute 19 *and* 20 *Vict. c.* 60 (*Mercantile Law Amendment Act*, 1856), *sec.* 5.

6. A horse, which was sold by auction, was described in the auctioneer's catalogue, by the seller's instructions, as having "been driven regularly in double and single harness." In an action for the price, after a proof, which was held to establish that the horse was not fit to be so driven, and that the seller was aware of its unfitness, *held* that the seller was not entitled to recover, in respect (1) of the implied warrandice at common law (the first branch of sec. 5 of the Mercantile Law Amendment Act not being applicable, as the seller was not without knowledge of the defect); and (2) of the implied warrandice under the second branch of sec. 5 of the Act, the horse having been sold as fit for a particular purpose. Rough v. Moir and Son, &c., March 5, 1875, p. 529.

Timeous Rejection.

7. A firm of engineers contracted to make and deliver a machine consisting mainly of two heavy pieces of cast iron, "the whole to be of the best description, and warranted." The two parts of the machine were transmitted to a railway station—the place of delivery—on 7th February. On 17th February the purchaser, after removing one of the pieces, discovered serious defects in it, and at once intimated rejection to the sellers. On 28th February an agreement was entered into between the purchaser and the sellers that the purchaser should then take delivery of the machine and pay the price, the sellers undertaking to pay half the expense of replacing the defective portion of the machine if it should break within twelve months. Five days afterwards the purchaser removed from the railway station the remaining portion of the machine, and on the same day intimated that he had discovered defects in this part also. *Held* that the purchaser was precluded by the agreement from rejecting the machine for defects which he might have discovered by examination before the date of the agreement. Smith Brothers and Co. v. Scott, March 17, 1875, p. 601.

Ship.

8. A seagoing steamship lying at Glasgow, ready to sail, was sold by missive, "with all belonging to her on board and on shore." *Held* that a chronometer, previously used in the vessel, which was in the hands of an optician on shore for the purpose of regulation at the date of the sale, was included in the sale, a chronometer being a necessary instrument of navigation, and there being no local or general usage of trade to lead to a different construction of the missive. Armstrong and Co. v. M'Gregor and Co., Jan. 19, 1875, p. 339.

Fixtures—Personal Objection.

9. In a question between a purchaser of lands and a person who was entitled to the income of a trust-estate, of which the lands formed part, and who had taken an active part in the sale, *held* that the latter was not entitled to remove wire fencing which he had put up at his own expense, when in occupation of the mansion-house by permission of the trustees, no notice having been given to the purchaser before the sale was completed that the fencing was not to go with the estate. Graham v. Lamont, Feb. 18, 1875, p. 438.

See *Agent and Client—Bankruptcy*, 2.

SCHOOL. *Schoolmaster—Retiring Allowance—Education* (*Scotland*) *Act*, 1872 (35 *and* 36 *Vict. cap.* 62) *sec.* 60—*Parochial and Burgh Schools* (*Scotland*) *Act*, 1861 (24 *and* 25 *Vict. cap.* 107), *sec.* 19.

1. The Parochial and Burgh Schools Act, 1861, sec. 19, provides that when it shall be found that "the schoolmaster of any parish is disqualified because of infirmity or old age for the due performance of the duties of his office, or that from negligence or inattention he has failed efficiently to discharge such duties, it shall be lawful to the heritors and minister . . . . to permit or require such schoolmaster to resign his said office,

SCHOOL—*Continued.*

. . . . and in every case of such resignation the heritors and minister may grant to such schoolmaster a retiring allowance . . . . provided that where such resignation shall not be occasioned by any fault on the part of the schoolmaster the heritors shall grant a retiring allowance."

The Education Act, 1872, sec. 60, empowers school boards to remove teachers if they are "incompetent, unfit, or inefficient," and provides that teachers, appointed previous to the passing of the Act, who may be so removed, shall have the same rights to retiring allowances as were vested in parish schoolmasters by the Act of 1861.

Held that, assuming that a teacher could only have claimed a retiring allowance under the Act of 1861, if removed in consequence of old age or infirmity, inasmuch as these were the only causes for which he could be removed without fault, he might, under the Act of 1872, be removed for other causes without fault, and might therefore be entitled to a retiring allowance although not removed for old age or infirmity. Robb v. Logiealmond School Board, Feb. 5, 1876, p. 417.

Schoolmaster—Retiring Allowance—Education (Scotland) Act, 1872, *sec.* 60 *—Process—Relevancy.*

2. A parish schoolmaster, appointed before the Education Act, 1872, was removed by the school board, under sec. 60 of the Act, proceeding on a report by an inspector that there were no pupils in attendance at the school, and that the schoolmaster was unfit for the office of schoolmaster in that parish, and his application for a retiring allowance was refused without a reason being assigned. In an action against the board by the schoolmaster claiming a retiring allowance he averred that the scarcity of scholars was caused by decrease of population, by political feeling, and by sectarian rivalry, which led the inhabitants to support other schools. The Court remitted to the school board to specify the ground of their resolution to refuse the pursuer a retiring allowance, if they still adhered to it. The board adhered to their refusal, and specified as the ground of it the pursuer's inefficiency, caused by his extreme indolence, culpable neglect of duty, and general misconduct, "as proved by the complete absence of scholars, and substantiated by the evidence of the inhabitants of the district." *Held* that, in the face of this resolution, the pursuer's averments were not relevant, and defenders assoilzied, but without expenses, as they had not at first assigned any reason for refusing an allowance. Robb v. Logiealmond School Board, May 21, 1875, p. 698.

Schoolmaster—Retiring Allowance—Education (Scotland) Act, 1872 (35 *and* 36 *Vict. cap.* 62), *secs.* 60 *and* 55—*Parochial and Burgh Schoolmasters (Scotland) Act*, 1861 (24 *and* 25 *Vict. cap.* 107), *sec.* 19.

3. In an action brought by a parish schoolmaster, appointed prior to the Education Act, 1872, against the school board of the parish, by whom he had been dismissed, for declarator that he was entitled to a retiring allowance, *held* that his claim was excluded by the resolution of the board dismissing him on the ground of fault, and that the judgment of the board finding fault proved was not subject to review in a Court of law. Morison v. Glenshiel School Board, May 28, 1875, p. 761.

School Board—Schoolmaster—Education (Scotland) Act, 1872, *sec.* 23—*Interdict—Sheriff.*

4. A petition in the Sheriff-court by a school board against the teacher of a public school praying to have him interdicted "from preventing or excluding the said school board, or members thereof, under the authority of the board, from entering the school during school hours, whenever and so often as they may deem necessary in the discharge of their duties under the Act of Parliament (the Education Act, 1872), or in any other way obstructing the school board in effectually carrying out the visitations referred to," *refused*, on the ground that the right of visitation claimed was not clear on the face of the statute. Kelso School Board v. Hunter, Dec. 18, 1874, p. 228.

SCHOOL—*Continued.*

School Board, Powers of—Schoolmaster, Tenure of Office and Emoluments—The Education (Scotland) Act, 1872, *sec.* 55.

5. A parochial school was divided into two departments—(1) A grammar school, in which the principal teacher or rector taught classical and modern languages and mathematics; and (2) an elementary school taught by an assistant.

In 1874 the school board of the parish resolved to unite the schools, and restricted the teaching of the higher branches previously taught in the grammar school to one hour daily.

In an action brought by the rector or schoolmaster, who had been appointed in 1858, for reduction of this resolution, and for damages, *held* that the school board were entitled to make this change, but without prejudice to any claim which the schoolmaster might afterwards be able to establish on the ground of diminished emoluments arising from the proceedings complained of. Hunter v. Kelso School Board, March 5, 1875, p. 520.

Schoolmaster—School Fees—Education (Scotland) Act, 1872, *secs.* 48, 53, 55.

6. The school board of a parish having passed a resolution requiring the schoolmaster, who had been appointed prior to the Education Act, 1872, to collect monthly the school fees, which formed part of his emoluments, and to return a statement of the fees collected quarterly to the treasurer, the schoolmaster raised an action concluding for reduction of the resolution and for declarator that he was not bound to collect the fees, on the ground that by the 53d and 55th sections of the Act it was the duty of the board to collect the fees and pay them to the schoolmaster. *Held* that in accordance with the usage prior to the Act the duty of collecting the fees remained with the schoolmaster,—and the defenders *assoilzied*. Buchanan v. Tullialan School Board, June 11, 1875, p. 793.

School Board—Education (Scotland) Act, 1872, *sec.* 23.

7. Where, prior to the passing of the Education Act, 1872, the parish school of a parish partly landward, partly burghal, was situate within the burgh, *held* that, on separate school boards being elected for the landward district and the burgh, in virtue of the 23d section of that Act, the school became vested in the school board of the landward district, and not in that of the burgh. Selkirk Parish School Board v. Selkirk Burgh School Board, June 5, 1875, p. 761.

SEPARATION AND ALIMENT. See *Husband and Wife.*

SERVITUDE. *Sheriff—Possessory Judgment.*

In 1814 the proprietor of a village feu A acquired the adjoining feu B, and occupied both down to 1842. Prior to 1814 the access to the back court of each was by means of a passage within its own boundary. During the period from 1814 to 1842 the proprietor sometimes used the passage on B as a means of access to the back court of A. From 1842, when the properties again came to be possessed separately (A having been sold under a bond and disposition in security granted over it alone in 1831), down to 1863, the use of the passage on B as an access to the back court of A was continued and increased, and in 1863 the passage on A was shut up, and from that time till 1874 the passage on B was exclusively used as the access to the back courts of both properties.

In a Sheriff-court process of interdict at the instance of the proprietor of A against the proprietor of B, to prevent him obstructing this passage on B, *held* (1) that the claim of the proprietor of A was for a servitude right of way over the property of B; (2) that as it was competent for the Sheriff to entertain and decide on the merits of that claim, it was incompetent for him to decline to do so, and confine himself to a mere possessory judgment; (3) that the disposition of A in security in 1831 could not be construed as conferring by implication the right of servitude, the use of the passage on

SERVITUDE—*Continued.*

B not being at that date essential to the convenient enjoyment of A; and (4) that there were no *termini habiles* on which prescription could be pleaded.

Observations on the case of Cochrane v. Ewart. Gow's Trustees v. Mealls, May 28, 1875, p. 729.

See *Sheriff*, 4.

SHERIFF. *Abandonment of Action—A. S. 10th July* 1839, *sec.* 61.

1. The pursuer of an action, after an interlocutor was pronounced disallowing proof by parole, obtained a diligence for the recovery of writings. He allowed it to expire without using it, and then presented a minute of abandonment of the action under A. S., 10th July 1839 (Sheriff-court Procedure), sec. 61. *Held* that he was entitled to abandon. Kermack v. Kermack, Nov. 27, 1874, p. 156.

Husband and Wife—Separation and Aliment.

2. A married woman raised an action in the Sheriff-court against her husband for interim aliment until a permanent arrangements of the rights and interests of the parties should be made in a competent Court, on the ground that the pursuer was obliged to live separately on account of her husband's cruel conduct. It appeared from a proof that at the date of the action, and until a few days before the proof, the pursuer was living in her husband's house. *Held* that in the circumstances the action was incompetent in the Sheriff-court.

Observed (*per* Lord Deas), that in granting an interim allowance of aliment to a wife the Sheriff ought to fix a time at which the aliment should cease. M'Donald v. M'Donald, May 25, 1875, p. 705.

Servitude—Stat. 1 *and* 2 *Vict. c.* 119, *sec.* 15—*Possessory Judgment.*

3. Where a proper right of servitude is claimed in a Sheriff-court action, as it is competent for the Sheriff to deal with the action on its merits, it is incompetent for him to decline to do so, and confine himself to a possessory judgment. Gow's Trustees v. Mealls, May 28, 1875, p. 729.

See *Debts Recovery Act—Nuisance*, 1—*Process* (*Appeal*)—*School*, 4—*Servitude.*

SHIP. *Ship-Measurement—Merchant Shipping Act*, 1854.

1. *A ship was constructed with an "awning" deck above the main deck, extending from forecastle to poop, with the exception of two gaps* 13 *feet* 6 *inches and* 8 *feet* 6 *inches broad across the vessel. The gaps were provided with doors in the ship's sides, and could be planked over, if required, so as to cover the vessel from stem to stern, but the doors were not capable of resisting the pressure of the sea, and the coverings of the gaps were not made water-tight.* Held (aff. *judgment of the Second Division*) (1) *that the vessel had not "a third deck, commonly called a spar deck," within the meaning of the provisions of sub-section* 5 *of section* 21 *of the Merchant Shipping Act*, 1854 (17 *and* 18 *Vict. c.* 104); *and* (2) *that the space between the awning deck and main deck was not "a permanent closed-in space on the upper deck available for cargo or stores, or for the berthing or accommodation of passengers or crew," in terms of sub-section* 4 *of section* 21 *of the said Act.* Lord Advocate v. Clyde Steam Navigation Co., March 11, 1875, H. L., p. 23.

Sale.

2. A seagoing steamship lying at Glasgow, ready to sail, was sold by missive, "with all belonging to her on board and on shore." *Held* that a chronometer previously used in the vessel, which was in the hands of an optician on shore for the purpose of regulation at the date of the sale, was included in the sale, a chronometer being a necessary instrument of navigation, and there being no local or general usage of trade to lead to a different construction of the missive. Armstrong and Co. v. M'Gregor and Co., Jan. 19, 1875, p. 339.

SHIP—*Continued.*

Collision—Reparation—Compulsory Pilotage—Merchant Shipping Act, 1854, *sec.* 388.

3. To entitle the owners of a ship, under the charge of a licensed pilot, where such pilotage is compulsory, to the benefit of the provision of the statute which exempts them from liability when a collision has occurred by the fault of the pilot, it lies on them to prove that it was occasioned solely by the pilot, and that there was no contributory fault on the part of the ship or master or crew.

Circumstances in which *held* (*diss.* Lord Ormidale) that the owners had discharged this *onus*. Trustees of the Clyde Navigation v. Barclay, Curle, and Co., June 18, 1875, p. 842.

Collision—Reparation—Merchant Shipping Act, 1854, *sec.* 514, *and Merchant Shipping Act Amendment Act*, 1862, *sec.* 54.

4. It is competent for the owner of a vessel to present a petition to the Court under the 514th section of the Merchant Shipping Act, 1854, with a view to having his liability for damages ascertained or restricted, without admitting liability for such damages. Miller, &c. v. Powell, &c., July 20, 1875, p. 976.

Lien for Repairs—Possession.

5. *A vessel was placed in a patent slip belonging to a firm of shipbuilders for repair. When certain outside repairs were completed she was removed by the shipbuilders, for their own convenience, into a public wet dock, into which the patent slip opened, and the repairs were there completed, the vessel being attached to pawls situated within the premises of the shipbuilders, and lying close to their slip. From time to time the vessel was moved for the convenience of those using the slip at the order of the harbour-master, but chiefly by the shipbuilders' men. During the whole time the master was present in the ship during the day, and at night a shipkeeper.* Held (rev. *judgment of the First Division*), *that the possession of the ship, and the resulting lien for the cost of repairs, which the shipbuilders had while it remained in their slip, did not cease when the vessel was removed by them to the public dock.* Barr and Shearer v. Cooper, Feb. 26, 1875, H. L., p. 14.

See *Agent and Principal*, 2—*Carrier.*

STATUTES.

1690, c. 33. See *Entail* 1.
1696, c. 25. See *Partnership*, 3.
1705, c. 2. See *Lord Chancellor in* M'Douall v. Lord Advocate, H. L., p. 56.
Ballot Act, 1872, sec. 12. See *Burgh.*
Conveyancing Act, 1874. See *Church*, 1.
Factory Acts. See *Reparation*, 3.
General Police and Improvement Act, 1862, secs. 48 and 50. See *Burgh.*
Mercantile Law Amendment Act, 1856, sec. 5. See *Sale*, 3, 4, 5, 6.
Merchant Shipping Act, 1854. See *Ship.*
Railway and Canal Traffic Act, 1854, sec. 7. See *Railway*, 3.
Revenue Acts. See *Revenue.*
Truck Act, 1831. See *Master and Servant.*

SUCCESSION. *Mortis Causa Conveyance—Titles to Land Act*, 1868.

1. *Held* that, under the 20th section of the Titles to Land Act, 1868, a *mortis causa* deed, in which the testator appointed trustees, empowered them to "realise all his heritable and moveable property," and directed them as to the disposal thereof, but which contained no words of direct conveyance or gift, was sufficient to carry the testator's heritable as well as his moveable estate.

Observed that the statute puts heritage precisely in the same position as moveables, when dealt with in a testamentary writing. M'Leod's Trustees v. M'Leod, Feb. 28, 1875, p. 481.

SUCCESSION—*Continued.*

Testament—Implied Revocation.

2. Terms of a codicil which held to nominate residuary legatees in addition to and not in room of those appointed by a prior deed. Coxe v. Cox, Oct. 24, 1874, p. 41.

Legacy—Condition.

3. *Held*, upon the terms of testamentary writings, that a legacy given in substitution of a prior legacy was not intended to be subject to a condition attached to the former. Coxe v. Cox, Oct. 24, 1874, p. 41.

Testament—Implied Revocation.

4. A bequest of a share of residue to each of a testator's nephews and nieces *nominatim* held to supersede a residuary bequest to them as representing their father, contained in a prior writing. Coxe v. Cox, Oct. 24, 1874, p. 41.

Testament—Destination—Conditional Institute—Heirs and Assignees.

5. In the construction of a will left by a husband, *held* that a disposition of his whole means and estate in favour of his wife, and "her heirs and assignees whomsoever," was intended to be contingent on the wife's survivance, and that her heirs were not named as conditional institutes.

Opinion (*per* Lord President) that as a general rule, where there is a *mortis causa* disposition to a person, his heirs and assignees, failing the disponee, his heirs will take. Findlay v. Mackenzie, July 9, 1875, p. 909.

Testament.

6. A testator directed his testamentary trustees to divide his whole estate equally among his sons and daughters, with the proviso that, should his only unmarried daughter's "share of the division not amount to £150 per annum," the trustees were to "invest in good and safe security as much as will realise that amount," but gave no directions as to the disposal of the capital so invested. The daughter's share of the estate was not sufficient by itself to provide £150 a-year. *Held* that the additional sum which it was necessary to invest for this purpose belonged to the other children, from whose shares it had been taken, subject to the life interest of the daughter. Mackenzie's Trustees v. Mitchell, &c., Feb. 24, 1875, p. 469.

Testament—Legacy—Falsa Demonstratio.

7. By a holograph codicil a testator bequeathed to his son, "all the gas companies shares that were lately bought by me from Mrs T. Bruce's trustees for £300." There were no gas companies shares purchased by the testator for £300; but he had, about six months before the date of the codicil, purchased from Mrs Bruce's trustees, as one transaction, shares in various gas companies for £798, and some shares in a steelyard for £2. *Held* that the words "for £300" must be taken as mere *falsa demonstratio*, and were not used as taxative of the bequest, and consequently that the legatee was entitled to the whole gas shares (but not the steelyard shares), purchased by the testator from Mrs Bruce's trustees. Bruce's Trustees v. Bruce, June 7, 1875, p. 775.

Conditional Bequest—Condition in Restraint of Marriage.

8. A truster directed that a part of the profits of his business, which was to be carried on by his trustees after his death, should be paid to his daughters, "but in the event of any of my said daughters being married her share of said profits shall lapse and fall into the residue of my estate," in which all his children were to participate. *Held* that the bequest was intended as a provision for the truster's unmarried daughters so long as they remained unmarried, and that the limitation was not invalid as a condition in restraint of marriage, and that a daughter who was married at the date of the settlement had no interest in the bequest. Sturrock v. Rankin's Trustees, June 26, 1875, p. 850.

Surrogatum.

9. A husband qualified a provision of liferent of residue in favour of his widow with the condition that during her life she should give the rents of certain lands to which she had right to a son. The widow having elected to retain

SUCCESSION—*Continued.*

the rents and reject the provision, *held* that the son was entitled to a *surrogatum* for the rents out of the liferent of residue. Johnston v. Johnston, &c., July 20, 1875, p. 986.

Vesting—Trust.

10. Where trustees are directed to hold a fund for behoof of children, and to divide and pay the same when it can be conveniently done, and it is declared that in the event of a child dying without issue before receiving his share under the trust the same shall be divided among the survivors, payment to one beneficiary of his share fixes the period of vesting for all. Sutherland's Trustees v. Clarkson, Oct. 29, 1874, p. 46.

Succession—Vesting—Trust.

11. *A took the title to heritable subjects which he had purchased in the names of certain persons, who, by deed of declaration of trust, declared that they held subjects in trust,* inter alia, *for the payment of the free yearly proceeds to A during his life, and after his death to his wife, if she survived him, for their liferent uses allenarly, the wife's liferent to be restrictable to such extent and in such manner as might be fixed by A; and after the determination of the foresaid liferents, in trust for A's children, in such shares and proportions as might be fixed by A, and failing such apportionment, share and share alike; declaring that the fee of the shares should be payable after the determination of the said liferents, and after the whole children who should have survived A and his wife, and who should be alive, had attained majority, or at such other times after the determination of the said liferents as should be fixed by A. A died, survived by his wife, and without fixing the shares of the children.* Held (rev. *judgment of the Second Division*) *that the children's shares of the estate vested at the execution and registration of the deed of declaration of trust in the children then born, and in the others as they came into existence.* Miller v. Finlay's Trustees, Feb. 25, 1875, H. L., p. 1.

SUPERIOR AND VASSAL.

1. *Observations* on the effect of the tenendas clause in explaining the dispositive clause. Lord Advocate v. M'Culloch, Oct. 29, 1874, p. 27.

Entry—Composition—Novodamus.

2. A vassal who held lands under old charters in favour of disponees, "their heirs and assignees," and by which the duties payable at entry of "heirs and assignees" were taxed at double the feu-duty, obtained in 1858 a charter of confirmation and novodamus. The clauses of confirmation and novodamus were in favour of the vassal, "his heirs and assignees whomsoever, excluding assignees before infeftment." The duties payable at the entry of "heir and assignees" were taxed at double the feu-duty.

In an action of declarator of non-entry brought by the superior, *held* (1) that the taxing clause in the earlier charters must be read as applicable only to assignees before infeftment, and not as applicable to disponees; and (2) (*rev.* judgment of Lord Young), that the taxing clause must receive the same construction in the charter of novodamus, in respect that it did not appear that the terms of the entry were intended to be altered. Magistrates of Inverkeithing v. Ross, Oct. 30, 1874, p. 48.

Irritancy ob non solutum canonem—Railway—Compensation—Property—Lands Clauses Act (8 *Vict. c.* 19)*—Railway Clauses Act* (8 *and* 9 *Vict. c.* 33)*—Bankruptcy—Trustee—Real and Personal—Assignation.*

3. The proprietor of a piece of land bounded by the sea flood brought a statutory claim of compensation against a railway company on the ground that the land, which had been used for shipbuilding, had been injuriously affected by the formation of the railway upon the shore, whereby access to the sea was cut off. When the railway was formed the land belonged to a vassal of the claimant, paying a feu-duty of £150, who had been sequestrated. The trustee in the vassal's sequestration did not take up the feu, and the superior subsequently obtained decree of irritancy of the feu *ob non solutum canonem.* The trustee, on condition that the superior made no

SUPERIOR AND VASSAL—*Continued.*

claim for feu-duties, assigned to the superior any claim of compensation competent to him. *Held* that the proprietor had no title to insist in the claim (1) in virtue of the decree of irritancy, because the claim of damages, if any, was personal to the vassal, and was vested in the trustee, or (2) in virtue of the assignation, as the trustee had no power to grant it.

Question, whether a claim for compensation on account of the value of land being injuriously affected by the operations of a railway cutting off its access from the sea was competent under the Lands Clauses and Railway Clauses Acts, either to the proprietor of the *dominium utile*, or to the superior for his interest. Caledonian Railway Company v. Watt, July 9, 1875, p. 917.

See *Property*, 1.

SUSPENSION. See *Bankruptcy*, 1—*Bill*, 1, 3, 4, *and Index of Justiciary Cases*, p. 1057.

TEINDS. *Augmentation—Decimæ Inclusæ.*

1. In a process of augmentation wherein the heritors opposed the augmentation, on the ground that the teinds were exhausted, process *sisted* to enable the minister to bring a declarator to try the validity of a *decimæ inclusæ* right founded on by the heritors, it not being clear upon the face of the documents produced whether the right was well founded or not.

Observed that the Court will adopt the same procedure, as a general rule, in cases where the existence of teind, available for augmentation, is denied by the heritors upon grounds which require investigation. Frood v. Earl of Stair, &c., Nov. 9, 1874, p. 76.

Valuation—Proof—Onus.

2. A decree of valuation dated in 1634 bore to value the teinds of the lands of A, with the exception of a certain ten shilling land, which through lapse of time it had become impossible to identify.

In a locality in 1874 the proprietor of a portion of the lands of A founded upon the valuation as embracing his lands. *Held*, in the absence of evidence as to the situation of the ten shilling land, that in the first instance the onus lay upon the minister to shew that the heritor's lands fell within the exception, but that in the circumstances that onus had been discharged. Stevenson v. Magistrates of Rutherglen and Others, Dec. 12, 1874, p. 174.

Teinds, Valuation of.

3. A decree of valuation in 1634 bore to value the teinds of certain lands belonging to a burgh, which had hitherto been paid in rental bolls. *Held* that there was no presumption that the teinds of the burgh green, which formed part of the lands, and which, though capable of cultivation, was presumably in pasture at the date of the valuation, had not been included in the conversion into rental bolls, and were not therefore included in the valuation. Stevenson v. Magistrates of Rutherglen and Others, Dec. 12, 1874, p. 174.

Sub-valuation—Approbation.

4. In an action brought in the Teind Court in 1874 for approbation of a report of sub-commissioners dated in 1629, valuing the teinds of certain lands, which merely reported that all parties being summoned and called there compeared the heritor, "and is cõtent that the auld rentall of the said lands of . . . stand in tyme cuming as it is and hes bein, to wit, xij bolls meill, baith for p'sonage and viccarage teynds in cais the titular be yr^{wt} cõtentit." Objection to the report, to the effect that the sub-commissioners had not pronounced any direct finding as to the value of the teinds of the lands, *repelled*, and decree of approbation pronounced. Duke of Montrose v. Earl of Camperdown, &c., June 7, 1875, p. 772.

King's Annuity—Warrandice.

5. In 1632 the teinds of certain lands were sold by the titular to the heritor for a price, the heritor becoming bound to relieve the titular of the king's annuity of six per cent, and of all taxations to be imposed on the teinds,

TEINDS—*Continued.*

and of the stipend then payable,—the titular becoming bound to warrant the teinds free from all future augmentations. In 1644 the heritor redeemed the king's annuity, and about 1674 these annuities were relinquished by the Crown throughout the country. In 1812 the whole teinds were exhausted by augmentations, including the portion which, in 1632, was payable as king's annuity. *Held* that the warrandice extended to the whole teinds, including the portion which, in 1632, was payable as king's annuity. Murray v. Countess of Rothes, Nov. 19, 1874, p. 106.

TITLE TO SUE. *Reparation—Slander—Executor.*

A widow, two years after her husband's death, raised an action of damages as his executrix and as an individual, alleging that the defender, by illegally retaining a professorship in a college after his appointment to the office of principal, and by slanderous statements concerning the deceased, had prevented the patron of the professorship from implementing a written promise to appoint the deceased to the chair. *Held* (*diss.* Lord Ormidale) that the pursuer had set forth a title to sue.

Observations on the maxim of the civil law, *Actio personalis moritur cum persona.* Auld v. Shairp, Dec. 16, 1874, p. 191.

See *Friendly Society—Insanity*, 1.

TRUCK ACT. See *Master and Servant.*

TRUST. *Proof—Statute* 1696, *c.* 25—*Partnership.*

1. *Held* (*dub.* Lord Gifford) that it was competent to prove *prout de jure* that the right to a policy of insurance, taken in name of the partner of a company, belonged to the company. Forrester &c. v. Robson's Trustees, June 5, 1875, p. 755.

Powers of Trustees—Nobile Officium.

2. *Held* that a petition (not under the Trusts Act) by testamentary trustees for powers not given by the trust-deed was incompetent. Berwick, &c., Nov. 13, 1874, p. 90.

Apportionment—Insanity of Trustee—Exercise of Power.

3. The sole trustee under a settlement was directed to hold a sum for behoof of a family of children, and was invested with the amplest discretionary powers as to the proportions in which the sum should be paid, and the times and manner of payment. The trustee, after making unequal payments to the beneficiaries to account of their shares, became hopelessly insane. She had previously assumed a co-trustee, who after her insanity assumed another trustee under the Trusts Act, 1867. *Held* that a valid bequest had been made to the children as a class, and that the powers conferred upon the trustee were a burden on that bequest; that since these powers could not be exercised by the trustee named in the settlement, the effect was not that the powers were transferred to the assumed trustees, but that the burden flew off, and the bequest to the children as a class became unqualified, and accordingly that the fund fell to be divided in such proportions as, when added to the payments to account previously made, would produce equality among the beneficiaries. Hill's Trustees v. Thomson, Oct. 30, 1874, p. 68.

Trusts (Scotland) Act, 1867 (30 *and* 31 *Vict. c.* 97), *sec.* 14.

4. The Trusts Act, 1867, sec. 14, enacts that "when any person shall be entitled to the possession for his own absolute use of any heritable property, or moveable or personal property, the title to which has been taken in the name of any trustee . . . . or other person who has died or become incapable of acting without having executed a conveyance of such property, it shall be lawful for the person beneficially entitled to such property to apply by petition to the Court for authority to complete a title to such property in his own name, &c.

Held that the above enactment does not apply to the assignee of a beneficiary. Macknight, March 20, 1875, p. 667.

TRUST—*Continued.*

Trusts (Scotland) Act, 1867—*Appointment of New Trustees.*

5. The Court will not appoint new trustees under an English trust, even where part of the trust-estate consists of heritable property in Scotland. Brockie, July 10, 1875, p. 923.

Trust, Administration of—Remuneration to Trustee.

6. *Held* that the trustees of a deceased partner, who had become entitled, under the contract of copartnery, to his share in the business, could not transact with the surviving partner, who was also one of the trustees, to the effect of giving him a larger share of profit than he formerly had, with a view of securing the continuance of his services as managing partner, on the ground that he was himself one of their number, and could not, as trustee, be *auctor in rem suam*. Mackie's Trustees v. Mackie, Jan. 15, 1875, p. 312.

Expenses—Trustee.

7. It is a question of circumstances whether testamentary trustees who have unsuccessfully defended the trust-deed in an action of reduction will be allowed their expenses out of the estate. Watson v. Watson's Trustees, Jan. 20, 1875, p. 344.

Trustee—Power to resign—24 *and* 25 *Vict. c.* 84; 30 *and* 31 *Vict. c.* 97 (*Trusts Acts*, 1861 *and* 1867).

8. A marriage-contract executed prior to the Trusts Act of 1861 provided that if any trustee desired to resign it should be in the power of the other trustees to discharge him. The whole trustees being desirous to resign, presented a petition, founding on the Trusts Act, 1867, for the appointment of a judicial factor and for authority to resign. It was opposed by the beneficiaries. *Held* that the trustees had power to resign under the Trusts Acts, 1861 and 1867, and that the power was not excluded by the terms of the marriage-contract, and a judicial factor appointed. Maxwell's Trustees v. Maxwell, Nov, 4, 1874, p. 71.

Marriage-Contract Provision.

9. *Held* that a trust-conveyance by a wife in an antenuptial contract of marriage had been intended to secure her a liferent as a provision in the event of her surviving her husband; and that it was in its nature irrevocable by the wife, although not expressly declared to be so. Menzies v. Murray, March 5, 1875, p. 507.

See *Entail*, 5—*Succession.*

TUTOR. *Tutor incertus dari non potest.*

A father conferred on the trustees under his trust-disposition and settlement a power to assume new trustees, and appointed his trustees "named or to be named or assumed, and the survivors and survivor of them," tutors to his pupil children. *Held* that the appointment of assumed trustees as tutors was invalid. Walker v. Stronach, Nov. 21, 1874, p. 120.

VIS MAJOR. See *Contract*, 1.

WARRANTY. See *Sale.*

WRIT. *Testing-Clause—Writer's Name—Statutes* 1593, *cap.* 179, *and* 1681, *cap.* 5.

1. In an offer to sell heritable subjects, which was not holograph, the writer was mentioned in the body of the writing as "Mr John Smith, who will prepare the disposition," and was only designed in the testing-clause as "the said John Smith." *Held* that the writer of the offer was not duly designed, and that the offer was therefore improbative, although in the acceptance, which was written on the same paper as the offer, allusion was made to "the said John Smith as agent for both parties." Mitchell v. Scott's Trustees, Dec. 4, 1874, p. 162.

Attested Deeds—Witnesses—Statutes 1593, *c.* 179, *and* 1681, *c.* 5.

2. *Held* that the Act 1681, c. 5, did not require the insertion in the testing-clause of probative deeds of the names of the subscribing witnesses, but

WRIT—*Continued.*

only of such a designation as, along with their subscriptions, was sufficient for identification. M'Dougall v. M'Dougall, June 15, 1875, p. 814.

Testing-Clause.

3. In a case in which a testator, who died in March 1874, had left a codicil with a defective testing-clause, which had been supplemented after his death, *held* that the deed was probative. Veasey v. Malcolm's Trustees, June 2, 1875, p. 748.

Conveyancing (Scotland) Act, 1874 (37 *and* 38 *Vict. c.* 94), *secs.* 38 *and* 39.

4. *Question*, how far the provisions of secs. 38 and 39 of the Conveyancing Act, 1874, as to the authentication of deeds, have a retrospective effect. Veasey v. Malcolm's Trustees, June 2, 1875, p. 748.

Attestation—Conveyancing Act, 1874 (37 *and* 38 *Vict. c.* 94, *sec.* 39).

5. A person died leaving a trust-disposition bearing to be subscribed by himself and attested by two witnesses, but without a testing-clause. His representatives presented a petition under sec. 39 of the Conveyancing Act, 1874, craving a proof, and thereafter to have it declared that the deed was subscribed by the granter and witnesses. The Court allowed a proof by commission, and thereafter found and declared as craved. Addison, &c. Feb. 23, 1875, p. 457.

CASES DECIDED IN THE REGISTRATION APPEAL COURT.

DEFEASIBLE TITLE. *Schoolmaster.*

When the master of a parochial side school occupies a schoolhouse and garden in virtue of his office his title to these subjects is not so defeasible as to prevent his being on the register of voters. Wardrop v. Cockburn, Nov. 3, 1874, p. 6.

OBJECTION. *Notice.*

A claim to be enrolled on the roll of county voters having been objected to on the ground that the claimant's title was nominal and fictitious, *held* that it was no sufficient ground for rejecting the claim that the claimant, who had not been cited by the objector, did not appear personally, although a claim on the same qualification had been rejected in the previous year on his failure to appear when cited. Rutherford v. Riddell, Nov. 2, 1874, p. 4.

OWNER. *Building Society.*

1. *Held*, in accordance with the case of Bishop v. Dove, Dec. 19, 1868, that a member of a building society was not entitled to be placed on the roll of voters as owner of a house allotted to him by an entry in the society's books. Dalglish v. Wright, Nov. 3, 1874, p. 5.

Title.

2. A purchaser of subjects, who has not obtained a disposition to the same till after 31st January of the current year is not entitled to the county franchise in respect thereof, unless he has, before that date, entered into a written contract of sale sufficient to bind both parties. Dalglish v. Wright, Nov. 3, 1874, p. 5.

POOR-RATES.

Held that the poor-rates, which, under sections 3 and 6 of the Representation of the People (Scotland) Act, 1868, it is necessary that an in-

POOR-RATES—*Continued.*
habitant occupier should have paid before the 20th June of the qualifying year, are only the rates which have become payable by him during the year ending with the preceding 15th of May. Hewat v. Henderson, Nov. 9, 1874, p. 12.

TENANT AND OCCUPANT. *Sub-letting—Demitting Possession.*
1. Where the tenant of a house let it furnished for three months in the year, ceding possession to the sub-tenant, but leaving his servant in the house, whose wages he paid, *held* that he had ceased to retain such occupancy of the house as to entitle him to a vote. Kirkwood v. M'Callum, Nov. 2, 1874, p. 1.

Husband and Wife.
2. *Held* that a husband's occupation of a house of which his wife was tenant could not give him a qualification as tenant. M'Queen v. Dunn, Nov. 2, 1874, p. 3.

Salmon-fishings.
3. *Held* that occupancy of salmon-fishings under a lease for twelve months prior to 31st July was a good title to the franchise, notwithstanding the annual close time.
Question as to the effect of a lease granting the privilege of rod-fishing merely. Dunn v. Cotesworth, Nov. 2, 1874, p. 5.

Successive Occupancy.
4. A person left a house at Whitsunday and took another in the same burgh in the beginning of June, and in the interval lodged at an inn. Objection that his occupation of a dwelling-house had not been continuous *sustained.* Adair v. Kay, Nov. 9, 1874, p. 9.

Objection to Title of Granter of Lease.
5. Objection to a person claiming to be enrolled as tenant and occupant of subjects that the granter of the lease under which he held had several years before granting the lease executed a disposition *omnium bonorum* for behoof of creditors, and had not been retrocessed, *repelled.* Douglas v. Adair, Nov. 9, 1874, p. 10.

Dwelling-House.
6. A man who took his meals in his father's house, and generally slept there, rented a small room in the same tenement at 12s. per annum, in respect of which he was separately rated for the relief of the poor, and in which he occasionally slept. *Held* that he was not entitled to the burgh franchise as tenant and occupier of the room. Adair v. Murray, Nov. 9, 1874, p. 11.

CASES DECIDED IN THE COURT OF JUSTICIARY.

APPEAL. *Competency of Appeal to Court of Justiciary—Debts Recovery (Scotland) Act,* 1867, 30 *and* 31 *Vict. c.* 96.
An action was brought under the Debts Recovery Act for a sum under £25, which the Sheriff dismissed as incompetent, in respect that the debt sued for did not fall under the Act. *Held* that an appeal to the Court of Justiciary was competent. Sandys v. Lowden and Rowe, Nov. 26, 1874, p. 7.
See *Public House,* 1.

CONVICTION. *Conviction Void from Uncertainty—Statute* 21 *and* 22 *Vict. c.* 90.
Where a complaint charged the accused with a contravention of the Medical Act, 1858, sec. 40, in so far as he did "wilfully and falsely pretend to be or take or use the name of a physician, doctor of medicine, licentiate in

CONVICTION—*Continued.*

medicine and surgery, bachelor of medicine, surgeon or apothecary, or other name, title, or description, implying that he is registered under said Act, or that he is recognised by law as a physician or surgeon or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecery," *held* that a conviction proceeding thereon, bearing merely that the accused was convicted "of the offence charged," was invalid, in respect that it did not specify the act by which the statute was held to have been contravened. De Banzie v. Peebles, March 16, 1875, p. 22.

DEBTS RECOVERY ACT, 1867. *Merchants Accounts—Triennial Prescription.*

Held that the expression "merchants accounts" in the debts Recovery Act, 1867, was not limited to such accounts as would fall under the triennial prescription. Sandys v. Lowden and Rowe, Nov. 26, 1874, p. 7.

INDICTMENT. *Relevancy of Libel.*

1. In support of a charge of falsehood, fraud, and wilful imposition, the libel set forth that the accused had wickedly and feloniously, and falsely and fraudulently, caused a cheque drawn by him upon the branch of the Bank of Scotland at Annan to be presented and cashed at the head office of the bank in Edinburgh, he well knowing that he had no money in the bank at Annan. *Held* that the libel was not relevant, in respect that the facts averred did not necessarily infer the crime charged. Rae v. Linton, Dec. 11, 1874, p. 7.

Trial—Declaration.

2. *Question*, whether it is competent to proceed to trial against a prisoner on an indictment containing charges on which a declaration has not been taken from him. Keith v. Lord Advocate, June 4, 1875, p. 27.

JURISDICTION. *Police Magistrate—Competency—Statutes* 1 *and* 2 *Geo. IV. c. lx., and* 12 *and* 13 *Vict. c. lxxxix.* (*Airdrie Police Acts*, 1821 *and* 1849).

The Airdrie Police Act, 1821, declared certain acts to be offences, and provided that the provost and magistrates, or a certain number of them, which was specified in reference to each particular offence, should be the tribunal for trying such offences. An amending Act, passed in 1849, created a new magistracy, and conferred upon them the jurisdiction in offences under the original Act. The interpretation clause bore that "the word 'magistrate' or 'magistrates' shall include the provost and bailies, or any one or more of them."

Held that one magistrate sitting under the amending Act could exercise the jurisdiction conferred upon the magistrates or any two of them in relation to an offence under the original Act. Paterson v. Rose, March 12, 1875, p. 20.

LIBERATION. *Undue Detention on Warrant of Commitment—Statute* 1701, *c.* 6—*Running Letters.*

A prisoner apprehended on the 18th and committed to prison on 24th September 1874 on a charge of falsehood, fraud, and wilful imposition, was indicted for the Glasgow winter circuit and again for the Glasgow spring circuit ensuing, but on the one occasion the counsel for the Crown deserted the diet, and on the other did not call the case, the Court refusing a motion by the pursuer's counsel to direct the diet to be called. On 29th January 1875 he obtained a warrant for letters of intimation with a view of running letters, but failing to pay the fees the letters were not issued. On 13th May, having been continuously in prison since his first apprehension, he presented a petition for liberation to the High Court of Justiciary. The Court, on 4th June, refused the petition, in respect that a fresh indictment had been served on the prisoner for trial before the High Court on the 14th of that month, and that the public prosecutor had intimated that he was prepared to proceed to trial on that day.

Opinion (*per* Lord Justice-Clerk) that it was competent for the Court to entertain a petition for liberation at common law, notwithstanding the

LIBERATION—*Continued.*
terms of the Act 1701, c. 6. Keith v. Lord Advocate, June 4, 1875, p. 27.

OPPRESSION. See *Proof—Suspension*, 1, 3.

PROOF. *Discretion—Oppression.*
A person was charged before a burgh police magistrate under the adulteration Act, 1860, with selling, as pure and unadulterated, milk which was not so. There being no public analyst in the burgh, some of the milk had been sent by the police officials to an analytical chemist, who reported unfavourably. *Held* that it was within the discretion of the magistrate to refuse a motion for the accused, that a portion of the milk should be handed to another analytical chemist, whose fee the accused was willing to pay, for an independent analysis, and that his judgment on this point was not subject to review. Bain v. Mackay, June 16, 1875, p. 32.
See *Public-House*, 1.

PUBLIC-HOUSE. *Public-Houses Acts—Appeal to Quarter Sessions.*
1. An appeal on the merits is allowed to Quarter Sessions against convictions by the Justices in Petty Sessions under the Public-Houses Acts; but there is no provision in those Acts, or in the Summary Procedure Act, for recording the evidence led before the Justices in Petty Sessions, but only for recording the names of the witnesses examined. *Held* that the Justices in Quarter Sessions are bound to rehear the evidence led before the Court below.
Observed (*per* Lord Young) that a conviction before the Justices in Petty Sessions must be assumed to be valid until the contrary is proved, and that it is the duty of an appellant to adduce before the Quarter Sessions the whole evidence previously led both for the prosecution and defence. Muckersie v. M'Dougall, Dec. 11, 1874, p. 12.
Certificate—Rei Interitus.
2. *Held* that partial destruction of the premises for which a person held an unexpired public-house certificate did not put an end to the certificate, so as to subject the holder to the penalty imposed on selling without a certificate, in respect that he carried on business within the partially destroyed building while repairs were being made. Craig v. Peebles, June 16, 1875, p. 30.

RUNNING LETTERS. See *Liberation.*

STATUTE. *Implied Repeal*—23 *and* 24 *Vict. c.* 84, *and* 35 *and* 36 *Vict. c.* 74 (*Adulteration Acts*).* Bain v. Mackay, June 16, 1875, p. 32.

SUSPENSION. *Competency—Statute* 29 *and* 30 *Vict. c. cclxxiii* (*The Glasgow Police Act*, 1866), *secs.* 131, 132.
1. *Held* that it was incompetent for the High Court of Justiciary to entertain a suspension of a sentence of the Police Court of Glasgow, sitting under the Glasgow Police Act, 1866, on grounds which amounted to defect of jurisdiction, and malice and oppression on the part of the Judge, in respect that in such cases the statute had provided an exclusive remedy by appeal to the Circuit Court.
Observed that if the proceedings had been beyond the statute the primary jurisdiction of the High Court would not have been excluded. Mackenzie v. Lang, &c., Nov. 9, 1874, p. 1.
Competency—Game Dealer's Certificate.
2. *Held* that a prosecution for dealing in game without a licence was an Excise prosecution, and that suspension of a sentence pronounced under such prosecution was incompetent in the Court of Justiciary. Lazenby v. M'Arthur, Nov. 9, 1874, p. 6.

* Both statutes are now repealed by "The Sale of Food and Drugs Act, 1875," 38 and 39 Vict. c. 63.

SUSPENSION—*Continued.*

Competency—Public-House Acts Amendment Act, 1862, *secs.* 33 *and* 34.

3. The Public-Houses Acts Amendment Act, 1862, secs. 33 and 34, allows an appeal from Quarter Sessions to the Circuit Court of Justiciary "on the ground of corruption or malice and oppression on the part" of the Justices "or on such deviations in point of form from the statutory enactments as the Court shall think have prevented substantial justice from having been done," and excludes any other form and ground of review. Where the Quarter Sessions refused, in an appeal, to rehear the evidence led before the Justices in Petty Sessions, *held* that they had declined to exercise their jurisdiction, that the jurisdiction of the High Court of Justiciary was not excluded by the above section of the statute, and suspension *sustained*. Muckersie v. M'Dougall, Dec. 11, 1874, p. 12.

Competency—Edinburgh Provisional Order Act, 1867, *sec.* 187.

4. *Held* that notwithstanding the terms of sec. 187 of the Edinburgh Provisional Order Act, 1867, a suspension of a conviction in the Burgh Police Court, on the ground of the irrelevancy of the libel, was competent even after the lapse of fourteen days from its date. Rae v. Linton, Dec. 11, 1874, p. 17.

See *Conviction.*

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